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Transformations in Medieval and Early-Modern Rights Discourse

edited by
Virpi Mäkinen and Petter Korkman

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AND EARLY-MODERN RIGHTS DISCOURSE

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Edited by

VIRPI MÄKINEN
Helsinki Collegium for Advanced Studies, University of Helsinki, Finland

and

PETTER KORKMAN
Helsinki Collegium for Advanced Studies, University of Helsinki, Finland

Springer

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TOWARDS MODERN RIGHTS THEORIES

PREFACE

The language of rights has become the *lingua franca* of modern moral discourse. Present-day moral and political struggles are waged over recognition of the rights of individuals or groups. The tendency of modern subjective rights discourse is to make fundamental the idea of individuals as rights-bearers by nature, with civil society and the state arising as a consequence in order to protect those rights. Given the way in which human rights are becoming increasingly embedded in the practices of international legal institutions, the rights discourse already characteristic of modern moral and political culture clearly looks to acquire even more political significance in the present millennium. For some, this prevalence of subjective rights discourse expresses the impoverished state of morality in our times, since the language of rights is that of uncaring egoism, a loss of commitment to any kind of common good. For others, the idea of the individual as sovereign master of a personal space defined by rights claims constitutes the fundamentals of a compelling liberal conception of morality and politics. Either way, the emergence of a modern rights discourse constitutes a dramatic transformation in Western thought, one that will mark our lives and the lives of our children for generations to come. When did this transformation occur? When did rights (*ius*, *iura*) in the modern sense of the word first enter the stage, and when did they become part of the dominant moral and political paradigm? What, furthermore, is it that marks a theory of rights as modern?

While the legalist tenor of Western moral language has roots deep in medieval Christendom, the idea of subjective rights has often been thought a distinctly modern contribution. Many overviews of the history of philosophy assume that rights entered moral and political discourse in the works of seventeenth-century writers such as Thomas Hobbes, Samuel Pufendorf, and John Locke. In the Enlightenment, the ideas of these modern natural law theorists finally matured into a language of rights as the fundamental moral property of individuals, and as the basic element of the moral universe. The position of subjective rights as a central theme in Western political culture was then affirmed and strengthened in such documents as the English Bill of Rights (1689), the Bill of Rights of Virginia (1776), the American Declaration of Independence of the same year, and the French Declaration of the Rights of Man and the Citizen (1789). Rights discourse later collapsed under the criticism of utilitarianism in the nineteenth century, but was revived after the Second World War by the international human rights movement, and in political theory more generally after the 1970s.

A wide range of scholarly contributions during the last half century or so has provided important insights concerning rights in medieval and early

modern thought. In many of these contributions, the idea that subjective rights discourse only emerged with early modern natural law theory, or even that subjective rights only date from the early human rights declarations at the end of the eighteenth century, have been challenged. Yet certainly, if we compare contemporary moral and political discourse with its medieval counterparts, rights language does seem to have taken over from the languages of precepts, virtues and obligations. Is this simply a question of an already existing terminology becoming more widespread and acquiring a more significant role in moral and political discourse? This is not a matter on which scholars would agree, as the present collection of articles indeed testifies. While some would date modernity understood in terms of the emergence of modern rights discourse as beginning in the thirteenth century, others argue that even the early human rights declarations of the late eighteenth century do not fit the bill.

The essential question faced by the historian of rights discourse is unavoidably philosophical. Disagreements over the dating of modern rights are ultimately expressions of an ongoing philosophical debate offering various analyses of what the essential characteristics of modern rights language are. Nobody would deny that rights became a prominent theme in medieval philosophy, or that, say, Franciscans and their opponents in the thirteenth century did develop a concept of rights that has much in common with later usage. To understand the nature and origins of our contemporary language of rights we should therefore study medieval debates. On the other hand, even the authors and readers of the early human rights declarations arguably derived rights from other moral categories, especially divinely imposed duties. Rights, some scholars argue, were therefore discussed both by medieval, early modern, and Enlightenment thinkers, not as the fundamental constituents of the moral universe, but as permissions granted so that individuals could perform the duties imposed on them by natural law. Since modern rights language, these authors argue, is quite different from this, the essential transformations in the language of rights should not be sought in medieval or early modern thought, or not at least only and mainly. They occurred in Western culture after rather than before the early human rights declarations.

The present volume will shed new light on the philosophical underpinnings of rights language in Western culture and on the transformations that it has undergone. Its chapters will, amongst other things, offer new insights into the relationship of rights language and duties in medieval and early modern thought, highlighting a number of authors and traditions that are of particular significance for the emergence of modern ways of talking about rights. What this book will not do is provide a single unified answer to the question of the essential transformation in rights

discourse. There is no such single transformation in rights discourse, nor is there any single moment at which modern subjective rights language emerged. An anthology with chapters bringing out central transformations in rights discourse in various medieval and early modern authors working in different historical circumstances is certainly an efficient means of bringing this to light. This book thus avoids streamlining history. Instead, it provides its reader with a new set of perspectives with which to enrich her understanding of the origins and the history of rights discourse.

This is a book for the inquisitive mind, for those who desire to draw their own conclusions, but who are eager to consult leading scholars in the field in order to do so. It is a book for students of theories of rights, for both scholars and beginners, and it is above all a book for all those interested in the philosophical and historical transforming moments that brought about what is now the dominant language of moral and political discourse. It was born in amiable collaboration between philosophers, theologians and historians working on the history and philosophy of rights.

It is our pleasant duty to record here our gratitude to the friends and colleagues who have agreed to contribute to this volume. We are also grateful to the Helsinki Collegium for Advanced Studies and the History of Mind Research Unit at the Helsinki University. We are thankful to Simo Knuuttila for his comments and encouragement along the way. We also express our sincere gratitude to the anonymous reader of Springer on behalf of all of us. Last but not least, thanks go to Timo Pankakoski, research assistant at the Helsinki Collegium for Advanced Studies, for his assistance with readying the manuscript for publication.

June 2005 Petter Korkman and Virpi Mäkinen

Rights, Duties and Actions

Chapter 1

ARE THERE ANY INDIVIDUAL RIGHTS OR ONLY DUTIES?

On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars

Janet Coleman (London School of Economics, U.K.)

In a collection of essays dedicated to medieval and early modern ideas on individual rights this contribution seeks to examine certain texts of the Middle Ages that reveal various and sometimes incompatible ways of dealing with *ius/iura*. There is a problem inherent in the tracing of rights theories from the Middle Ages to modern times: one can choose to observe either antitheses or complementarities. This paper focuses on antitheses because there are *different* medieval traditions of rights discourse, that of civil lawyers, that of theologians, to name only two.[1] From within the later thirteenth-century scholastic theological tradition, this paper attempts to chart one dominant attitude to *iura* that seems to place special emphasis on duties, simultaneously downgrading rights without altogether abolishing them in the domain of civil law.

It is well known that medieval rights language developed concurrently with wider notions of liberty, some authors speaking of 'liberties' as exemptions from law; others however, speaking of 'liberty' as a possession,

[1] See Coleman 1996, 1–34.

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 3-36.

a power of the soul capable of exercise without appeal to some higher human authority in the making of choices and the performances of acts.[2] In the latter sense, the exercise of one's liberty was a *ius*, a 'right' or power. When discussed by theologians such *iura* were moral claims on behalf of a normative conception of human nature guided in actions by natural law in all *civitates*, whatever their constitutional structure, as republics or monarchies, throughout history. Hence, a language of *ius/iura* was developed from within community – be it a community of the species guided by fixed and universally-known norms or that of political society reflecting species – specific norms in its positive laws so that *iura* did not oppose community values.[3]

MEDIEVAL RIGHTS AND OBLIGATIONS

My aim is to look at a cluster of texts written by scholastic theologians at the end of the thirteenth and early fourteenth centuries whose authors, despite their increasingly intense engagement with Aristotle's *Ethics* and *Politics*, were none the less more influenced by Augustinian understandings of the category: 'post-lapsarian man', the imperfect, fallen individual. What I call neo-Augustinians, including secular university masters and Franciscans, seem to have discussed individual powers, capacities, 'rights' in ways that were very different from the approach to the same issues of many contemporary Dominicans. Dominicans held to views of material property and its ownership, indeed to the relationship between soul and body, that differed sharply from those of Franciscans and many neo-Augustinians. They also differed markedly on the consequences of the Fall with respect to our ability, as individuals or collectively, to will and act according to right reason and perform what natural law commands. It is the Dominican tradition that I think led more directly to talk of rights as claims in the early modern period. Neo-Augustinians, on the other hand, seemed to submerge

[2] See Tierney 1997.

[3] I find Hohfeld's (1919) sharp distinction between active and passive rights to be anachronistic when applied to medieval discussions. On medieval subjective right meaning "une qualité du sujet" in Villey 1964, 97–127 and Grossi 1973, 117–222, the reference to *le sujet* is not to the unique and different, isolated individual whose reason is merely an instrumental means to achieve objects of private, sensual desire, as one has it in the English tradition of Hobbes. Rather, they mean to focus on the intentions behind acts of normative agents, universally conceived, and not on 'this' intention of a unique, different, naturally unsocial agent against other intentions of different, naturally unsocial agents who derive 'right' from their private desires alone and their view of morality, either from no more than the contingent interactions between such individuals or, as in Hobbes, the arbitrary determination of an absolute sovereign.

rights in prior known duties and this too would come to have an influence on certain early modern theories.

Here, I am seeking the perspectives of neo-Augustinians on the following issues: First, are there any individual 'rights' for imperfect individuals as self-lovers in political communities or are there only duties?; second, what are the limits of obedience and therefore, is it proper to speak of a 'right' to disobey, or ought we to speak, rather, of a 'duty' of resistance in the avoidance of sin? My aim is to elucidate some of the consequences of the range of arguments provided by several members of the Augustinian Order along with those contemporaries who shared their neo-Augustinianism. A very common topic of later thirteenth-century scholastic debate concerned the nature and source of the virtue of a disinterested, non-utilitarian love of community and its well-being. Neo-Augustinians held to the view that a love of the common good and of the *patria* derived only from grace rather than from nature. My focus will be on some of the arguments made by the secular master Henry of Ghent, referring in passing to the positions of James of Viterbo, Augustinian master in theology at Paris, who succeeded Giles of Rome as Prior General of the Augustinian Order.

My interest in some of these questions was recently inspired by having read a very interesting book by Matthew Kempshall, *The common good in late medieval political thought*[4] along with his translations of relevant quodlibetal texts.[5] One of the central questions Kempshall tried to answer in his book emerged from the differing views on the following: If the life of perfect virtue is the goal of the imperfect individual, and God is the goal of the life of perfect virtue, then was it possible to conclude that the individual can secure his union with God only by means of incorporation into the common good of society? If this were the case, then was the individual in some sense subordinated to the common good of the political community as a necessary precondition for his participation in eternal beatitude?[6] Kempshall thereafter, elucidated the range of arguments drawn on from the combinations of neoplatonic hierarchies with Aristotle's position on the life of virtue. He set these arguments against the historical background of the often vicious debates between Franciscans and others over poverty and property, the dispute between secular and mendicant university masters at the University of Paris, the debate over the relative merits of the contemplative and the active lives, and perhaps most importantly, the conflict between France's king Philip IV and the pope Boniface VIII. With the greatest benevolent will in the world, no scholar can deny that these

[4] Kempshall 1999.
[5] McGrade, Kilcullen and Kempshall 2001.
[6] Kempshall 1999, 6.

debates reveal conscious and often heated antitheses of perspective rather than a seeking after complementarities. Hence, they guide my own approach.

SEEKING THE COMMON GOOD BEFORE THE INDIVIDUAL GOOD: THE DOMINICANS, ALBERTUS MAGNUS AND THOMAS AQUINAS

In a narrow sense, the issue was indeed whether our natural inclination to live in society somehow made the constitution and regulation of, and participation in, a law-governed political regime a necessary precursor to an individual's salvation. Those theologians more knowledgeable about, and influenced by, Aristotle's explanations of how the *polis* was capable of being discussed as a self-contained ethical environment for moral agents tended to spend a good deal of their time elucidating the virtues of good governance and good citizenship prior to anything else they might say about man's final salvific end. The common good or common utility as the aims of action were contrasted with the aim of private advantage which they equated with tyranny. They discussed how justice was concerned with what is both common and particular, so that the human community depends on just communication or exchange, notably but not exclusively, of individual possessions to ensure the self-sufficiency of the whole. The principle behind this just communication or exchange was seen as concerned with what is common, determining equity according to a hierarchy of worth of associated individuals exemplified in the *just* ordering of their interpersonal relations.

For instance, the principle of ordering what is personal towards what is common is, for the Dominican Albertus Magnus, the principle of right, *ius*, or justice. In so far as the good of the individual is morally ordered towards the good of the many, which is in turn, ordered towards the good of a city and towards the more divine good of the people, Albertus considers this moral ordering to be a peculiar feature of legal justice in the *respublica.*[7] For Albertus it is the ruler who exemplifies devotion to the common good while subjects do so only in proportion to their ability and function; hence, the common good is fully realised in the *persona* of the ruler while other members of a political community have it by proportion and analogously.[8] Therefore, the king lacks nothing, is self-sufficient in every good, excels in virtue, possesses in abundance all instrumental accoutrements of wealth, glory, friends and he extorts nothing from his subjects, using their subsidies

[7] Op. cit., 41.
[8] Op. cit., 43.

for the benefit of the *respublica* to secure the common good of his people.[9] This is an ideal-type description of office and its duties. For Albertus it is impossible for the good of the community to be neglected without the individual's good thereby and in consequence being damaged and dishonoured.[10]

Albertus speaks of legitimate self-love, notably a love for what is highest in us, that is, one's intellect by which one seeks to procure possession of the absolute truth and absolute goodness. Only the primary goods of the soul are held to be intrinsically ordered towards the ultimate good of happiness, and therefore, humans in their association must seek *more* than self-preservation, *more* than merely to subsist and preserve their lives, but also to communicate in the activity of minds which is the *bonum commune*.[11] It is for this reason that he argues that law, by definition, not only commands those actions which contribute to the common good but also serves as a rule or plan as to how members of the political community ought to live in the future, law being able to educate men to live the best life. Law for Albertus is not simply instituted to prevent men from committing evil acts. It is capable of instilling goodness in people, and every prudent legislator intends to make his citizens just, not simply obedient.[12] His theoretical model is that laws are instituted not only to ensure there will be no injustice but also that people will act through reason. The concord that results unites imperfect political communities, minimally to secure peace and mutual benefit and maximally to realise moral goodness in each and every citizen or subject. Albertus does make room for the Augustinian perspective on perverse acts deriving from the imperfection of men and he deals with requisite punishments of evil actions. He accepts the Augustinian view on tolerable evil, the utility of tolerating lesser goods and venial sin, but his overall emphasis, especially in his commentaries on Aristotle's *Ethics*, is *not* here.

Similarly, but even more explicitly, for Albertus's student Thomas Aquinas, the *natural object* of both the intellect and will is the common good. There is in man a natural and initial inclination to good which he shares in common with all substances. Hence, for Aquinas the order of the precepts of the natural law corresponds to the order of our natural inclinations which are neither perverse nor powerless. The natural inclination to the good in rational man is twofold and interrelated: it is to know the truth about God and to live in society. Therefore, all man's actions connected with such inclinations come under the natural law.[13] This means

[9] Op. cit., 44–45.
[10] Op. cit., 48.
[11] Op. cit., 57.
[12] Op. cit., 60–61.
[13] Thomas Aquinas, *Summa theologiae* [hereafter *Sth*] 1a 2ae, q. 94, a. 2. concl.

that there is one standard of truth or rightness for everyone and it is equally known by everyone. All people realise that it is right and true to act according to reason. How they do so in contingent situations is the test of whether or not they have been able to discipline their wills by reason.

Aquinas established degrees in the hierarchy of good in the universe and argued that degrees of perfection are degrees of increasing commonness or community. For him, imperfect things tend towards their own good, that of the individual; more perfect things tend towards the good of a species; the even more perfect tend towards the good of a genus, and the most perfect, God, secures the good of all being and the good of the universe.[14] By analogy Aquinas argued that since the good of the human community, that is the species, is the ultimate goal of human life, the *bonum humanum*, then not only is this common good more divine than any individual or less common good, but so too are those humans who are responsible for the community or *respublica*.[15] The *ratio boni in communi* presupposes for Aquinas the participation, the natural subordination, of every individual's intellect and will in a hierarchy of goodness which culminates in God as an extrinsic principle of all that is. He takes this to be a conclusion of universal philosophical reason; it is not arrived at on the basis of religious revelation or faith. Every human can come to the conclusion that the whole community of the universe is governed by divine reason, that there is a rational guidance of created things, and this Aquinas calls, eternal law.[16] The eternal law is conceived of as the plan of government in the supreme governor, God, so that all schemes of government of those who direct as subordinates must derive from this eternal law. In consequence, all laws in civil societies, so far as they accord with right reason, derive from the eternal law.[17] Hence, the good of the just and well-organised community is one which, in being sought and accomplished, is the necessary if not sufficient setting for the achievement of the individual's ultimate good. Indeed, the best political society for Aquinas is one in which the moral underpinning of its laws is taught by the Church following the divine positive law, so that citizens are not only virtuous through reasonable acts as enshrined in civil positive law, thereby securing their external goal, the common good of their community, but as Christians, they follow divine positive law and thereby seeking an internal intentional goal, salvation. On this view, *respublicae* suited to the kinds of beings we are, channel us to supplement the reason which guides our wills in exterior acts with faith, hope and *caritas.* Rational creatures have their own natural goal in God and this is secured through natural intellective

[14] Thomas Aquinas, *Summa Contra Gentiles* III, 24.
[15] *Sententiae Lib. Ethicorum* I. 2; Kempshall 1999, 85.
[16] *Sth* 1a 2ae, q. 91, a. 1, concl.
[17] Op. cit., q. 93, a. 3, concl.

cognition thereafter perfected by *caritas* offered through the Church instructing in the precepts of divine law. For Aquinas, because the goodness of God is the common good for all mankind, humans have a natural inclination to love God more than themselves *and* a natural inclination to seek the common good and in consequence, their own.[18] In short, good politics leads best to salvation.

THE ALTERNATIVE NEO-AUGUSTINIAN TRADITION: GRACE, OBEDIENCE, AND LOVE OF SELF BEFORE THE COMMON GOOD

There was, however, a larger and more encompassing issue, especially for those I call neo-Augustinians, and this explicitly concerned the life of perfect virtue possible for the individual. It was achieved through incorporation not primarily into any historical political community but rather into the Church community. Without incorporation into the Church the perfect virtue of salvation was impossible no matter how law-abiding and morally responsible one might be in whatever political community one happened to find oneself.

The discussion as found in Aristotle and in Cicero concerned what motivated men to love and serve the common good and the common utility, where these were said to be the goal of any individual's involvement in political society. Therefore, he sought the collective good first through his own morally virtuous acts guided by prudence and thereby his own individual good was achieved in consequence.

But this was treated differently by neo-Augustinians. No matter how much Aristotle they had studied in the arts and theology faculties of universities, neo-Augustinians resisted the perspective that it was open to reason to devote oneself or indeed sacrifice oneself for the well-being of one's earthly *respublica*. They compared this impossible goal, given what they took men's natural capacities now to be, with the love of God above all else as the supreme value which many neo-Augustinians thought could not be achieved without grace. Whatever Aristotle had said in *Ethics* Book 1 and 9 about our natural capacities to be devoted to the community before ourselves, and that true friendship with another derives from seeing that other as another self, most neo-Augustinians adopted the pervasive Augustinian thesis that the love of anything beyond oneself is *not natural* to us and requires the additional grace that comes from baptism and membership in Christ's Church. They relied more heavily on Augustine's

[18] Op. cit., 1a 2 ae, q. 60, a. 5.

discussion of the common good as a result of the biblical injunction in I Corinthians 13:5 that the essence of love, *caritas*, is *not* to seek its own benefit. Because they held with Augustine that fallen man now only had the capacity to love himself first and to seek his own benefit before that of others, rather than to love God first and his neighbours through God in consequence, they insisted that for an individual to be able to act in ways expressive of loving God and community before self required the iniquity of the human will to be reorientated by grace. Nature, society and politics could not achieve this. Membership in the Church alone could ensure supernatural help added to natural inclinations, regarded as powerless, imperfect or corrupted. Contrary to the views of Aquinas, for neo-Augustinians natural inclinations alone could never ensure that any good act could be performed with the right intentions in *this* post-lapsarian world.

NEO-AUGUSTINIAN OBEDIENCE CONTRASTED WITH THOMISTIC LAW AS INTELLIGIBLE TO MEN

Far more than other scholastics who used arguments directly from Aristotle, Cicero, canon and civil law, neo-Augustinian theologians tended to criticize Aristotle and to cite scripture and monastic authors instead. Here they found arguments – notably in the writings of St. Bernard and the Victorines – themselves inspired by the Benedictine Rule, that one's own good, salvation, was only possible in a community, a family of men, but this community had to be dedicated to a very specific collective good: disciplined obedience to God. The Rule made it explicit that one was freely to accept and faithfully fulfill the instructions of a loving father so that by the labour of obedience one might return to Him from whom one had strayed by the sloth of disobedience. It was not only the Ten Commandments that had to be obeyed within the monastic community. One was to deny oneself in order to follow Christ, to chastise the body, not to seek soft living, to love fasting and to avoid worldly conduct. The Rule[19] sought to create a new monastic man with the ability to attribute to God and not to self whatever good one sees in oneself and yet to recognise that evil is one's own doing. Monks were to hate their own will and to keep constant guard over their own and others' actions. What is broken down is man's pride in his achievements, a pride in seeing himself as unique and a self-mover. The sense of self must be replaced through the twelve degrees of humility which constitute steps in obedience without delay, where there is no living by one's own will, no obeying one's own desires and passions. Nor was there a sense

[19] *The Rule of St. Benedict*, c. 4.

that one's own reason could adequately discipline one's desires. The individual monk instead walks always *by another's judgment and orders*, since obedience given to superiors is obedience given to God.[20] The concentration on the road to one's salvation was not, however, to be individually undertaken: it is achieved through communal obedience to commands where the fear of God is ever before the monk's eyes. Only when all twelve steps of humility have been climbed will this new man have achieved that perfect love of God, having begun his obedience through fear and having ended with habitual love. The inclination for one to love God more than oneself comes only through grace achieved through obedience to superiors and faith, rather than from natural inclinations or reason. One's superiors and their commands, however, cannot make one just since only God can do that. It is, I submit, very difficult to get a theory of rights out of this command theory of obedient action.

It is true that when Aquinas was forced to defend the mendicants and other religious against the arguments of the secular clergy, he too argued that the oath under which a member of a religious order conducts his life makes his condition more perfect than that of the secular clergy or indeed, laymen, because men in religious orders perform acts in a life devoted exclusively to God. But for Aquinas, mendicants are unique in combining an active with a contemplative life[21] exemplifying in their preaching in the world their concern that the good of many is always preferred to the good of one person. He therefore, understood all law as ordinances of reason, intelligible to man, directed to the common good and promulgated by an authority whether that authority was a whole multitude, or a group or an individual acting on its behalf.[22] Law for Aquinas is distinguished from mere command precisely because law has as its intelligible goal the common good. Where the Old Testament law ordered acts towards the sensible and earthly good, New Testament law orders acts towards the intelligible and heavenly good. It is the *intelligibility* of law that makes subjection to its precepts rational and responsible behaviour. This is why legal justice in cities of men has as its intention to order men's actions towards the common good. Prudence, as an individual's exercise of right reason, enables him to judge and direct his actions through which he will secure this goal. For Aquinas, following Aristotle, political prudence and legal justice aim to result in the common good, respectively ordering every action and every virtue in terms of those things capable of being ordered to the wellbeing of the *respublica*. Positive law as a dictate of reason aims to make men virtuous in their relations with

[20] Op. cit., c. 5.
[21] Thomas Aquinas, *De perfectione spiritualis vitae*, xxiv, xxvi.
[22] *Sth* 1a 2ae, q. 90, a. 4.

others as exemplified in their exterior actions. But there is also the divine law which concerns the relation of the individual in this life to God who alone has knowledge of men's intentions behind their exterior acts. Aquinas thinks that the precepts of what he calls divine given law[23] can be known and understood by men: they are found in Scripture and taught by the Church. Divine law directs human life to man's final end and its precepts enable him without any doubt to do what he should and avoid what he should. For Aquinas, the perfection of virtue requires that man should be upright not only in his external acts, directed by just positive law, but also in his intentions, and divine law allows men to regulate their *own* interior actions or intentions. Where legal justice cannot judge a man's intentions, divine law can and will mete out punishment in the afterlife. It is for this reason that men know that obedience is owed to all legitimate human authority, in state and church, because it is based on the divine and natural order that is intelligible to them. The temporal ruler with the right intentions promulgates laws for the common welfare and this ideally includes enabling their going beyond peaceful concord to secure what is absolutely good, their own salvation.

Benedict's *Rule* combined with Augustine's statements about true justice only being achieved in the city of God, however, appears to have played much larger roles in neo-Augustinians' understandings of an inherent moral order in the universe, only dimly reflected in the societies of men, but more accurately and perfectly reflected in religious communities dedicated to true virtue precisely because such virtue and consequent acts were the product of obedient faith and not simply of natural reason. Hence, for them, the true community about which they spoke was the Church rather than any temporal *respublica*. Although all scholastics linked *communitas* with *communicatio*, for neo-Augustinians communication had its origins and source in Christ's communication or commission to Peter and thereafter, his vicar the pope in what they referred to as the age of grace – meaning history after Christ's first appearance amongst men as king and priest. For this reason, when neo-Augustinians do elaborate on how temporal *respublicae* are to be ordered and legitimated, they tend to place Christ's vicar as the origin and source of all temporal legitimation as we will see.

[23] Op. cit., q. 91, a. 4 concl.

HENRY OF GHENT

Most scholars have found Henry's political thought in his various late thirteenth-century quodlibets.[24] He is an interesting example of neo-Augustinianism that had not yet become as extreme as it would later appear in the writings of James of Viterbo or Giles of Rome at the turn of the century. When he discusses the common good of human society, he uses Plato, Socrates, Aristotle and Cicero but his emphasis is on Augustine's *ordo caritatis*: the love of self, the love of neighbour and the love of God. Kempshall observed that he seems to leave little room for any intermediate good of the community, since love for the good in common seems only to operate for Henry with respect to a *bonum in communis* that exists in God alone. Henry does think that an intellectual creature has a natural love for God above all other things because God is the absolute good, the reason why every other good is loved and the universal good of which every other good simply forms a part. But with respect to everything other than God, intellectual creatures have a greater natural love for themselves. In society, this means that an individual loves himself first and his neighbour only by extension, willing the good for himself before he wills the good for someone else. In opposition to the Thomist position, for Henry, love of the common good or of the *patria* is not, because it now cannot be, a love of which we are capable that is prior to our self-love. Self-love here is not selfish love but for Henry to love oneself more than one loves another individual does not represent the perfection of love. He turns to Richard of St. Victor and Augustine for support.[25] This perspective has consequences for his views on the rightful possession of material things for human use.

In *Quodlibet* VII, question 27, he provides six ways in which exterior goods have been *conceded* to ecclesiastics for human use: (1) *possessio iuris sive haereditaria*, (2) *proprietas sive dominium*, (3) *fructus*, (4) *usus*, (5) *factus*, (6) *possessio factus*. There is a reverse order of perfection in these six modes by which churchmen hold property for their use. Like Franciscans, Henry thinks that the ultimate owner of ecclesiastical goods is God. Ecclesiastical goods are possessed by the Church collectively but ultimately are God's. This contrasts starkly with many Dominican positions, notably but not exclusively, that of John of Paris for whom basic property rights, though subject to social obligations and civil law, belong by their very nature to individuals who, through their own labour, bring forth such 'rights' as

[24] For Henry's quodlibets, see Henry of Ghent 1518 (1961) and 1979. Chronology of quodlibets is in: Glorieux 1925 (1933), vol. 1, 177–199.

[25] References in Kempshall 1999, 161.

claims.[26] For John, church property thereafter is a consequence of gifts of original, lay, private owners, given to the Church as a community. Henry, like John, also thinks it possible in post-lapsarian times to separate proprietary 'right' from the actual holding of the possession. A layman, for instance, who may indeed be a proprietor, can maintain his proprietary right in property that is none the less offered to the Church. But Henry's hierarchy of ways in which property may be held by ecclesiastics means that the relation of prelates to church goods and all men to their own goods is, as rightful *users*, before any civil law establishes proprietary 'rights'.

He explains that prelates have a duty to provide for their collective future by administrating, procuring and distributing goods from church wealth for the future survival of their members. But he has ensured that ordinary ecclesiastics may only be considered users of what is necessary to their survival and may not even consider themselves usufructuaries, i.e., dispensing simply as they wish from the profits of church wealth.[27] When he speaks as he most often does about ecclesiastics and their relation to material goods he speaks of them as having a free '*ius*' to fruits or profits. To have a *liberum ius omnes fructus* is not a rights claim whose parameters end simply with the free exercise of one's own will. Rather, the *liberum ius omnes fructus* is a communicated power/*potestas* to *use*, appropriate, dispense the thing freely to whomever the ecclesiastic wishes in whatever circumstances, but always with the natural law and scriptural divine law commandments as provisos to *use* well, to make appropriate good *use* of, for instance, church profits for the survival of members, and not even as usufructuaries. The ecclesiastic is therefore, following through on a known duty, an obligation to use things well and to a limited, stipulated end: the survival of members, now and in the future. Indeed, he is judgeable if he does not use things well and for this purpose, being seen as failing in his obligation.[28] Therefore, Henry's discussion of ecclesiastical *dispensatores*, who have a *ius utendi*, should be interpreted as having less a right to use *ad libitum* than a *duty* to dispense well following divine and natural law stipulated commandments to do so with the aim of securing no more than the present and future survival of members.

[26] John of Paris, *De potestate regia et papali*, esp. c. vii, 96f; Coleman 2000, c. 3, 118–133.

[27] Henry of Ghent, *Quodl*. VIII, q. 27: "Non sic autem ministri ecclesiae possunt de fructibus bonorum ecclesiae sibi commissis disponere, qui ut dictum, non possunt nisi modica dare, nec habent generalem et liberam administrationem. Quia tamen de bonis ecclesiae ea quae sunt usibus suis necessaria possunt accipere, quo ad hoc proprie dicuntur usuarii ab usu iuris."

[28] Mäkinen (see below n. 27) rightly finds that when Henry discusses a priest's relationship to ecclesiastical goods he never uses civil law concepts of *dominium plenum*, *nuda proprietas*, *dominium utile* and *directum* as one finds in, for instance, Bartolus. Mäkinen 2001, 108–109, commenting on Henry's *Quodlibet* VIII, q. 27.

Furthermore, for Henry, there is an even more perfect state than that of ecclesiastical *usuarii* who use church goods *ab usu iuris*. It is that of the factuary who has renounced all ownership and factually uses, day by day, only what he needs, acquired through daily labour or begging. He has renounced any claim *in civil law* to those necessities. In effect, Henry has mounted a defence of Franciscan voluntary poverty although he never mentions the Order by name.[29] Henry discusses a person's power to renounce temporal goods always with the proviso that he recognise his obligation to maintain his own family and his own life. He insists that it is a *moral wrong* to give up all possessions. He does not use the language of rights. In effect, one cannot have a right freely to do whatever one may will and this, for Henry, seems to go well beyond the injunction that one may not will self-harm nor harm to others. If one decides on giving up wealth and instead to beg, Henry thinks one can maintain one's duty to stay alive better by also recognising one's obligations to give back something in return and he gives the example of praying for others in addition to begging.[30] On my reading, these are less rights than they are duties for Henry, actions of will according to already known stipulations, precepts, commands about how best to exercise one's powers to will and act in the domain of exterior material goods so that one's duty of self-preservation, and the duty to ensure the survival of others, is fulfilled. They are never, for Henry, powers exercised indifferently and *ad libitum* even in the narrowest domains of chosen action.

In his *Quodlibet* IV, question 20: *Utrum bonum sit omnia esse communia in civitate*, Henry outlines two opposing and extreme conditions of human kind and relates these to three modes of possession of things for human use. The first is the state of human nature in innocence and original justice. The other is the state of human nature set apart by sin and turned away from original justice. There is correspondingly a kind of possession of communal goods where there is *no* mode of appropriation whatever for use and possession. We are being forewarned that possession of goods in common in the state of innocence before the Fall has nothing to do with any of our possible modes of appropriation which are post-lapsarian developments.[31] Then there is a kind of private possession where everyone appropriates for himself and nothing is reserved for common use. There is, however, a third, middle way, where something is had according to one's own use, *secundum*

[29] My reading differs in some respects from that of Mäkinen 2001, 109–112.
[30] Henry of Ghent, *Quodl*. V, q. 30 and Mäkinen 2001, 112–114.
[31] This pre-dates the Franciscan theologian John Duns Scotus's similar position by more than 20 years.

usum propria habendo, but following what reason dictates and according to time and place, what is for one's own use is offered for communal use.

Henry discusses a situation in which possession of communal goods was exemplified in Plato's republic and which, he believes, Aristotle argued against *in aequivico*. Henry believes that Socrates was really saying much the same thing as Aristotle when he proposed that the best city after the Fall was united in its concern, love and care so that what belonged to others was treated as though it were one's own. Each person in the city therefore, advanced the good of someone else *as though it were his own good*. Here each citizen is united to others by the object of their love in that each individual loved the possessions of others *as if they were his own* and therefore, secured the good of another citizen as if it was his own good. In this situation, Henry's citizens are post-lapsarian self-lovers so that in a city in history, united by love, they would be able to treat the property and welfare of others as if these were their own property and welfare. Even in the best city it is impossible for men to seek the common good for its own sake and before their own. Instead, they treat what is common *as if* it were their own. He draws parallels with the teaching of the apostle Paul, I Corinthians 12:12 where each Christian individual is said to be a member of one another so that everything pertains to common use according to what right reason requires for the place and times.

After the Fall, the common use of possessions does not exclude private possessions. He says that in post-lapsarian conditions a total community of possession would now be *useless* because there would not be any exchange agreements. Henry also rejects the arrangement where there is only private possession and private use and his reason is that it would be wrong, not unworkable or *inutilis*, to provide for oneself alone.[32] Men are social creatures and it would be a wrong or sin against this natural principle, whose source is God, not to recognise this. Socrates was aware of human weakness but he did not propose purely private possession of material goods, otherwise he would have advocated Augustine's *civitas terenna*, which Henry speaks of as the city of the devil where selfish love reigns.[33]

He explains how the post-lapsarian division of property came about by drawing on arguments in Cicero and Aristotle. He describes how Cicero argued that men sought the most peaceful life by developing and sustaining *meum* and *tuum*. But for Henry, the appropriation and division of things into mine and thine came about through iniquity and that is why, thereafter, a

[32] Henry of Ghent, *Quodl.* IV, q. 20: "est iniqua quia solitaria..."
[33] Op. cit.: "...qui in rei veritate constituit civitatem diaboli."

strategy was required to maintain peace.[34] Nothing was private by nature, but private possession came about, as Cicero observed, through long occupation. He also describes how Aristotle, like Cicero, said this occupation is good and useful in his city. From what was common each came to hold his own, but Henry adds that if he desired more he violated the law of human society.[35]

Later, Henry distinguishes between the original state of innocence and the subsequent state of grace. He observes that such a community of goods was more sublime and more perfect in the original innocent state than it could ever be after the Fall which is now the state of grace. In the state of innocence all temporal goods would have been shared as one common hereditary property, since in the state of innocence men were not original owners, God is.[36] In the state of innocence men were heirs to God's property and required no additional mode of appropriation. There was no individuated strong property right in the state of innocence: men were heirs to a common possession for their use, not ownership.[37] While *meum* and *tuum* resulted from iniquity, strong property 'rights' emerged from what is now reasonably judged to be *expedient* in post-lapsarian times where there have been developed modes of appropriation, ratified in positive civil law. In post-lapsarian conditions it is not *expedient* that temporal goods be seen as a common hereditary property where common use would be free and without exchange. The state of grace has it own *expediency*, and citing Aristotle, Henry agrees that it is now preferred that goods are privately possessed. In this state of grace, the inheritance of discrete property and the possession of profits are *expediencies*, but always with the proviso that should someone need something for his use, the possessor is *obliged* either freely to concede it as an act of mercy, without any exchange or payment, or on the agreement (*cum pactione*) that future restitution be made either of the same thing or of

[34] Op. cit.: "sed per iniquitatem alius dixit hoc suum esse et alius istud et sic inter mortales facta est divisio." As Mäkinen (2001, 117) observes, Henry uses the term *appropriatio*, not *dominium* or *proprietas*.

[35] Henry of Ghent, *Quodl.* IV, q. 20: "Quietissimam vitam agerent homines in terra, si haec duo verba a natura rerum tollerentur, meum et tuum. Hinc etiam dicit Tullius. Sunt autem privata nulla natura, sed veteri occupatione. Sed istam occupationem Aristoteles dicit in sua civitate esse bonam et utilem. Iuxta illud quod subdit Tullius. Ex quo eorum quae communia erant quod cuique obtigit id quisque teneat, eo plus siquis appetet violabit ius humanae societatis."

[36] Henry of Ghent, *Quodl*. VI, q. 22: "Sed talis boni communio sublimior et perfectior fuisset in statu innocentiae, quam post lapsum possit esse in statu gratiae, quoniam in statu innocentiae bonorum omnium temporalium fuisset omnium una communis hereditaria proprietatis."

[37] In contrast, Mäkinen (2001, 117–118) thinks this is a reference to strong property rights. I however, read him as speaking of the communication of a common inheritance and use.

its equivalent according to the will of the restorer or immediately by exchange according to the will of both.[38]

Where Aquinas had argued that the division of property, private possession and servitude, were not imposed by nature but were conclusions of reason which do not alter natural law but add to it,[39] Henry's perspective emphasizes that the *meum* and *tuum* of self-lovers are the consequences of iniquity and that conventional positive law is its remedy. But for Henry, self-love and the *meum* and *tuum* that are its consequence can only be somewhat ameliorated in this life by the grace that comes from membership in the Church. He says that the teaching of the apostles always made clear that private possession was for common use. We know this from New Testament divine law rather than from natural law or positive civil law. Peace, concord and friendship are, he thinks, best secured when material goods which belong to another person as his possessions are shared by all as their common possession, but our affection for material goods is such that they are always conceived by us as privatised objects of our love. Even in Henry's description of Socrates's ideal city, men were connected by the greatest friendship through which everyone was regarded as another self (*alter ipse*), by the greatest love through which everyone loves one another *as he loves himself*, and this he says, is Augustine's city of God as it exists in history (*constituit in praesenti civitatem Dei*).

But this ideal community is not the most perfect state of all: common possession was more sublime and more perfect in the state of innocence and the community that is founded on love of God, Augustine's city of God *after* history, will be more perfect than Socrates's ideal. It can only be realised in heaven and until then, in post-lapsarian times, Henry describes the Christian community. It is necessarily imperfect in its exercise of *caritas* and its

[38] Henry of Ghent, *Quodl*. VI, q. 22: "In isto ergo statu gratiae expedit ut sint quantum ad statum communem civitatum, hereditates proprietariae et possessiones fructuum, ita tamen quod, si alius ex eis aliquid indigeret ad usum, quantum ei opus esset, libere possessor concedere deberet absque omni communitatione et redditione rei eiusdem et cuiuscumque alterius, si vellet quod esset pietas et misericordia, vel si hoc nollet, cum pactione restituendi in futuro rem eandem in se vel in aequivalenti pro voluntate restituentis, vel statim per communtationem pro voluntate utriusque." See Mäkinen 2001, 118, n. 43.

[39] Thomas Aquinas, *Sth* 1a 2ae, q. 94, a. 5, ad. 3: "Common possession of all things and the equal liberty of all" can be said to pertain to the natural law; neither private possession nor servitude were imposed by nature: yet they are adoptions of human reason in the interests of human life. Private property is, therefore, a conclusion of reason which does not alter natural law but adds to it. Compare Huguccio on permissive natural law: "by the law of nature something is mine and something yours but this is by permission, not by precept, for divine law never commanded that all things be common or that some things be private but permitted that all things be common or some private and so by natural law something is common and something is private." *Summa Decretorum* c. 1190 as cited in Tierney 1997, 142.

imperfection can only be moderated by the operation of divine grace. Only in the Church can a post-lapsarian individual enjoy the kind of grace whose effect will be that his affection will be *more common and less possessive* towards his individual goods but never perfectly so. Henry insists that those *more* perfect individuals who live in religious communities are able to observe a *measure* of common possession which is unattainable in political communities. This is because their greater perfection is the product not of natural love but of grace. The perfection of any given community depends for Henry on the degree to which natural self-love is controlled and constrained by the operation of divine grace and not by natural reason.

SELF-LOVERS AND THE MOTIVATIONS TO SACRIFICE ONE'S LIFE FOR THE COMMUNITY

There is a large body of scholarship that deals with medieval and early modern discussions of the right of resistance to unjust government, even unto self-sacrifice for the community. In his quodlibets Henry of Ghent also addressed the question of whether an individual, be he one who does not live in hope of eternal life, that is, is a virtuous pagan, or is indeed a Christian, should choose, according to right reason, to sacrifice his life for the community. He argued that if and when this occurs such an individual is always seeking a greater good for *himself*. This greater good is for Henry a choosing between the lesser of two evils. For both pagans and Christians, a man, he writes, ought to choose to sacrifice himself not because he hopes to be rewarded with a future life but because he realises that not to do so would be a sin and offence against God. Henry explicitly says that all men, in seeking virtue, share a concern not to commit a sin and according to right reason must always choose virtue and shun vice. Self-sacrifice, laying down one's life for one's community when it is necessary and when the wellbeing of the *respublica* cannot be secured by any other means is, as Augustine himself argued, not a devotion to the community but an attempt to avoid sin. Personal honour or glory are not his aims but when he does so choose to avoid sin he is knowingly motivated to secure a greater good for himself rather than for the community. This demonstrates to Henry that the motivation behind all post-lapsarian acts is self-love. Devotion to the common good in terms of the ultimate in self-sacrifice is, for him, a question of avoiding a greater evil, either through the practice of virtue or through the shunning of vice. The exercise of any of our powers following a choice to act in one way or another, even in the situation where an individual sacrifices himself for his community, is not discussed as a right to act in one

way or another, but as a duty to seek virtue and avoid sin as a benefit to oneself.[40]

This position is sustained by Henry when he treats questions of obedience and resistance to authorities.[41] This topic of discussion originated in his examination of religious communities. He regards the subjection of one human to another as justified only when a superior is able to rule the subject better than he is able to rule himself. The result of obedience to this kind of superior is that the subject derives a greater benefit for himself and thereby serves God better and more perfectly. But Henry thinks that to suggest to an individual who is capable of ruling himself correctly that he should subject himself to an individual who is less capable of doing so is sheer stupidity. Henry happens to think this never arises in religious communities since it is reasonable to assume that there will always be a more capable person in authority within the Church. Hence, in a religious community a subject must assume that his superior has reasonable cause for his command so that obedience is the rule. If the consequences of the command prove contrary to God or bad for the community then the responsibility is on the superior commander for sinning and not on the subject who obeyed orders. This parallels Augustine's argument about soldiers who do the will of the state's commander without suffering blame or incurring sin.[42] A subject who is bound by an oath of obedience, and oaths are always to God, has only one option open to him according to Henry – he maintains the performance of a *lesser* good commanded by a superior at the expense of a greater good intended by a subject who, in good conscience and after reasonable deliberation, has decided that breaking his oath will result in a greater good. He must presume that his superior is virtuous and the subject must therefore, perform what is commanded as if it *were* the greater good. Any subject bound by an oath of obedience would risk committing a mortal sin if he broke that oath.[43]

The issue, then, is always of deciding what is sinful, avoiding it, and not of anyone's rights. This applies both to subjects and superiors. Indeed, when Henry discusses how Christ's kingship governs both the spiritual and temporal spheres and he focuses on the benefits provided by temporal rulers he argues: people do not institute a ruler in order to subject themselves or their property to servitude. Only if need arises is every individual under an

[40] See Kempshall 1999, 171. To my mind this makes it very different from the discussion of self-preservation as a right of self-defence which could be waived through the free choice to exercise the right or not as found in Vitoria. See Tierney 1997, 298.

[41] Henry of Ghent, *Quodl*. XII, q. 31.

[42] Augustine, *City of God*, I. 26.

[43] See Kempshall 1999, 171–173. Also see Aquinas, *Sth* 2a 2ae, q. 98, a. 1 on oaths and it being a mortal sin to break them. Henry's argument here has affinities with those found later in Hobbes on non-resistance to a sovereign command.

obligation to contribute *in usum publicum* and only then may a temporal ruler turn his subjects' property over to the *res publica* of which they form a part. The ruler has *duties* so to do because his office is to maintain peace and concord having been given the commission of the guardianship of the common utility.

It is true that obedience to this superior is conditional on his securing the good for which the act of subjection originally took place. But Henry eventually argues that the *obligation* of obedience remains binding on subjects even if it is not clear to them that a particular statute is in fact necessary to secure the common utility or good. The goodness of the ruler is to be taken on trust and his purpose is taken to be of benefit to everyone in the community, being as he is the source of profit, lordship and stewardship.[44] Henry even argues that there is a special oath of the community and of the individuals within it insofar as they continue to be parts of that community. An individual's decision to remain physically present in a community *obliges* him to obey the edicts which are issued for the good of that community and he says "if they think otherwise they are gravely in error".[45] He also thinks they can choose to move to another community. Subjects however, should remain on guard with respect to those demands meant to fulfill the common benefit. If it can be established and proved that a statute fails to further the public benefit, then obedience ceases to be obligatory. However, bad statutes are to be obeyed for as long as the superior is tolerated in office. When there is no hope for his future correction, action should be taken. How? Henry's solution is that rather than tolerate a bad superior but disobey his statutes, subjects should first release themselves from their obligations to obey him by removing the offending superior from his authority.[46] Disobedience, then, is the prior concern and it is a wrong to be avoided.

What runs through all of Henry's arguments in his various quodlibets is the view that human beings may be integral parts of political communities in these fallen times, but what ultimately defines their participation in the *res publica* is their own perceived need to be protected from the worst consequences of self-lovers' behaviour. For this reason they owe duties of obedience to authorities charged with the public duty of securing peace and

[44] Henry of Ghent, *Quodl.* XIV, q. 9. For an interesting discussion of German Protestant positions on the obligation to fight for the fatherland which takes precedence over duties to one's own father or lord, and on the legitimacy of self-defence of individual subjects without dissolving government, focusing in particular on Althusius and Arnisaeus, and Sir John Eliot (Arnisaeus's translator) and James Steuart who used Althusius, see von Friedeburg 2002, 238–265.

[45] Here, the similarities with the later arguments of Locke 1690 are noted.

[46] See Kempshall 1999, 195.

concord amongst self-lovers. Political authority is ultimately, and by concession, a *remedium peccati*. Strictly speaking, there are no 'rights' of resistance. There are only duties to secure the best means to self-benefit in post-lapsarian times when self-lovers only have the power to seek their own good first before any common good.

TRANSLATING *IUS/IURA*

How then should we translate *ius naturae*/*ius naturale* when used especially by neo-Augustinians? Is it a right to preserve one's own life or a duty of self-preservation? For Henry of Ghent as well as for others, every person has an obligation not only to sustain his own life but also that of others once his own needs are met.[47] In cases of extreme necessity it was held from the later twelfth century, at least amongst canon lawyers, that a starving man may rightfully take what he needs from another's property in order to survive, without his action being considered theft. Is taking something rightfully a 'right' or is it a legitimate means or measure to fulfil the overriding obligation: to keep oneself alive by using what others, in civil law, may claim as theirs? Or is it both?

Brian Tierney has argued that it is both as a common medieval viewpoint. I think the degree of mutuality and priority depends on the author.[48] Furthermore, if we look to thirteenth-century canonists' discussions of *ius* we find that it is always derived from *iustitia*. Something is *ius*, a law, because it is *iustum*. As Tierney once observed, insofar as *ius* is the plan for doing the just thing, directing conduct in relation to self and others, Aquinas does not have a notion of subjective rights. I think this is correct. But what Aquinas does emphasize and neo-Augustinians do not, is the notion that right reason is determined by an individual's good use of their reason guiding their wills in action. Justice is therefore, an external balance between people that is discovered by reason, itself consonant with the higher *a priori lex* of eternal law, and is therefore, a moral rather than a theological virtue.[49]

[47] This of course is still found in Locke 1690.

[48] See Swanson 1997, 399–459; 405 he equates righful action with a right; but he also notes that the principle of extreme necessity was not inevitably characterised as a natural right and he cites especially Franciscans (op. cit., 414, n. 33). It is noteworthy that those who can be seen as casting it as a natural right were Godfrey of Fontaines and the Dominican John of Paris, both of whom used Aquinas and were part of what I consider the very different Dominican justifications of these ideas in contrast with neo-Augustinians.

[49] Aquinas speaks of those virtues whose function is the moderation of a passion as ethical/moral rather than theological, and says, for instance that humility, as a moral virtue, closely related to temperance and modesty, was recognised by the ancients, under the name *metriotes*/measure/moderation. *Sth* 2a 2ae, q. 161, a. 2 – a. 4.

Man, for Aquinas, is to be conceived as the master of his own affairs and even in criminal proceedings he is to be presumed innocent as well as knowledgeable about what natural law requires of him before evidence to the contrary is provided.[50]

But neo-Augustinians tend to use *recta ratio* primarily as an authoritative communication to Christ's vicars and not to all men. For them the picture of the Fall's consequence regarding each man's reason and his capacity to love anything other than himself is one where not only can nature *not* do through its own principles everything that natural reason dictates[51] but without grace we cannot fulfil even the dictates of natural law. James of Viterbo, for instance, argued explicitly that because of the ignorance which is in human nature the rule of reason alone is *not* sufficient for mankind, even in their political relationships. This is why it is *expedient* that the society of men, who are in many respects not adequate to govern themselves, should be ruled by others esteemed for their prudence and intellect. His emphasis is on human malice where men do evil and injure one another; hence it is *expedient*, not just, in the sense either of natural law's or eternal law's justice, for some to be rulers of others by whom men may be restrained from wickedness.[52] Because of men's self-love, James writes that each seeks only his own advantage and so it is fitting that there should be certain governors of the community who seek and procure the common good. For James of Viterbo, individuals will not do this on their own and from their own capacities. Hence, amongst men it is *expedient* that some should be rulers of others by whom the ignorant are directed, offenders restrained and punished, the innocent defended, the common good procured and society preserved.[53] He says explicitly that amongst Christians those who *rightly* acquire the power to rule in this way do so by *institution* of those who act on God's behalf, i.e., Christ's vicar the pope.[54]

Neo-Augustinians went even further to show that *ius/iustum* in post-lapsarian times requires faith in God and obedience to His intention to order the universe as He has willed, intentions which are not for the most part intelligible to us and hence, are matters of command which obliges us to perform. As James of Viterbo puts it: "all human power is imperfect and unformed unless it is formed and perfected by the spiritual power and this formation consists in approval and ratification. Human power always needs a two-fold formation that it may be perfected according to the nature of what it can do – it needs the formation of faith, just as there is no true virtue

[50] Op. cit., q. 58, a. 8; q. 60, a. 4.
[51] James of Viterbo, *De regimine christiano*, 4b reply to 2bii, Kempshall 2001, 297.
[52] James of Viterbo, *De regimine christiano*, 151.
[53] Op. cit, 151–152.
[54] Op. cit., 152.

without faith as Augustine says, so that no power [most specifically, no civil power] is entirely valid without faith."[55]

Brian Tierney's magisterial work on what he has called the "great sea of medieval jurisprudence" especially the writings of canon lawyers, has shown that while Aquinas did not have a theory of individual, inalienable subjective rights, some canonists did, especially when decretists discussed the concept of natural *ius* as a sphere of personal autonomy where the right-holder could act as he chose. But this *dominium* or sovereignty over one's acts, as Tierney also observed, was to be understood as both a right and a duty. Tierney associated those rights that are also duties with inalienable rights, namely, the right to self-preservation that cannot be renounced and that can be exercised in all circumstances. But I think that the reason for its 'unrenounceable' inalienability, especially as highlighted by neo-Augustinians, has more to do with their distinctive perspective on God's communicated duties to man, known upon reflection, not on our natural inclinations but as written in scripture, that is, divine law, and commanded by those with the requisite authority *vice* Christ. On this view, self-preservation is written into a prior fundamental sacred unalterable law expressive of God's will and handed down as a command, both in the law of nature and in Scripture. There is no attempt here to distinguish, as did Albertus and Aquinas, between law and command. How then should we translate the words used by theologians like Henry of Ghent: *fas*, *licitum* and *ius*? Rights seem less in evidence but obligations seem everywhere: *Fas,* meaning natural equity, is what is *owed* to each, a duty; *licitum*, what the law, natural or divine, *permits* in relations between individuals;[56] *ius,* meaning equity, a claim we may make in external relations between individuals *because* it is predicated on a duty of others to us or our duty to them. The *potestas* we may have is always to be exercised in acts in such a way that the acts are circumscribed by what is already known to be obliging on us that we dutifully perform.

RIGHTS AND SELVES, OWNERSHIP AND JURISDICTION, MEDIEVAL AND EARLY MODERN

In all of these discussions of rights, rightful acts and duties, there is a crucial question that must be raised and it concerns the scholastic conceptualisation of the self. What I do not think can be found in any of this

[55] Op. cit., 103.

[56] Are we to understand acts that are permitted as unspecified and indifferent? This, it seems to me, would only be possible under civil, positive law, and not under moral normative law.

medieval language is a concept or a right of *self-ownership* as one finds it in all of its peculiarity and, I think, almost uniquely, in the seventeenth-century John Locke.[57] Later in this volume Rudolf Schüßler discusses the late scholastic casuist development of the *possidentis* principle, especially as used by the Salamancan theologian Domingo de Soto.[58] To my mind what de Soto discussed as remaining in an individual's possession was his liberty, or even his reputation or *fama*, but he is not speaking about an individual thereby 'owning' his person or self. What one finds in medieval discussions is the notion of the person possessing potencies or qualities in the sense of having a *rightful jurisdiction* over their exercise. Ownership is not a synonym for jurisdiction although the word *dominium* in medieval texts was often used to indicate both concepts and the reader is left to determine which is being signalled by its context and object.

It is well known that Locke, of course, made use of the long-established medieval concept of man being God's creature who therefore, was bound by a duty to preserve himself and through reason discovers legitimate means to do so, appropriating from what God gave men in common so that he establishes private property. The establishment of a private property right, through the command that men appropriate material resources for their use in the service of self-preservation was, for Locke, in harmony with natural law precepts. Here, his argument is very similar to Dominican arguments, not least those of John of Paris.

The Lockeian self

Locke, however, then goes on to develop an unusual argument about having a property *in* one's own person.[59] This emerges out of a very distinctive kind of Lockeian puritanism, an attitude to personal identity as an isolated and private subjectivity that cannot, I believe, be found in medieval arguments. Locke notably argued that one's identity over time must be assured by one's *own* memory, the product of one's *own* experiences, a memory structured by narrative to render it publicly verifiable. Furthermore, as he made clear in his *Essay concerning human understanding*, over a life time selves change. One's personal identity, he concludes, consists in nothing but consciousness of present and past actions. The self depends on nothing but an individual's own consciousness of his self, constructed

[57] See Balibar 1998. Hobbes however, also speaks of our propriety in our life and limbs.

[58] See Rudolf Schüßler's article in this book.

[59] John Locke, *Second Treatise of Government*, ch. V, para. 27. See Swanson 1997, 400–401 on the reluctance of Locke's contemporaries, even those on behalf of whom he was writing, to accept this theory of the natural rights of property. It took nearly a century for this to be accepted.

through memory over time, "so that the present thinking thing which is the individual [at the moment] attributes to it self and owns all the actions of that thing as its own".[60] Locke's attempt to define the person as private, self-conscious, self-identity shows *some* affinities with an earlier range of attempts to define the powers of the self as the soul with qualities, notably that of a will, guided by reason, and capable of exercise amongst contingent alternatives. But in the earlier tradition, the will as a 'possession' or quality is not taken to be the self but is, rather, a capacity or power employed as a means of realising moral choices *of* the self. And this self, like every other self, is already inscribed in a community of functional status hierarchies that legislates to achieve a common good. There is no doubt that Locke agreed with others in the seventeenth century that the instinct of self-preservation was perhaps the deepest of human impulses. But Locke went on to develop an argument about the natural rights of the individual expressed in the individual's liberty to follow his own bent, independent of status except as a property owner, granted only his observance of natural law. For Locke, the voluntary and rational consent that is required of all men in the social and rational state of nature to construct civil society, had as its purpose the establishment of civil power that would impartially protect the natural law. But this was to secure the liberty of individual selves as unique consciousnesses whose identities were self-ascribed, in order that they might realise their freedom and promote their unique and individual initiatives and caprice in the improvement of God's creation. Although there are scholastic, natural law elements in the Lockeian position his is not a scholastic argument in intention because Locke has a very different understanding of the self and its creative self-consciousness whereby its self-ownership is achieved through an individual's appropriation of his own unique experiences.

Indeed, the Anglo-American contemporary conception of the self owes much to this Lockeian picture of self-ownership and self-creation, insisting as many do that we are self-defining, individual and unique. Hence, from a private self-consciousness we come to realise the need to establish, by contract and consent, a government that legislates to secure the happiness and security of the individual self amongst other individual selves. But there is another, even more radical, competing vision that contributes to an Anglo-American contemporary conception of the self, especially in juridical circles, and it derives from the seventeenth-century description of the self provided by Hobbes. Despite huge differences in their political theories, both thinkers tried to show that individual selves were self-defining, a view that none of the medieval texts we have discussed could endorse.

[60] Locke, *An Essay concerning Human Understanding* II, xxvii, paras. 17–26.

The Hobbesian self

It is one dominant modern view, derived from Hobbes, that insists that right and wrong are defined arbitrarily by a sovereign to whom has been renounced and transferred the original sovereignty of individuals who mutually contract with one another to set up an artificial contractual society and establish this third party, the sovereign. Hobbes's state authority and power remain thereafter distinct not only from the people who originally instituted it but also from officers wielding state power. Technically there is no law that a Hobbesian sovereign may make that can be unjust and no subject can claim against his injustice by right. There is no prior objective justice, no *lex* prior to the sovereign's justice. His commands do not require even consent. If the exercise of one's liberty is to be understood as one's right, then Hobbesian liberty becomes what the sovereign defines it to be. Hobbes famously believed that to ascribe liberty to the human will was a great mistake. One only possesses liberty from the sovereign and once one has entered the social contract. Liberty for Hobbes is that sphere of action where, and so long as, the sovereign's laws remain silent and therefore, one's liberty and rights of exercise consequent to it are open to authoritative change, reversal, continuous redefinition. Rights in this contractual society are really permissions, telling us what the conventionally-established rights-bearer is at liberty to do and not what he must or must not do.

Hobbes, however, described a sole remaining right of nature, *ius naturale*, a *naturalis libertas* which sometimes he spoke of as a *facultas animi*. The right of nature was for each individual to seek the means to his own preservation. This right is construed as prior to any collective good rather than as in harmony with it. Excluded from the definition of this right of nature is any idea of moral rightness, since one is free to do anything whatever and one has a right to everything, including other people's bodies, in order to secure one's life. The self-interested self with its capacity to choose whatever it wills is therefore, an abstract subject which wills whatever it desires and thereby is self-defining. Hobbes distinguished this one subjective right of nature from *lex naturalis*, but in so far as he does speak of natural law, he breaks from the prevalent natural law tradition as Locke did not. Instead, Hobbes provides an account of what people must do to carry out their desire to survive by claiming that it is a discovery of reason, a positive rather than a normative discovery. The dictates of reason are not laws but rather conclusions or theorems concerning what conduces to the conservation and defence of our own lives.[61] Unlike Locke's argument from natural law and man's rational access to its dictates, Hobbes does not

[61] See Forster 2003, 189–217; Hobbes, *Leviathan* 15.41, in: Hobbes 1972, I. 14, 146.

infer God's wishes, nor does he presume, as Locke does, that we are sent into the world upon God's business, performing what God commands. Hobbes has no argument that his natural law doctrine is in fact God's law. Indeed, he insists that law and right differ as much as obligation and liberty. Furthermore, Hobbes's understanding of how human reason works is that it is morally neutral, a tool of the passions. It does not adjudicate between goals as it does for Locke. It only tells us instrumentally how best to achieve them.[62] In fact, Hobbes's sovereign has authority within the limits of orthodox Christianity but he also controls those limits, dictating what Christianity is. And perhaps most important is Hobbes's materialism from which emerges his non-metaphysical concept of what man is as a person. For Hobbes there is no such thing as an incorporeal substance so that everything that exists does so in the material world and is a body of some sort.[63] The soul is merely 'life', a condition of being alive, and Hobbes says "of things held in propriety those that are dearest to a man are his own life and limbs".[64] Not only do men's souls, i.e., lives, cease to exist at death for Hobbes but while alive they are matter in motion. Reason, a learned capacity, instructs each individual on the basis of his own experiences on how to maintain his matter in motion, in effect, his 'propriety', his life.

This is the material, bodily, Hobbesian self. It was a rare, very controversial position to maintain in the seventeenth century. It is not what medieval authors conceptualised as their selves. But the bodily material self, as an abstract subject, is what came to be, for moral sceptics in the eighteenth century, the nonfoundational self with a will to seek what it desired. Such a self was a problem for and in communities of such selves. The artificial social contract therefore, seeks to eliminate the problems caused by these kinds of selves through positive law. In liberal democracies, when these are defined by those interested in the juridical subject and state sovereignty, it is this abstract subject in which rights inhere. The person who needs this artificial social contract and a sovereign is defined as naturally unsocial, self-interested, without any knowledge of over-all ends to structure his means-ends deliberations to acquire what he simply desires. His ends are privately attained from intensely individualised experiences, and the most dominant end is to stay alive. The individual who then covenants with others to establish a sovereign gives up his natural liberty or right to use his power as he wills, his right of governing himself, *dominium* as *jurisdictio* in order to secure his primary, very own end: self-protection. But Hobbes also claims that where positive laws constrain the will and restrain natural liberty, a core

[62] *Leviathan* 6.53–54, in: Hobbes 1972, I. 5, 83.
[63] *Leviathan* 4.21, 12.7 etc., in: Hobbes 1972, I. 3, 72.
[64] Hobbes 1972, II. 30, 300.

of natural liberty, the right of nature, is retained by the individual should his self-preservation be threatened. Hence, right is always prior to the good.

On this view, the self or subject has been theorised prior to its historical instantiation in any given community and prior to its social shaping. The individual right of this bodily material self can never be sacrificed to the general good of any whole society; indeed there is no such general good except as it emerges momentarily and unstably through an aggregative summing of individual choices in historically contingent circumstances concerning each chooser's own perceived apparent good or self-interest. Each chooser is constrained by positive laws and 'free' where those laws are silent. His rights are constrained by those conventionally accorded others. The social contract between self-lovers is seen to be a useful and expedient means of ensuring peace and order.

Now, both the Lockeian self previously described, and even more so, the Hobbesian self, respectively, contrast more or less with the medieval conceptions of the self. The pre-modern self was a normative self, already defined by God and the powers given to each and every member of the species for exercise by individuals as self-governors in their living of a morally constrained life. Every medieval, pre-modern self was obliged by moral rules that are *a priori* and to which men had access. Locke has some of this where Hobbes has none. The pre-modern self that was being encouraged to fulfil its created ends was already a potential awaiting to be actualised, its specific choices to act in one way or another dependent on ascribed, functional status. But the moral quality of those acts and hence, the realisation of the normative self in each would be identical in all who so achieved that full actualisation. It would be the normative self of the perfected species, individualised in this or that body, or in this or that office, but not as uniquely different, private, self-owned 'selves' or as selves construed as 'held in propriety', life, limbs, a minimalist material bundle of desires. Here is where both Hobbes and Locke imagine something quite different from medieval, pre-modern conceptualisations of the self: Locke's self, like Hobbes's self, is self-defining and unique. Locke in particular, insisted that as self-owners, radically private consciousnesses sought ways to realise their very own individual freedoms, construed as the play of experiential caprice, the defining characteristics of the voluntarist self. It is a certain kind of seventeenth-century Protestant discourse that needed to be developed, and was, for both the Hobbesian and the Lockeian visions, respectively, to have emerged.

Indeed, so far as I can see, in medieval discussions *dominium* when used to describe power of, or over, *persons* was never full and complete ownership but rather, meant jurisdictional governance or a duty of care. What *we* translate as ownership in its various modes, even when the same

word *dominium* was also used, was for medievals only with respect to external material things.[65] What seems truly innovative amongst certain later scholastic casuists as discussed by Schüßler, below, was that they applied and transferred a principle of property law to possessing one's own reputation or indeed, liberty. But they were not speaking of what Locke meant when he used the term *self*-ownership. We need the self-defining and unique self, be it Lockeian or Hobbesian in derivation, to arrive at the person in whom rights inhere when we speak of modern rights.

A FINAL LOOK AT MEDIEVAL RIGHTS AND OBLIGATIONS

Normally when medieval authors discussed rights over material things they were indeed referring to a variety of claims to use at will, but even here these are always within the prior known stipulations of justice, just use, an expectation that one use well those exterior, material things over which one had such rights and indeed, within the limits of what is known by natural law to be required for self-preservation. When discussing civil law and the *iudex saecularis* one finds authors using *ius* as a power over a temporal thing by right attributed to a person by positive law. For instance, we see the power to lay claim to a temporal thing in a court of law, but even here there is always a rider that the claimant must use it in a way not prohibited by natural law. Neo-Augustinians in particular, however, did not think we could follow natural law's precepts from our natures and hence, we find them always allowing for ecclesiastical oversight *ratione peccati* even in what were often regarded as purely secular cases.[66]

When discussing the secular judge's power over the body of a criminal condemned to death, Henry of Ghent[67] says the secular judge has a power (*potestas*) to capture, detain and kill a man's body. But the condemned man also has the power *quoad animam potestatem super idem corpus utendi*, to escape, if he can and secure his life so long as he injures no one else. These *potestates* have different sources. The judge's power comes from his duty of jurisdictional care for the public good, but the criminal's *ius* comes from his natural law duty of self-preservation. Henry then says of the criminal's power over his own body: *Potestatem autem quoad proprietatem in substantia corporis sola anima habet sub Deo, et tenetur ius suum in hoc*

[65] See for instance Godfrey of Fontaines, *Quodl*., vols. II–V and XIV; *Quodl*. VIII, q. 11, 105: "Idea etiam iure naturae quilibet habet dominium et quoddam ius in bonis communibus exterioribus huius mundi cui iuri etiam renuntiare non potest licite..."

[66] See Coleman 1987, 75–110, especially on the Franciscan Pecham.

[67] Henry of Ghent, *Quodl.* IX, q. 26.

custodire absque iniuria alterius. Tierney reads this as his having a property right in his own body.[68] But I think it a mistranslation to say: Only the soul under God has property in the substance of the body and holds its *right* to care for it without injury to another. I understand Henry to be saying that the soul has a sovereign, directive power as far as the property in the substantial characteristics of body is concerned, and it is the soul's *duty*, not right, to care for it so long as it does so without injury to others. Henry of Ghent does not use *dominium* but *potestas* regarding a *proprietas in substantia corporis*.

We have also already observed above from Henry's quodlibets that *proprietas* concerning exterior material things is not a full ownership right but is rather, under God who does have such full ownership. This contrasts starkly with the Dominican John of Paris's position[69] in several ways: as we have seen above, with regard to property rights in external, material things, John argues[70] that basic property rights belong by their very nature to individuals who, through their own labour, bring forth such 'rights'. Neo-Augustinians on the other hand thought property was ultimately God's and ours only as conceded to us as an inheritance from God to be *used* according to a whole range of conventional civil law rights of use and possession, 'expediencies', in the fulfilment of our obligations to survive. Franciscans and neo-Augustinians argued that all members of ecclesiastical and lay communities have no fundamental (as opposed to legal) rights of ownership as individuals or collectively; they are only administrators and stewards of (God's) wealth. The communication from God the owner, creator and governor, is to follow obediently the expedient rules of civil law, established and communicated to men by authorities in order to secure peaceful interrelations. Furthermore, regarding exterior material goods, they are to possess and in consequence use His creation well as stewards and to which they have no fundamental rights of ownership, on pain of admonition and judgment should the contrary be asserted to be the case. Henry of Ghent is elucidating any individual's duties which are much more stipulated as to permitted action than any talk of rights would be if the latter were taken to be a so-called free and indifferent space of action where one could act simply as one pleased. Henry of Ghent seems to be discussing the exercise of an individual's power as his duty of care to self and others.

[68] Tierney 1997, 78–89.
[69] John of Paris, *De potestate regia et papali*.
[70] Op. cit., c. vii, 96–97.

CONCLUSION

Natural law is a set of *a priori* dictates: they are directing, governing rules of action which we are obliged to follow. Certain medieval authors emphasized that our natures were sufficient to allow us to derive these conclusions from our rational reflection on our inclinations and experiences. We could and would then construct governments whose civil laws were themselves rational, mirroring the intelligibility of natural and eternal law, all of which favoured the common good as prior to any individual good. Others however, emphasized that the dictates could neither be derived nor followed from our natural inclinations or experiences so that we needed another remedy to establish peace and order amongst self-lovers: expedient, authoritative pronouncements which we were thereafter obliged to follow. The neo-Augustinian perspective on self-preservation of self-lovers does not seem to accord rights so much as command duties of action.

Brian Tierney, after examining Henry of Ghent, argued that Henry's use of a rights language was remarkably similar to that of some early modern rights theorists.[71] But as I see it, there were indeed certain early modern rights theorists who were in fact talking more about duties than individual rights. There is no doubt that for *all* medieval *and* early modern rights discussants, the concept of rights was theoretically subordinate, not foundational, because they all operated within the frame of natural law. The foundation was an already inherent moral order and any so-called 'rights', *iura,* were recognised as such because they were defined in terms of *prior* rules of justice. When exercised they passed the test of *recta ratio*, either as authoritatively communicated and accessible to natural reason, or as authoritatively commanded in divine law and passed on by Church authorities who were thereafter, said to concede certain jurisdictional and legitimating oversight to civil authorities making laws to cover expediencies. Especially in the latter case, natural and divine law precepts to guide action were judged not wholly accessible to our reason, but none the less obliged us to perform the duties stipulated thereby. What remains so interesting is the difference between Aquinas's and other Dominicans' understanding of our access to natural law and the position of the neo-Augustinians. For Aquinas, since all people are created in the image of God, human nature itself, not baptism or grace, gives each person the faculties which entitle him to use God's creation and enable him to use it well.[72] Not so for neo-Augustinians.

The perspective of medieval neo-Augustinians led them to focus on legitimate civil justice as an expedient remedy, coercively obliging men to

[71] Tierney 1997, 87.

[72] See Swanson 1997, 418–419 on Thomas Aquinas, Godfrey of Fontaines, John of Paris and John Locke.

obedience to authoritative command in order to secure collective utilities as 'the good' of either Church or 'state'. Such command is legitimated according to the judgment of authoritative right reason or 'reasonable cause' as determined by the *potestas absoluta* of public authority, and not by any right reason understood as independently determined and guiding the wills of individuals comprising the multitude. On this view, the law of public authority is not open to rational scrutiny by any individual or group thereof. And one therefore has no appeal against the law's apparent injustice by right.

It seems possible to see in their use of the general medieval argument which insists that imperfect things always tend towards self-love and their own individual goods (whereas perfect things tend towards the good of the species or of the universal community) a view that civil law for imperfect self-lovers ensures not rights but duties, a conforming of obedient individual wills and where such duties to be performed for the common good are defined by authority, however instituted: by tradition, consent, election, but always approved and confirmed by a higher, incontrovertible authority, Christ's representative on earth. This raises the interesting issue for neo-Augustinians of what the possibilities for *dominium* are, where *dominium* means self-governance/self-rule (and not self-ownership) regarding actions of the will. For such neo-Augustinian authors are there licitly any pre- or post-lapsarian 'rights' in natural law or are they better construed as powers to be exercised in obedience to authoritative command as duties/obligations?

It seems to me to be the case that the medieval argument that 'rights', liberties, privileges granted by higher authorities, either in civil society or by the historical Church are, for neo-Augustinians, nothing other than *de jure* legal recognitions of already-engaged *de facto* collective or individual practices constituting obligations to the community. *And* it also seems to me that neo-Augustinians in particular construed such practices as *illicit* until legally and authoritatively condoned, so that instead of positive law *following* practice, for them, licit practice could only follow law-ultimately divine law as taught by the Church and where civil law required ratification by Christ's vicar on earth.

This seems to mean that *ius naturale*, the moral law known to each and all which rules the human race along with custom, as Gratian in the *Decretum* had it, is for neo-Augustinians nothing more than a set of inviolable commands – not to follow the inclinations of nature, which although from God are now defective or powerless – but to moderate those inclinations through the dictates of divine law as known from being a member of the Church and hearing scripture authoritatively and incontrovertibly interpreted, and its precepts passed on to civil magistrates. As James of Viterbo insisted (and thereby outraged Godfrey of Fontaines who followed Aquinas) charity perfects natural love, not because both loves

are present in the will, where one is the perfection of the other, but because with the advent into act of charitable love which is perfect, natural love which is imperfect ceases to be in act.[73] Hence, for this neo-Augustinian perspective, the dictate to do unto others what one ought to will done to oneself is not a set of rights as freedoms to act as one desires or pleases, such desires being inadequately guided by now imperfect and weak reason, but rather, comprises a set of duties to fulfil God's order upon authoritative command. Furthermore, from this perspective, civil positive law is uniquely punitive and constraining rather than educative, restraining us as self-lovers from our iniquitous, self-loving behaviour. Nor, from this perspective, is the *ius principandi* to be understood as a right to rule but rather as a duty to ensure peace and concord through conventionally-established constraint.

There seems to have been a serious future for some of these medieval neo-Augustinian ideas not only in early modern absolutism but in eighteenth-century moral scepticism. They too spoke only of men's passions and interests, and not of their right reason guiding their interrelations. To avert the worst excesses of our knavishness the remedy would be positive law. In what has come to be a common place of our contemporary jurisprudence, adopting elements of Hobbes's theory of sovereignty, rights as liberties of action would be seen as those activities capable of exercise in the unstable spaces where the sovereign law remained silent.[74] As Hobbes had said, law and right differ as much as obligation and liberty.

[73] Kempshall 2001, trans. 4aii, 295. He goes on to argue: "natural self love is weak and imperfect but not perverse. Tending towards the self naturally more than and before God is not perversity of nature but nature's defective and powerless state which cannot be raised to loving God more than itself without the additional gift of grace. […] Charity perfects natural love and elevates it to what it was powerless [to achieve by itself]." 4b reply to 2bii: it should be said that nature can not do through its own principles everything that natural reason dictates, 297.

[74] See Hart 1955, 175–191.

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Chapter 2

RIGHTS AND DUTIES IN LATE SCHOLASTIC DISCUSSION ON EXTREME NECESSITY

Virpi Mäkinen (University of Helsinki, Finland)

CHARITY AND JUSTICE TOWARD THE POOR

During the twelfth century, European cities were growing fast, population increased greatly, a market economy, coinage and the textile industry were growing, just to mention some important social factors. Negative aspects of the consequences of this rapid social and economic development also came to light. The growing number of hungry people and the poor (*miserabiles personae*, such as orphans, the sick, the old, and widows), came to be a considerable social problem for the medieval Church and later for society as well. The long struggle against the growing number of mendicants started at the same time. Monasteries and other religious institutions took care of the poor as much as they could. In medieval canon law, the responsibility of organizing poor relief belonged to bishoprics. The Church recommended benevolence toward the poor who did not have the means of sustenance, encouraging people to give alms. Gratian's *Decretum* maintained the obligation toward the poor in need by stating:

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 37-62.

"Feed the poor. If you do not feed them you kill them."[1]

"The one who keeps more for oneself than he or she needs is guilty of theft."[2]

These laws obliged a person with property to a duty of charity and justice to the poor. Theorists on poor law (both theologians and canon lawyers) also taught that helping others increased religious merit. They were not, however, particularly interested in the reasons for poverty which was taken as a matter of fact. It should be remembered that poverty had a positive moral value in the Middle Ages, when it was embraced voluntarily as one of the central vows taken by monks and nuns. The friars, especially, the Franciscans, gave it more emphasis as an aspect of the imitation of Christ, as a total renunciation of all property rights. When poverty was involuntary, however, either because one was born into it or because of economic reverses, it is neither a virtue nor a vice but a misfortune. The involuntary poor were called *miserabiles personae*. Theologians and canon lawyers concurred that it was wrong to punish an involuntarily poor person on either count. The appropriate moral response was to help the poor, making special provisions for them not extended to others.[3]

With the revival of canon law begun by Gratian's *Decretum*, which played a central role in education in Church law at the universities, canonists devoted much attention to poor relief, especially in the courtroom. They declared litigants equal before the law, regardless of wealth. While granting the poor equal rights, they also sought to mitigate practical disadvantages the poor might suffer in court. The views of the canonists were consistent here, and were reinforced by papal edicts. The canon lawyers also organized legal aid for the poor.[4] It should be noted that secular courts were not as sensitive to the needs of the poor and there was little sign of canonical influence on their practice. For secular governments, the poor were 'invisible men'.[5]

When discussing poor law, theologians and canon lawyers also considered the right to private property and the amount of almsgiving. These subjects provoked considerable discussion owing to the conflicting principles found in Scripture, Roman law, and the Church Fathers. Augustine's position dominated early medieval theory on the issue and

[1] D. 86 c. 21
[2] D. 42 c. 1
[3] See Colish 1997, 326–330; Tierney 1959.
[4] The first declaration of the Church's responsibility to give legal aid to the poor (including widows and orphans) was made at the Council of Chalcedon in 451. The idea of justice for the poor has also included in Roman classical law. See Brundage 1985. For the development of medieval criminal law, see also Mäkinen and Pihlajamäki 2004.
[5] See Colish 1997, 327–328; Brundage 1997.

Gratian follows him, agreeing that all things were held in common in the original state. Augustine as well as Gratian maintained the right way to use one's property was to give the surplus to the poor.[6] Early medieval canonists and theologians generally declared that private property was a consequence of the Fall, since postlapsarian mankind, subject to the vice of greed, finds it difficult if not impossible to function without his own property. The sharing of all things was an ideal and the more perfect way to live but possible only for those dedicated to themselves in monasteries.[7] For ordinary people, private property rights were plausible and practical. It is significant to see that despite private property being legitimately given for our fallen state it was not seen as an ideal situation or a natural right reflecting human nature. Rather, it was a concession to human weakness that should be tolerated.[8]

Later, from the mid-thirteenth century onwards, Augustinian's ideas were combined with others derived from Aristotle, for example, especially from his *Nichomachean Ethics* and *Politics* (now available in Latin translations). The individual's right to own and enjoy property were taken as a fact of social and economic life. Property was seen an important factor in supporting oneself and one's family. William of Saint-Amour (d. 1272), a secular master at Paris, stated that the measure of mercy toward the poor is to be proportional to the human condition. Those with only one tunic should not be compelled to divide it with others, for then both would remain unclothed. Zacceus was, therefore, a good example of proper almsgiving. He gave half his possessions to the poor while retaining enough for his own sustenance. William also used the example of Zacceus to argue that private

[6] For Gratian citing Augustine, see D. 47 c. 8: "Neque enim minus est criminis habenti tollere, quam, cum possis et habundas, indigentibus denegare. Esurientium panis est, quem tu detines; nudorum indumentum est, quod tu recludis; miserorum redemptio est et absolutio pecunia, quam tu terra defodis."

[7] There are references, for example, to the Acts (4:32) and Aristotle, as follows in C. 12 q. 1 c. 2: "Denique Grecorum quidam sapientissimus, hec ita esse sciens, communia debere, ait, esse amicorum omnia [...] Istius enim consuetudinis more retentio etiam apostoli eorumque discipuli, ut predictum est, una nobiscum ut uobiscum communem uitam duxerunt. Ut enim bene nostis, erat multitudinis eorum cor unum et anima una, nec quisquam eorum aut nostrum de his, que possidebat, aliquid suum esse dicebat, sed omnia illis et nobis erant communia [...] Doctrinis et exemplis apostolorum obedire precipimus..."

[8] Bonaventure, *2 Sent*. d. 44, a. 2, q. 2, ad. 4 (2, 1009a–b): "omnia esse communia, dictat secundum statum naturae institutae; aliquid esse proprium, dictat secundum statum naturae lapsae ad removendas contentiones et lites [...] Nisi enim essent huiusmodi dominia coercentia malos, propter corruptionem, quae est in natura, unus alterum opprimeret, et communiter homines vivere non possent. Non sic autem esset, si homo permansisset in statu innocentiae; quilibet enim in gradu et statu suo maneret. Et sic patet, quod illa ratio non concludit, quod servitus vel dominium respiciat naturam institutam, sed solum, quod respicit naturam lapsam, ubi ordo habet perturbari et potest per dominium conservari." See also Thomas Aquinas, *Summa theologiae* (hereafter *Sth*) 2a 2ae, q. 66, a. 1, resp., 64.

property should be limited but not denied; no one should appropriate more than suffices for one's own needs.[9] Nevertheless, the use of property was limited by the requirements of the common good and of the needy. Superfluous wealth should therefore be given to the needy, a moral duty demanded by justice.

The question of the proper amount of almsgiving as a matter of justice also arose. Among the theologians and canonists it was not quite clear whether almsgiving was essentially an act of justice or of mercy. One way of reconciling the texts was to consider the subjective condition of the mind of the giver. The theorists emphasize the importance of correct moral intention and giving with discretion. To give alms to somebody in need was in itself an act of justice. However, if it was connected with good will and fellow feeling toward the recipient, the act could at the same time be one of mercy.[10]

Recipients, i.e., the poor, were also seen to play a positive moral role because they helped donors practise the virtues of charity and justice. Accepting help graciously also enabled recipients to develop the virtue of humility. Nevertheless, it was not quite clear whether the poor had any form of 'right' against other people. The *Decretum* includes, however, at least one such a law:

"When a person is dying of hunger, necessity excuses theft."[11]

The principle of extreme necessity was developed from this and other similar laws included in Gratian's *Decretum* by twelfth-century canon lawyers.[12] The principle came to play a role only in extreme circumstances when an individual's basic needs were not met by her own resources, family, or society.[13] Thus, a person in extreme need might rightfully take the property of other people to sustain her life. This principle was included in the official canon law summas – both Johannes Teutonicus's *Glossa ordinaria* to the *Decretum* and the Dominican Raymund of Penafort's *Summae*. These books offered practical advice to confessors on both points of law and pastoral responsibilities. Despite the principle of extreme necessity also including the common laws of the various European states, it had hardly any justification in practice, and was thus more an ethical standard invoking moral statements.[14]

The principle of extreme necessity came to be better known as a moral and legal standard at the end of the twelfth century, coming into the

[9] William of Saint-Amour, *De quantitate eleemosynae*, 57–58.
[10] Tierney 1959, 35 where he refers to Stephen Langton.
[11] D. 5 c. 21
[12] See, e.g., D. 86 c. 21 and D. 42 c. 1.
[13] For the development of this principle, see Swanson 1997, 398–415; Tierney 1989, 638–644.
[14] See Swanson 1997.

Church's teaching at the same time as powerful social and economic changes occurred. The cases of the poor in need were also discussed throughout the Middle Ages in scholastic writings and disputations. In the quodlibet distutations beginning from the 1280s, the principle of extreme necessity appeared in a new light. The most important moral philosophical development for our subject concerned the relation between the principle of extreme necessity and an individual's duties and rights to life and subsistence. In this paper, I will argue that we see the early terminology of the duty of self-preservation and the right to life (i.e., the right of subsistence) in the late medieval interpretations of the principle of extreme necessity.[15]

The concept of 'individual right' is understood in this paper as the natural right of any human being to life and liberty, including the will, power, and the claims of an individual. Individual, natural rights are associated with such terms as moral, licit, and rational. It should, however, be remembered that when speaking about late medieval or early modern ideas on individual rights we are not considering modern theories of human rights, only the early language of rights.

EXTREME NECESSITY AND NATURAL LAW

The content and definition of natural law varied according to theologian and decretist. It should also be remembered that medieval authors did not explicitly differentiate between the terms natural law (*lex naturalis*) and natural right (*ius naturale*), these concepts often being used as equivalents. The main reason for this variation was several definitions of natural law to be found in the sources, one of the most important being Gratian's *Decretum*. The *Decretum* itself was a compilation of earlier texts: the material Gratian set out to collect, organize, and rationalize ran from the Decalogue to the enactments of contemporary councils and included Scripture, the writings of the Church Fathers, papal letters, decretals, and rulings of councils and synods.[16]

One important question was the interpretation of *ius naturale* in the texts dealing with the principle of extreme necessity. It should be noted that the theorists on poor law developed various definitions of *ius naturale*. In general, there were two main lines of interpretation: *ius* was seen either in an objective sense or in a subjective sense. One reason for the several

[15] Cf. Janet Coleman's article in this volume.
[16] See Winroth 2000.

interpretations was that Gratian uses at least two definitions of *ius naturale* in his *Decretum* without being able to combine them in an unambiguous understanding of natural law.[17] The first definition at the beginning of the *Decretum* is:

> The human race is ruled by two things, namely, natural law and usages. Natural law is what is contained in the Law and the Gospel. By it, each person is commanded to do to others what he wants done to himself and prohibited from inflicting on others what he does not want done to himself. So Christ said in the Gospel [Mtt. 7:12]: 'Whatever you want men to do to you, do so to them. This indeed is the Law and the Prophets.'[18]

Gratian mentions two kinds of law that control human life. Natural law concerns all people in all circumstances, but the right of custom is changeable and depends on time, place and the contracts people enter into.[19] Gratian claims that the core of natural law is the Golden Rule, adding that the moral precepts of the Old Testament (the Law) and the New Testament (the Gospel) are included in the natural law, but not everything that Scripture contains. For him, the natural law corresponds to the divine will, so that it orders only what God wills to happen and forbids only things and deeds that would be forbidden by God. When something is done against the will of God or Scripture, it happens against the natural law as well.

Gratian's *Decretum* also gives another definition of natural law adopted from the Roman legal tradition through Isidor of Seville:

> Natural law is common to all nations because it exists everywhere through natural instinct, not because of any enactment. For example: the union of men and women, the succession and rearing of children, the common possession of all things, the identical liberty of all, or the acquisition of things that are taken from the heavens, earth, or sea, as well as the return of a thing deposited or of money entrusted to one, and

[17] See Coleman 1988, 616–618.

[18] D. 1 c. 1: "Ius naturale est quod in Lege et Evangelio continetur: quo quisque iubetur alii facere quod sibi vult fieri; et prohibetur alii inferre quod sibi nolit fieri. Unde Christus in Evangelio: 'Omnia quaecumque vultis ut faciant vobis homines, et vos eadem favite illis. Haec enim est lex et prophetae'." Translation by Thompson, in Gratian's *The Treatise on Laws* 1993, 3.

[19] D. 6 c. 3: "Naturale ergo ius ab exordio rationalis naturae incipiens, ut supra dictum est, manet immobile. Ius vero consuetudinis post naturalem legem exordium habuit, ex quo homines convenientes in unum coeperunt; quod ex eo tempore factum creditur, ex quo Cain civitatem aedificasse legitur."

> the repelling of violence by force. This, and anything similar, is never regarded as unjust but is held to be natural and equitable.[20]

According to the second definition, natural law is based on natural instinct, which is common to all human beings. Since this kind of law was also often understood to apply between animals, it is common to all sentient creatures.

Comparing the first and the second definitions reveals some difficulties. The second definition does not contain the Golden Rule that constituted the natural law in the first. Moreover, Gratian's first definition of natural law is a rule enjoined by Scripture, but Isidore's definition is merely a product of instinctual behaviour. Nevertheless, Isidore's definition also contains principles that were compatible with Scripture (compare e. g., Acts 4:32).[21]

Several definitions also caused a problem in the proper understanding of the expression 'natural law' that could not be resolved either by Gratian or his medieval commentators. Some saw the natural law as describing the original primitive conditions in which men lived when they were as yet untouched by the conventions of civilization. Others used it to describe psychological and physical characteristics of men no matter what environment they found themselves in. Gratian included both senses in his definitions of natural laws, but failed to distinguish between the conditions of primitive society and those proper to human society which satisfied intellectual, psychological and spiritual human needs.[22]

One of the most common ways among medieval decretists and theologians to handle the principle of extreme necessity under the law of nature was to take the example of a theft.[23] In his *Summa theologiae*, Thomas Aquinas asked the question of whether it was lawful to steal because of need. In his reply, he pointed out that a person in extreme need did not steal in taking another's property, because what he took was common possessions under the law of nature. For Aquinas, positive human law may justify a surplus, but it had no justification in natural law except for its social use. In addition, no good positive law may violate the precepts of natural law.[24] Aquinas referred to Gratian's definition of natural law in the *Decretum*.

[20] D. 1 c. 7: "Ius naturale est commune omnium nationum eo quod ubique instinctu naturae non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, communis omnium possessio, et omnium una libertatis, acquisitio eorum quae caelo, terra, marique capiuntur, item depositare rei vel commendatae pecuniae restitutio, violentiae per vim repulsio." Translation by Thompson, in Gratian's *The Treatise on Laws* 1993, 6–7. See also Isidor of Seville, *Etymologiae* V, IV, 1–2 (PL 82, 199).

[21] See Tierney (1997, 59) commenting on the two definitions of natural law by Gratian.

[22] See Coleman 1988, 618; Tierney 1997, 59–61.

[23] For examples in other scholastic authors, see Swanson 1997, 407, n. 17.

[24] Thomas Aquinas, *Sth* 2a 2ae, q. 66, a. 7.

Like Aquinas, Bonaventure also treated the principle of extreme necessity by using the ideal of the common possessions of all. Discussing the various modes of common possessions in his *Apologia pauperum* (1269) Bonaventure wrote that:

> The first form of common possessions is that which flows from the right of the necessity of nature (*ex iure necessitatis naturae*), through which anything required for the sustainment of natural life becomes the share of the man who is in extreme need of it, even though it may have been appropriated by someone else. It is impossible to renounce this form of common possessions because it flows from the law naturally imprinted upon man (*ex iure naturaliter inserto homini*), since he is an image of God and the most honorable creature, for whose sake all the things of the world were made.[25]

Bonaventure points out that everyone has a duty by natural law for the sustenance of life. In the same context, he also specifies the Franciscan ideal of poverty as the renunciation of common possessions. Bonaventure claims that the Franciscan way of giving up common possessions (the ideal of poverty that differed from other monastic or mendicant orders) concerned a friar only in so far as he lived under human law; no one can give up a form of common possession that flows from the natural law imprinted upon man.

The texts commenting on the case of the poor in extreme need often included the ideal that all created goods were common in such a situation. Another ideal was that every person had an obligation to sustain the life of others once her own needs had been met. The theological reasons were based on the doctrine of *ordo caritatis* and the Commandment of Love ("Love your neighbour as you love yourself"). The Aristotelian scholastics taught that the order of love (*ordo caritatis*) was based on the idea that every created being has a natural inclination in general toward good and in particular toward the supreme Good. For a human being, this also requires deeds not necessary for others but for one's own good. According to Thomas Aquinas, for example, the love of one's neighbour is based on self-love, the core of the Commandment of Love, from which this love follows.[26]

Importantly for our subject, neither Aquinas nor Bonaventure had a doctrine of subjective rights. They both defended the case of extreme need by using the principle of the common possession of all under the objectively

[25] Bonaventure, *Apologia pauperum*, c. 10, n. 13 (8, 309): "Prima namque communitas est, quae manat ex iure necessitatis naturae, qua fit, ut omnis res ad naturae sustentationem idonea, quantumcumque sit alicui personae appropriata, illius fiat, quia ea indiget necesitate extrema. Et huic communitati renuntiare non est possibile, pro eo quod manat ex iure naturaliter inserto homini quia Dei est imago et creatura dignissima, proter quam sunt omnia mundata creata." Translation in de Vinck 1966, 232 with some modification.

[26] Thomas Aquinas, *Sth* 2a 2ae, q. 71.

understood law of nature. Among medieval theologians, common property was seen to be the mode of possession in the state of innocence before the Fall. In speaking about the origins of property, they usually held that under natural law everything was common. Private property rights, for their part, were based on positive law developed after the Fall, since fallen man could no longer share property. Involving Aristotle, they stated that property should be owned privately in order to have a peaceful and harmonious social life.[27]

EXTREME NECESSITY AND INDIVIDUAL RIGHTS

Some canon lawyers stated in the twelfth century that a person in extreme necessity had something very like a right (*ius*) to take what she needed.[28] As Brian Tierney (1989) has shown the English canonist Alanus (fl. 1208–1238) interpreted the principle of extreme necessity such that "the poor man did not steal because what he took was really his own *iure naturali* – which could mean either 'by natural right' or 'by natural law'."[29] Laurentius, for his part, wrote that when the poor man took what he needed, it was "as if he used his own right and his own thing".[30] Hostiensis (c. 1190/1200–71), reformulated the idea as follows: "One who suffers the need of hunger seems to use his right (*ius suum*) rather than to plan a theft."[31] Tierney defines such a right using modern rights language as a 'rightful power'. Further, he argues that the person in need also had a 'rightful claim' according to canonists. The canonists had developed a process called 'evangelical denunciation', which means that a bishop could hear any complaint involving an alleged sin and provide a remedy without the plaintiff bringing a formal action. Several canonists argued that since this procedure was available to the poor person in extreme need, he could assert a rightful claim by an "appeal to the office of

[27] See, e.g., Aquinas, *Sth* 2a 2ae, q. 66, a. 1, resp., 64; Op. cit., q. 66, a. 2, resp., 66–67; Bonaventure, *2 Sent*., d. 44, a. 2, q. 2, resp., (2, 1008); Op. cit., d. 44, a. 2, q. 2, ad. 2 (2, 1009).

[28] See Tierney 1997, 58–69.

[29] *Gloss ad Comp*. I, 5.26.5 (Couvreur, 161 n. 280). Cited in Tierney 1989, 642; 1997, 73. See also Swanson 1997, 405.

[30] Tierney 1989, 642; 1997, 73.

[31] Hostiensis, *Lectura in V libros Decretalium ad* X.5.18.3: "Unde potius videtur is qui necessitatem patitur uti iure suo quam furti consilium inire." Cited in Tierney 1989, 642; 1997, 73.

the judge". The bishop could then compel an intransigent rich man to give alms from his excess, by excommunication if necessary.[32]

These types of text concerning the status, and claims of needy persons seem to provide, in Tierney's terms, examples of early natural rights *theory*. More particularly, he argues that the origin of natural rights theories is based on those "patterns of language in which *ius naturale* meant not only natural law or cosmic harmony, but also a faculty, ability or power of individual persons, associated with reason and moral discernment, defining an area of liberty where the individual was free to act as he pleased, leading on to specific claims and powers of humans qua humans".[33] It should, however, be noted that the meaning of *ius naturale* as a faculty and power by the medieval decretists also lightens the idea of moral consciousness which is not important in speaking about subjective natural rights. Secondly, the meaning of *ius suum* may also refer to the Stoic principle of natural law (i.e., *ius suum tribuendi*), which does not connote possessive ideas. In this respect, Tierney's conclusion seems exaggerated. Nevertheless, Tierney has recently offered a more substantial analysis of the theoretical settings concerning his main argument – one of the last in this book.[34]

In the early history of individual rights, the principle of extreme necessity became a powerful argument against the Franciscan ideal of apostolic poverty during the debates on poverty between the Franciscan Order and the secular theologians (1250s to 1270s) and between the Order and Pope John XXII (1320s to 1340s).[35] Briefly, the debate concerned the Franciscans' claim that they were living in absolute poverty without private and common property and so had given up all rights. In his famous bull *Exiit qui seminat* of 1279, Pope Nicholas III (1277–1280) interpreted the Franciscan Rule (*Regula Bullata*) explaining the use of things as a factual use (*usus facti*), which he describes as "a moderate use of necessary things, both for the sustenance of life and the performance of the duties of their positions, in every way in accord with their Rule... These things the friars can licitly use during permission granted".[36]

According to Nicholas, the licence to use was given to the friars by the owner or the donor of those goods they were using in fact. The pope also maintained that the friars should receive their livelihood "either from things freely offered, from things they humbly beg, or from things acquired by labour" and continues:

[32] Cited in Tierney 1997, 74 where he also gives references to the *Ordinary Gloss* to the *Decretum* see, G1, D. 47 c. 8. See also Tierney 1979, 37–39.

[33] Tierney 1989, 625. For the context and texts of the decretists' rights terminology, see op. cit., 620–638.

[34] See also his excellent latest study, Tierney 1997.

[35] For the debate, see Lambert 1961; Leff 1967; Lambertini 1990 and Mäkinen 2001.

[36] Nicholas III, *Exiit qui seminat*, a. 3, 194.

> And indeed, where these [manners of living] should all fail, as is not to be presumed in any way, by the law of heaven, the way to provide for the sustenance of nature in a situation of extreme necessity that is granted to all caught in extreme necessity is not closed off to the friars, just as it is not to others, since extreme necessity is exempt from every law.[37]

The text considers the case of extreme necessity with a traditional argument already to be found in the writings of Bonaventure. Nevertheless, the case was an interesting one since it touched on the problematic relation between the Franciscan ideal of poverty as complete renunciation of property rights and the teaching on natural rights common at that time. Neither Bonaventure nor Pope Nicholas III saw any problem here. We have to wait until Ockham's reply before we are given an answer (or an attempt at an answer) to the dilemma left by the pope.

After the pope's interpretation, the Franciscan doctrine of absolute poverty supposed that the friars used things by *usus facti*, which was a purely exterior act of using a thing. In factual use, the friars were like non-legal persons without any legal status either as individuals or as a community. Further, in accordance with the Franciscan interpretation, *usus facti* also considered irrationals, that is, animals, the mad and children. This kind of characterisation was, of course, problematic from the moral point of view.[38]

The Franciscans and their opponents published many treatises in which they discussed these subjects in the property debate. The Franciscan case was also touched on in annual quodlibetal disputations at the University of Paris. Godfrey of Fontaines, a secular master at Paris, disputed the questions posed concerning Franciscan poverty and the claim that they had renounced all kinds of rights. Godfrey argues in his *Quodlibet* XII, question 19 that:

> From this it follows, however, that no one can in this way give up temporal goods, since in extreme necessity anyone has the right to use temporal goods to the extent which is sufficient for his sustenance. No kind of perfection whatsoever will demand or permit someone to renounce this right and *dominium*. Thus, a person who cannot give up the use of some thing should not [do so]. Similarly, in such a case he cannot

[37] Op. cit., a. 2, 193: "Et quidem ubi, quod non est aliquatenus praesumendum, haec cuncta deficerent, sicut nec ceteris, sic nec ipsis Fratribus, jure poli in extremae necessitatis articulo, ad providendum sustentationi naturae, via omnibus extrema necessitate detentis concessa praecluditur, cum ab omni lege extrema necessitas sit excepta." Translation mine.

[38] For the history of the legal interpretations of Franciscan poverty, see Mäkinen 2001; Brett 1997.

> or should not renounce the *dominium* or faculty or right of using those things.[39]

Godfrey states that everyone has an inalienable dominion and right of using goods (*ius utendi*) based on natural right in the case of extreme necessity. The dominion and right are involved because every person has a duty of self-preservation. In another *Quodlibet* VIII, question 11, Godfrey explores the connection between extreme necessity, duty and natural rights:

> Furthermore, since by natural right each person is obliged to maintain his life, which is not possible without using external goods, each person by the law of nature has dominion and a certain right in the common exterior goods of this world which she cannot licitly renounce.[40]

In this text, Godfrey went on to ascertain the principle of extreme necessity, which grew out of the fundamental and universal duty of self-preservation and right of subsistence. For Godfrey, it seems that the right of subsistence follows from the duty of self-preservation. Several years later, John of Paris, a Dominican theologian, also stated a right of subsistence in a passage largely borrowed from Thomas Aquinas's explanation of the principle of extreme necessity in the *Summa theologiae*. John describes the subject thus:

> Human life is ruled by natural and positive law. Natural law never alters but positive law loses its force in certain cases where it does not remain in accord with the natural law upon which it is founded. Natural law does not determine that a thing be mine or yours, for natural law recognizes the common possessions of all things. [...] That everyone is bound to preserve his own life is natural; therefore, according to natural law, an individual who would not otherwise survive except by taking the property of others may do so. Positive law has no force in this case, and the property which he takes no longer belongs to others but becomes his own. This is true whenever he might not otherwise be able to provide for

[39] Godfrey of Fontaines, *Quodl.* XII, q. 19, 142: "...nullus potest sic renuntiare bonis temporalibus quia in extrema necessitate quilibet habeat ius utendi bonis temporalibus quantum sufficit ad eius sustentationem. Nec qualisquemque perfectio exigit vel permittit quod aliquis huic iuri et dominio renuntiet. Qui enim usui alicuius rei renuntiare non potest, nec debet; similiter etiam dominio et facultati vel iuri utendi illa re in tali casu renuntiare nec potest nec debet." Translation mine.

[40] Godfrey of Fontaines, *Quodl.* VIII, q. 11, 105: "Immo etiam propter hoc quod unusquisque tenetur iure naturae vitam suam sustentare, quod non contingit nisi de bonis exterioribus, ideo etiam iure naturae quilibet habet dominium et quoddam ius in bonis communibus exterioribus huius mundi, cui iuri etiam renuntiare non potest licite." Translation mine.

> himself [...] And this resolves the problem, because whoever makes use of his own goods and not another's does not commit theft.[41]

The citations both by Godfrey of Fontaines and John of Paris above show that the principle of extreme necessity came to be formulated in terms of natural individual rights by the early fourteenth century.[42]

The Franciscan theologians of the late thirteenth and early fourteenth centuries were, however, reticent about expounding the principle of extreme necessity in terms of natural rights, because their doctrine of poverty held that property rights were first instituted by civil governments. The Order's procurator to the Holy See, Bonagratia of Bergamo (d. 1342) treated the principle of extreme need when defending Franciscan poverty without property rights. In his *Tractatus de paupertate Christi et apostolorum* (1322) he writes avoiding mention of the notion of right (*ius*):

> It is stated both in canon and civil law that in the time of extreme necessity everything needed for the sustenance of life is available to all human beings in the world. No one can say it is his own. In the time of such necessity everything is common for human beings.[43]

Bonagratia refers to the canon law principle of extreme necessity and the common possessions of all following the centuries-old tradition of objectively understood natural law. Comparing John of Paris and Bonagratia of Bergamo's interpretations of the principle reveals that for the former those things used under extreme necessity come to be like one's own, whereas the latter states that under natural law everything is common and nothing is one's own.

The first Franciscan who explicitly expounded the principle of extreme necessity in terms of individual rights was William Ockham, who interestingly compared a poor person in need with a Franciscan friar (using the same comparison as Godfrey of Fontaines about forty-four years before). Since the Franciscans claimed not to have any forms of rights, not even the right of using a thing, Ockham describes this in his *Opus nonaginta dierum* (1332), chapter 61:

> The friars have a licence to use things at times other than that of extreme necessity; but they have no right to use whatsoever except in a time of

[41] John of Paris, *Commentarius in Libros Sententiarum* III, 3 ff. 130v–131r. Cited in Coleman 1996, 18–30. This is perhaps the first medieval text where the author uses the Latin word *individuum* in the same sense as we use about an individual person.

[42] Swanson 1997, 399–415.

[43] Bonagratia of Bergamo, *Tractatus de paupertate Christi et apostolorum*, 504–505.

extreme necessity. Therefore, a licence to use is not a right of using (*ius utendi*).[44]

This shows that Ockham assented to the secular criticism that a Franciscan friar had a right of using a thing, but *only* in extreme necessity. Apart from urgent situations, the Franciscans used things only by licence, not by right, not even by natural right, in their ordinary daily lives.[45]

On the other hand, in the same chapter (61) of his *Opus nonaginta dierum* Ockham also stated that no human being could be without a natural right. The reasons were twofold: first, no one can renounce such a right; and second, the natural right of using goods is "common to all men, since it is held by nature, and not by any subsequent convention".[46] The Franciscans, however, seem to be an exception in this matter. How this was possible? Let us consider Pope John XXII's criticism and Ockham's reply to him more explicitly.

ACTIONS, RIGHTS, AND DUTIES

In his several bulls, John XXII criticised the Franciscan practice of poverty without any rights. The pope focused particularly on the notion of *usus facti*, factual use, which meant for Franciscans the simple, non-legal use of external things only for sustenance of life without any rights. Pope John's criticism of Franciscan poverty was mainly based on two issues. As a lawyer, he focused on the semantic-legal arguments concerning ownership and the use of external goods in order to show that the Franciscan way of living beyond all legal standing was against the law. His legal arguments were mainly based on the impossibility of making the distinction between *dominium* and *usus facti*, especially concerning consumables. The pope reasoned that the substance of such things deteriorated when used and thus all the profit would come to the user, not to the owner.[47]

Another reason for John's criticism of the distinction between factual use and dominion was based on the moral statements concerning human acts. In this respect, he tried to show that the Franciscan way of living was both unjust and unmoral.[48] In his bull *Ad conditorem canonum* (1323), John argued against the Franciscan way of using things without any rights, considering the act of using things from the moral point of view. For the

[44] William Ockham, *Opus nonaginta dierum* (hereafter *OND*), c. 61, 561.
[45] See Mäkinen 2001, 186.
[46] William Ockham, *OND* c. 61, 559.
[47] John XXII, *Ad conditorem canonum II*, 1140.
[48] Studies concerning the controversy between the Franciscan Order and Pope John XXII see, Lambert 1961; Leff 1967; Tabarroni 1990; Mäkinen 2001.

pope, the act of using (*actus utendi*) was the most fundamental act belonging to the user. He describes the user as being the owner (*dominus*) of his own acts through free choice (*liberum arbitrium*) and will (*voluntas*). No other person can thus perform the act that is granted to the user.[49] In his later bull *Quia quorundam mentes* (1324), the pope writes that:

> It is impossible that an extrinsic human act could be just if the person does not have any right to do it: therefore, such kind of use [i.e., *usus facti*] is certainly not just but necessarily unjust. Therefore, it is absurd and erroneous that an act by someone who does not have any right to it, is more just and more acceptable to God than an act by someone who has a right to it.[50]

In this text, John maintained that no one can justly use a thing without having some form of right to it – at least one should have the right of using (*ius utendi*). The pope went on: "This [grant] indeed is nothing else but that the user can apply his act to the granter's thing: just as he who gives his horse as a *commodatum* loan to someone does not grant the borrower the act of riding, but that he can perform that act on his horse. This is certainly not to grant a simple act of using without a right, since to grant this is nothing else than to grant a right of using."[51] According to the pope, whoever uses a thing has to have a right of some kind to it.

For John, *usus facti* – the Franciscan way of using things – was a bare act of using (*actus utendi*) and therefore implied at least the right of using a thing.[52] Further he argued that the friars' factual use of a fungible without any kind of right over it was to use it up (*abusus*). Thus the friars' way of life was determined as not just and not based on right, and therefore illicit. The pope seems to move here from "not just" to "unjust" without noticing the fallacy.[53]

Ockham replies to the criticism raised by John in his *Opus nonaginta dierum*, developing the Franciscan ideal of *usus facti* considering its connections to moral philosophy further – partly because of the criticism by

[49] John XXII, *Ad conditorem canonum I*, col. 1228, ll. 14–17.

[50] John XXII, *Quia quorundam mentes*, 1148: "Impossibile enim est, actum humanum extrinsecum esse iustum, si exercens actum ipsum nullum ius habet illum exercendi: immo non iustus seu iniustus necessario convincitur talis usus. Item, est absurdum et erroneum, quod actus alicuis, non habentis ius actum huiusmodi faciendi, sit iustior et Deo acceptior, quam habentis, quum concludat actum iniustum iustiorem et Deo acceptiorem existere, quam sit iustus." Translation mine.

[51] Op. cit.

[52] Op. cit.

[53] *Ad conditorem canonum II*, 1142; *Qua quorundam mentes*, 1147. See also Mäkinen 2001, 171–172.

the pope.[54] In his reply, since Ockham is trying to demonstrate that the Franciscans' *usus facti* is a licit use of fact, he focuses on the idea that among morally permitted acts there are both just acts and so-called morally indifferentiate acts – acts which are not just but which are not unjust either.[55] Ockham's reply makes two points. First, he considers the act itself; secondly, he develops the concept of rights.[56]

Ockham discusses morally good acts in the context of justice, since the pope had not seen a distinction between 'justice' and 'licit'. Ockham considers that the distinction between the just and the licit is important. He tries to explain his idea by giving three definitions of 'justice' in the *Opus nonaginta dierum*, chapter 60. According to Ockham, the noun 'justice' can be understood first "as a certain particular virtue distinct from the three other cardinal virtues [...] according to which a man acts justly towards another". Second, justice is understood "as a certain general virtue, which is called legal justice, which ordains all the acts of the virtues to the common good". Third, justice is understood "as the due ordination of an act to reason or to another operation, and in this sense according to some it is called justice taken metaphorically".[57]

According to Ockham, John understands justice in its first sense. Ockham argues that in accordance with the first, as with the second sense of justice, an act can be licit without being strictly just. But in accordance with the third sense of justice, taken metaphorically, every licit act is also a just act, because it is consonant with true reason.[58] The acts in accordance with the

[54] For Ockham's reply to the pope, see Tierney 1997, 118–130. In the same chapter he also analyses the replies to the pope by Hervaeus Natalis, a master of general of the Dominican Order, in his *De paupertate Christi et apostolorum* (Op. cit., 104–108) and by Marsilius of Padua in his *Defensor pacis* (Op. cit., 108–118). For Hervaeus Natalis, see Jussi Varkemaa's article in this volume and for Marsilius of Padova, see Annabel Brett's article in this volume.

[55] For this notion see, Brett 1997, 59.

[56] Brett 1997, 59–68.

[57] William Ockham, *OND* c. 60, 556–557: "Ad cuius evidentiam est sciendum quod nomen 'iustitiae' tripliciter accipi potest. Uno modo accipitur pro quadam virtute particulari distincta ab aliis tribus virtutibus cardinalibus [...] secundum quam homo iuste operatur ad alterum. Secundo accipitur iustitia pro quadam virtute generali, quae vocatur iustitia legalis, quae omnes actus virtutum ordinat ad bonum commune. Tertio accipitur iustitia pro debita ordinatione actus ad rationem vel aliam operationem, et ita secundum quosdam vocatur iustitia metaphorice sumpta." Translation in Brett 1997, 60.

[58] *OND* c. 60, 557: "Aliter dicitur actus iustus a iustitia tertio modo dicta, sive illa iustitia debeat metaphorice vocari iustitia sive etiam proprie; et isto modo omnis actus licitus est iustus, quia est bonus et verae consonus rationi. Et sic patet differentia inter usum licitum et usum iustum. Quia accipiendo iustum primo modo et secundo modo, sicut proportionaliter accipitur iustitia, multi sunt usus liciti, qui non sunt iusti; tertio modo accipiendo iustum, omnis actus licitus est iustus secundum eos, qui ponunt quod omnis actus humanus est bonus vel malus moraliter." See also *III Sent*. VI, q. 11, 386–388;

third sense of justice are morally neutral acts (also called indifferent acts); such acts are permitted both as licit and just acts in the sense that they are not in conflict with legislation. Such acts do not, however, belong in the category of intentional acts.[59]

All of this also corresponds to Ockham's understanding of factual use (*usus facti*), the Franciscan way of using things. Ockham defines the concept of *usus* in three senses in his *Opus nonaginta dierum*, chapter 2. First, use (*usus*) is "a certain determinate positive right, instituted by human arrangement, by which one has the licit power (*potestas licita*) and authority to use things belonging to another, preserving their substance". In this sense, we add to the word use 'of right' (*usus iuris*).[60] The second sense of the word *usus* is the act of using (*actus utendi*). In this sense, we say that the act of riding a horse is the use of horse and eating is the use of food.[61] The third sense of the word *usus* is 'use of fact' (*usus facti*), which is a certain act (*actus*) performed in relation to an external thing. It may be synonymous with *actus utendi*,[62] but may also mean a moral right to use something without necessarily having any legal right to do so.[63] For Ockham, *usus facti* as a bare and non-legal act of using a thing was basically a neutral and morally indifferent act of using a thing. For him, the licit factual use (*licitus usus facti*) was such a basic act, being in conformity with right reason. Moreover, the friars do not have any form of intention to own those things they only use. The friars intend the opposite, since they have given up all kind of rights over things, they are outside all legal standing. Thus the friars have no (claim) rights against the owner of those things they only use. If the owner wanted to take them back, he could do so whenever he liked. The idea of *usus facti* naturally caused problems with things consumed by use.[64]

In order to understand further Ockham's idea of *usus facti* as a licit act, we should consider his definition of several modes of power (*potestas*) to

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Quodl. III, q. 15, 261. Brett (1997, 60–62) notes that Ockham's ideas on the morality of actions in his *Opus nonaginta dierum* are closer to those of Scotus than to his own earlier conclusions on the subject. Arthur Stephen McGrade and Jussi Varkemaa have also analysed Ockham's ideas on rights in their brilliant articles in this volume.

[59] For Ockham's teaching on the basis of morally good acts, see Kilcullen 1995a; Holopainen 1991.

[60] *OND* c. 2, 127–154.

[61] Op. cit., c. 2, 85–88.

[62] Op. cit., c. 2, 99–100, 122–125.

[63] Op. cit., c. 6, 260–271. Cf. Op. cit., c. 56, 38–39. 'Not necessarily' is explained in Op. cit., c. 58, 87–96. Pope Nicholas III also took factual use for a licit power to use which does not involve a right by which one might claim use in court. However, he also calls factual use the act of using. In this sense, Pope John XXII's definition of *usus facti* was narrower than those of Nicholas and Ockham. See Kilcullen 1995a.

[64] For these problems, see Mäkinen 2001.

use temporal things. The most important was the natural power to use everything that one needs in order to sustain one's life. We should remember here that for Ockham the right of heaven (i.e., natural right) is a natural equity in harmony with right reason. A natural right of using is a licit power (*potestas licita*) to use temporal things which was possessed by human beings and other creatures in the state of innocence. The most important questions for our subject are thus whether the friars can also have such power in the post-lapsarian state and if so, how it is possible to defend this without involving also in legal sense?[65] For Ockham the answer was a simple one: "Everything done rightly without a right of the forum is done by right of heaven."[66] Let us consider his ideas in more detail.

According to Ockham, the natural power to use temporal things can be restricted by human law and by a free man's own will and can sometimes be impeded so as not to result in any act of using, but the power to use temporal things cannot be eradicated entirely. Ockham maintains that

> ... anyone is permitted to use by right of heaven [i.e., by natural right] any temporal thing that he is not prohibited from using either by natural, human, divine law or by his own act. This is because in time of necessity anyone can use any temporal thing whatever by the law of heaven without which he cannot preserve his own life, since in this case he is not obliged to use a temporal thing by any law or by his own act.[67]

In other cases, the permission and consequently the licence is needed. Ockham states that she who has a natural right of using does not need new right. Therefore, one who has such permission or licence can by right of heaven use a thing which is another's.[68] This was, in fact, the case of the friars:

> ... if they have in things no positive right common to themselves, the friars use whatever things they licitly use by right of heaven and not by right of forum, however much they may be outside a situation of extreme necessity: for they cannot renounce the natural right of using, yet they can by vow resolve that they do not wish to have any thing of their own

[65] McGrade also discusses the same question in the footnote 21 of his article in this volume.

[66] *OND* c. 65, 577. Translation in Kilcullen 1995a.

[67] *OND* c. 65, 578: "... sic posse uti temporalibus potest per legem humanam et voluntatem propriam liberi hominis quodam modo coartari et aliquando ne in actum utendi exeat impediri. [...] posse tamen uti temporalibus totaliter evelli non potest. Et ideo iure poli potest quilibet uti re temporali quacunque, qua uti neque iure naturae neque iure humano neque iure divino neque facto proprio prohibetur. Et ideo tempore necessitatis extremae potest quilibet iure poli uti qualibet re temporali, sine qua vitam suam conservare non posset; quia ad non utendum re temporali in hoc casu neque iure concunque neque facto proprio obligatur." Translation in Kilcullen 1995a.

[68] *OND* c. 65, 578–579.

> or any right of their own in temporal things, and therefore they cannot use any thing by a right of forum.[69]

Ockham explicates the importance of the vow of poverty made by the Franciscans. He had already referred to the same idea in the earlier texts cited above (compare Ockham's words: "anyone is permitted to use by right of heaven any temporal thing that he is not prohibited from using either by natural, human, divine law or by his own act" where the words 'by his own act' refers to the vow of poverty made by a friar).

Turning to the second line of Ockham's argument against John, he considers the notion of 'right' (*ius*) in various senses. For him, a 'right' is either a right of heaven (*ius poli*), also called natural right and moral right or a right of the law courts (*ius fori*), and also called a positive and legal right.[70] In his *Opus nonaginta dierum*, he defines the notion of 'right' (*ius*) as a form of agent power (*potestas*), which was a licit active potency (*potestas licita*).[71] In discussing the word 'power', Ockham does not use the sharp distinction between the licit and the just, as in his definition of an act, but confuses the notions of licit and just power, especially with regard to his idea of natural right (*ius naturale*).[72] Ockham uses the notion of *potestas licita* for a 'right' in its strict sense, be it natural or positive.[73]

Ockham uses the notion of *licita potestas utendi* in describing the power that the friars have of using things outside extreme necessity; however, he describes this by stating that it is sufficient for the factual use to be licit to have the general power of using, which God gave to the whole human race in the persons of our first parents. Ockham's conclusion is that since such a power of using exists, use in fact can also be licit.[74]

Ockham states in his earlier writings that God's precepts and known general principles per se (under natural law) were under moral obligations. It is significant to note that according to 'earlier' Ockham it was possible to

[69] Op. cit., 578–579: "... utitur licite iure poli tali re, et non prius; quia modo est amotum prohibens ius naturale ne exiret in actum utendi, quod ante amotum minime fuit. Et ex hoc patet quod Fratres Minores, si non habent ius positivum in rebus commune sibi et omnibus aliis fidelibus, quibuscunque rebeus licite utuntur, iure poli et non iure fori utuntur, quantumcunque sint extra articulum necessitatis extremae. Quia iuri utendi naturali renuntiare non possunt; possunt tamen voto firmare, quod nullam rem propriam nec aliquod ius proprium in temporalibus volunt habere, et ideo iure fori nulla re uti possunt." Translation in William of Ockham 1995b, 56–57.

[70] *OND* c. 65, 34–41; 76–82.

[71] Op. cit., c. 2, 302. See also Brett 1997, 62–63 and Varkemaa's article in this volume.

[72] For this notion and analyses in Ockham, see Brett 1997, 64–68.

[73] *OND* c. 61, 140–144.

[74] Op. cit., c. 4, 333.

discuss morality without rights but not without duties.[75] In his *Opus nonaginta dierum*, the language of rights as part of moral agency is obvious.

Ockham considers that natural right (*ius naturale*) based on conditional natural law can be restricted by human law.[76] Some natural rights, for instance, the right to use things, can be blocked by human positive law in some circumstances, although it cannot be altogether revoked. This shows that Ockham's natural law theory envisages rules of various kinds, some of which may be over-ridden under some circumstances by considerations which in other circumstances have lower priority.[77]

It should be noted that Ockham postulates three kinds of natural law. The first are laws that hold everywhere and always, such as "Do not commit adultery", "Do not lie" and the like. These are laws to which everyone is "indispensably obliged". They are also "immutable, invariable and indispensable" (i.e., no one except God can grant a dispensation). The second natural law "is to be observed by those who use natural equity alone without any custom and human legislation". Thus the second natural law hold for the state of innocence before original sin. According to Ockham, in this second way (and not in the first) all things are common by natural law, "because in the state of nature as [originally] established all things would have been common, and if after the Fall all men lived according to reason all things should have been common and nothing owned, for ownership was introduced because of wickedness". The third mode of natural law holds for other states, contingently upon decisions by the people concerned. It is natural law on supposition. Supposing some act, divine or human, we can gather by evident reasoning that we ought to act or not act in a certain way except with the consent of those concerned. According to Ockham, behind natural laws of the third kind lies a process combining reasoning and decision: the human race, or the people of some community reason that, given certain conditions, it would further the common good to institute a certain arrangement. This reasoning, however, does not demonstrate that this arrangement must be instituted, merely that it would be advantageous. People may then decide together to institute this arrangement. If it is adopted, then various universal principles, conditional in form, apply and, together with factual statements about the institutions established, generate obligations. The last stage of this process is strictly deductive but the earlier stage is not. For Ockham, the obligations generated at the end are not

[75] See e.g., William Ockham, *Quaest. variae*, q. 8, vol. 8, 424. See also Holopainen 1991.
[76] For Ockham's theory of natural law and its three levels, see Kilcullen 1995a.
[77] Kilcullen 1995a.

immutable; they do not hold always and everywhere, being obligations only on certain suppositions of fact.[78]

For Ockham, the principle of extreme necessity is a natural commandment that is not absolute but is subject to some condition and qualification, such as "use something of another's even against the owner's will – if you are in a situation of extreme necessity".[79] Natural laws of the third kind may be overriden. In his *Short Discourse*, Ockham explains this as follows:

> Natural equity can be taken in two senses. In one sense it means what is in conformity with right reason that cannot be false or not right. [...] In another sense natural equity means what should regularly be observed by those who have the use of reason unless there is some special reason why it cannot be observed. Not to use something belonging to another against his will belongs to natural equity in this sense, yet in a time of extreme necessity it is permissible to use a thing against the will of its owner. Not only the pope but also the emperor, and anyone else, can occasionally act against natural equity in this sense.[80]

The terms 'regularly' and 'occasionally' are Ockham's usual way of marking the fact that some rules are subject to exception in some cases. In the citation above, the first sense of 'natural equity' corresponds to the first of the three modes of natural law distinguished in the *Dialogus*. The second sense corresponds to the third mode of natural law (i.e., "not to use something belonging to another against his will" is the rule protecting property). According to Ockham, rules can be set aside not only by the consent of those concerned but also against the will of one party in a time of extreme necessity. Necessity overrides the conclusions natural reason draws from the institution of private property.[81]

Necessity may also justify an exception to an explicit divine commandment in a matter left open by natural law. In the *Dialogus*, the Master says that necessity makes exceptions to some divine commands; namely, those that forbid something not evil in itself (i.e., not forbidden by natural law), but not to natural laws:

> For the sake of necessity it is permissible to act against a divine commandment, even one that is explicit, in things not evil in themselves but evil only because they are prohibited. [...] From these and a great

[78] For three modes of natural law, see William Ockham, *Dialogus*, part III, tract II, bk 3, c. 6. See also Kilcullen 1995b.
[79] *Dialogus*, part III, tract II, bk. 1 c. 10.
[80] William Ockham, *Short Discourse*, bk. 2, c. 24, 69.
[81] Kilcullen 1995b.

> many other [texts] we gather that the rule 'Necessity has no law' [...] should be understood not only of positive human laws, but also of positive divine laws, unless in those divine laws the opposite is laid down expressly...[82]

CONCLUSION

According to the principle of extreme necessity, a person in extreme need might lawfully take what civil law has provisionally made the private property of others when someone needs it to survive because all goods are common in such a case in accordance with natural right. This principle came to be a doctrine of church law at the end of twelfth century, including both the *Decretum* and the official canon law summas of it. Thus there was a long tradition of interpretation of this principle among the decretists and theologians. The principle of extreme necessity was evoked in this new light in the late thirteenth- and early fourteenth-century scholastic discussions, the scholastics interpreting it in the language of individual rights.

Godfrey of Fontaines and John of Paris (c. 1250–1306) contributed to the early history of individual rights by using the principle of extreme necessity. Godfrey argued that each person has a fundamental and inalienable natural right to use goods in order to save her life in the case of extreme necessity. He also stressed the right to life and the duty of self-preservation each person has in extreme need. The significance of Godfrey of Fontaines and John of Paris for late scholastic discussion on rights is based on their influence: their works became standard teaching within the Dominican Order during the succe eding centuries.

Ockham's contribution to the discussion on individual rights was a turning point in the Franciscan tradition as well as in the history of rights. Where the earlier Franciscans spoke about objectively understood natural law, Ockham spoke of subjective rights, claiming that natural rights could not be renounced. In fact, Ockham was forced to develop the Franciscan ideas on poverty in the area of moral philosophy, since his opponent, Pope John XXII, turned the argument against the Franciscan ideal to the analysis of human acts.

Important for further development on subjective rights was that Ockham defined a right as a form of active power by a moral agency. Concerning the Franciscan idea of *usus facti*, Ockham stated that it was only a bare and non-legal act of using. However, the Franciscan way of using things – *usus facti*

[82] *Dialogus*, part III, tract. I, bk. 2 c. 20.

– was a licit act since it was in accordance with right reason which was both the criterion of just law and the basis of natural rights. Ockham emphasised the distinction between positive rights and natural rights. A positive right of using a thing (*ius utendi*) was a licit active power (*potestas licita*) as regards some external things since it was established by statute or human agreement, the holder of such a right ought not to be deprived of it without fault or reasonable cause. If he were so deprived, he could sue for his right in court. Ockham asserted that the Franciscans claimed not to have this kind of right, since the friars have given up all kinds of positive rights. What Ockham tried to demonstrate is that there was a natural right of using a thing that was common to all and that was derived, not from human law, but 'from nature'. This right could never be renounced since the actual use of things was necessary to sustain life.

In describing such explanations of the Franciscan way of using things, Ockham recognised that the natural right of using things had been limited by the law that instituted private property. Therefore, one could normally use things belonging to another only in case of extreme necessity. Ockham argued – in order to save the case of the Franciscans being outside all rights – that the underlying natural right also came into play when one used something by licence of an owner. The permission of the owner did not confer any new right on the licensee, he wrote, merely removing the restrictions of human law that normally impeded the exercise of a natural right. This was precisely the position of the Franciscans according to Ockham: "They have no positive right but they do have a right, namely a natural right" in accordance with the third mode of natural law.

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Chapter 3

RIGHT(S) IN OCKHAM

A Reasonable Vision of Politics

Arthur Stephen McGrade (University of Connecticut, USA)

The bearing of medieval and early modern thought on current issues is particularly striking with regard to natural rights. Is the whole conception of natural rights distinctively western or does it have sound broader applications? Is it valid even for the West? Which articulations of the idea, and with what surrounding philosophical or religious assumptions, are most fruitful or most dubious? Such questions have been central to decades of scholarly controversy over the mutual compatibility and historical filiations of two ideas of natural right(s) found in late medieval scholasticism, the 'objective' and the 'subjective' – 'natural right' and 'natural rights'. The two ideas turn on two senses of the Latin term *ius*. In one sense, *ius* means "what is right" or "that which is just (*id quod iustum est*)", the *object* or objective of the moral virtue of justice and, by extension, of just legislators or judges. In the other sense, *ius* means '*a* right', a legal or moral power someone has. 'Subjective' simply refers to the someone – the subject – who has the *ius*. In the debate about scholastic theories of right(s), William of Ockham has sometimes been identified as the primary source for an idea of subjective rights as arbitrary powers of radically isolated individuals, an idea supposedly derivable from Ockham's voluntarist nominalism and in sharp contrast to a classical, objective conception of justice and rightness

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 63-94.

exemplified in Thomas Aquinas's communitarian doctrine of natural law.[1] These pairings of distinct ideas of right(s) with distinct broader philosophical and theological positions have supported historical narratives with direct bearing on current political thought and action. In some scenarios, natural rights are a misguided creation of the Enlightenment, inimical to an older conception of justice that is sorely needed today. In others, natural right (or Thomistic natural law) is an obscurantist relic, and we must base our politics on a Hobbesian or other modern theory of individual rights.

Brian Tierney's *The idea of natural rights* and Annabel S. Brett's *Liberty, right and nature*[2] present a different picture of late medieval thought, one that is more finely drawn than the view just described and more positive in its bearing on current issues. Instead of a fateful conflict between the two amalgams of Ockham-nominalism-egoism and Aquinas-classicism-community, these studies show us a complex series of developments in which subjective power-rights were affirmed by eminent jurists more than a century before Ockham and were accommodated without great strain in sixteenth-century Thomist thought, while rights in Ockham appear, not as unrestrained liberties, but as reasonable means to reasonable ends in a politics oriented toward the common good. This is not to deny differences between Thomist and Ockhamist views. Nor do historians who follow language as the best guide to thought need to agree with John Finnis that "though he never uses a term translatable as 'human rights', Aquinas clearly has the concept".[3] Some form of the concept is expressed in other thirteenth-century texts, but it is not clear that Aquinas himself had it or, if he did have it, made significant use of it. Still, in view of the developments set out by Tierney and Brett, it is possible to sympathise historically as well as logically with Finnis's declaration that "there is no cause to take sides as

[1] The idea of subjective *natural* or *human* rights has come in for much criticism. Perhaps the most celebrated rejection of the idea is Alasdair MacIntyre's assertion that "there are no such rights, and belief in them is one with belief in witches and in unicorns" (MacIntyre 1981, 67). In a series of articles beginning in the 1960s the French historian of jurisprudence Michel Villey argued that any idea whatever of subjective right is contrary to the whole conception of objective right. For MacIntyre, Villey, and others as well, subjective rights discourse during and since the Enlightenment is a symptom and also a source of modern egoistic individualism. See especially Villey 1964, 97–127, in which Villey identifies Ockham as the first thinker to sanctify powers as rights and mordantly hails him as the inaugurator of a Copernican revolution in jurisprudence leading to our present situation where "Tout est concurrence et conflit de droits subjectifs" (97). For detailed discussion of Villey's critique see the study by Brian Tierney cited in the next note.

[2] Tierney 2001 (1997); Brett 1997. I have benefited from discussing some points in this paper with Dr. Brett.

[3] Finnis 1998, 136. The whole chapter, "Towards Human Rights", 132–186, is illuminating.

between the older [natural law] and the newer [natural rights] usages as ways of expressing the implications of justice in a given context".[4]

More broadly, there is no need to construe modernity as the repudiation of a single, canonical medieval account of right and wrong. Medieval resources for understanding and assessing our own ways of thinking about natural rights are richer than previously supposed. Aquinas, Ockham and other scholastics furnish various departure points for more and less promising transformations of rights discourse, and the original, 'untransformed' views of these authors also deserve attention. Ockham, in particular, I will urge, had a quite reasonable view of the human subject of subjective rights and at least the outline of a reasonable vision of politics.

In their independent studies, Tierney and Brett have brilliantly contextualized what Ockham had to say about rights in relation to late medieval and early modern discussions in a variety of fields: Roman civil law, medieval canon law, dogmatic theology, the literature of casuistry, academic political theory and practical polemics. In what follows I take advantage of their work to reinsert Ockham's idea of rights into his own thought. I hope first to clarify further the basis and distinctive character of natural rights in Ockham by reference to other aspects of his own philosophy and theology and then to indicate the parts played by both right and rights in his politics. The result will be additional confirmation of the substantial compatibility of subjective with objective right(s) discourse. I conclude by considering briefly why, nevertheless, there may be practical differences between the two ways of talking.

REASON AND RIGHTS

Reason is central to everything in Ockham's moral theory, including his idea of natural rights. Indeed, reason is so much of the essence of natural rights for Ockham that he can be read as suggesting that every reasonable act is the exercise of a natural right; and it is with reference to reason that his controversial description of a right as a subjective power must be understood. But what kind of reason does Ockham have in mind when discussing natural rights? This is a question on which his early writings in ethics shed light. Before considering what reason amounts to for Ockham, however, we will do well to address the issue of his voluntarism, for Ockhams's conception of the human will sets some of the main problems for

[4] Finnis 1980, 210. Again, the whole chapter (198–230) is valuable. Here Finnis maps the taxonomy of rights put forward by the American jurist W. N. Hohfeld onto his own version of natural law discourse.

reasonable human conduct and some of its more attractive possibilities. The present section of this paper begins, then, with an assessment of the label 'voluntarist' as applied to Ockham, continues with a brief look at reason in his academic writings, and concludes with an account of the rational basis and character of Ockhamist natural rights.

There are firm grounds for calling Ockham a voluntarist and at least one very weak basis for the label. Among the firm grounds is his stress on goodness of will as the decisive criterion for the morality of an action. Another sound justification is his contention that human willing is not necessarily determined by any created cause other than the will itself. Ockham rejected the view that whenever we will something it is "under the aspect of the good" (*sub ratione boni*), that our willing is always determined by some judgment of reason or intellect as to the goodness of the thing willed. Ockham held that we are capable of willing things we know perfectly well are bad. He defended this position on the theologically conservative ground that otherwise it would be impossible to sin "from badness," that is, maliciously.[5] A very foolish reason for calling Ockham a voluntarist is the strange belief that he, in effect, celebrated such bad willing, that his ethical theory and by implication his political theory had no place for rational judgments of good and evil (judgments that are objective in the current sense of the term) but that he made good and evil depend on individual will. As we shall see, quite the contrary is the case. Willing what 'right reason' (*recta ratio*) dictates is absolutely essential to the goodness of an Ockhamist good will. As far as human will and reason are concerned, one could say that Ockham was a voluntarist in psychology but a thoroughgoing rationalist in ethics.

The fact, as Ockham sees it, that we are not psychologically compelled to act in accordance with the dictates of reason, even when we clearly understand those dictates, sets problems for us both as individuals and in community. As individuals we cannot count on ourselves to become automatically more virtuous as our moral knowledge increases. In social and political contexts, similarly, we cannot count on others always to act reasonably, no matter, again, how clearly they understand what is reasonable and no matter what positions of institutional authority they occupy. Ockham's conception of the will also sets some attractive possibilities, however, for he sees us as having power to will and act in accordance with reason even in our present, fallen condition and even at great cost in terms of personal advantage. To speak of Ockham's voluntarism, then, is not simply a mistake. The will plays an important part in his account of human action. The mistake comes when volition is assigned a directive role. For Ockham,

[5] See Kent 2003, 242.

the proper source of direction for what we do is reason, to which we now turn.

The integration of reason, in the form of Aristotelian ethics, with love of God, as understood in the Augustinian and Franciscan traditions, was a project for Ockham from the start of his major theological work, his commentary on the *Sentences* of Peter Lombard. After a substantial epistemological prologue, he begins Book I of his commentary with a discussion of 'enjoyment' (*fruitio*). Following Augustine, he holds that only God is to be enjoyed – that is, loved for himself as supremely good – while all else is to be 'used'. Ockham argues, however, that there can also be a 'middle act' between using and enjoying, an act in which something is taken as good without reference to a further good (and hence not merely used) but is not regarded as the highest possible good. Such intrinsic but not supreme goods include those mentioned by Aristotle as things we would choose even if nothing further came of them, "honor, pleasure, understanding and the virtues".[6] In making room for a moral life directed toward such goods, while insisting on love of God as the uniquely supreme ethical motive, Ockham sets the tone for much else in his thought.

Ockham's most systematic account of the relations between the religious and 'sub-religious' moral frameworks adumbrated in his discussion of enjoyment is a treatise traditionally known as *De connexione virtutum* ("On the Connection of the Virtues"),[7] which appears to be based on a lecture or lectures he gave to meet requirements for a degree in theology at Oxford. In this investigation of the connections of the moral virtues (including justice) with one another, with prudence ("right reason regarding things to be done", *recta ratio agibilium*), and with the theological virtues of faith, hope and charity, Ockham distinguishes five degrees of moral virtue. In all five, the acts and habits of a virtue presuppose right reason, which must be *included in* what is willed in an act for that act to be virtuous. The first, third and fourth degrees are of greatest interest here. The first and third differ in the universality of their commitment to right reason. Roughly, at the first degree acting reasonably is a matter of acting for a particular right reason appropriate to the act at hand (for example, performing some action for the sake of peace). At the third degree, the commitment is to right reason as such (willing an action precisely because it is dictated by right reason). The fourth degree presupposes that conditions for the preceding degrees have been met and adds that the act be done from love of God: "The fourth degree is when someone wills the performance of such a work according to all the preceding

[6] Aristotle, *Nicomachean Ethics* I. 5, 1097b3–5, cited by Ockham at *Ordinatio*, d. 1, a. 1, 378. Translated in McGrade et al. 2001, 356.

[7] For text, translation, introduction, and commentary, see Wood 1997.

conditions and circumstances and beyond this wills that work precisely for love of God."[8] Ockham is concerned to investigate relations of causality and compatibility among the acts and habits of the moral virtues and vices in their several degrees with one another, with prudence (of which there are four kinds), and with the theological virtues of faith, hope and charity (each of which he considers both as sacramentally infused by God and as acquired or intensified through our own activity). The *De connexione virtutum* is thus a substantial and intricate piece of ethical analysis, but the complexity of its articulation contrasts with its chief conclusion: that the goal of moral development is a certain simplicity. In Ockham's view, a generally reasonable person will not aim at amassing a collection of discrete responses to the many situations that might arise in life – one set of routines or rules for situations requiring courage, another for justice, yet another in relation to God – but will seek to develop a unified stance toward what is supremely worth loving for its own sake.[9]

Ockham thus presents us with a virtue ethic that purports to be both fully rational and at its summit comprehensively religious. Is this coherent? There have been doubts. It has sometimes been held that, in the end, Ockham's is purely an ethic of divine command, that for him there is no good or bad apart from God's (possibly arbitrary) will. Something like the issue of voluntarism thus arises regarding God. Again, as in the human case, there is a respect in which the label fits and one in which it is profoundly misleading. It is quite true that for Ockham (as for all medieval theologians?) a direct divine command overrides choices that would otherwise be reasonable (the case most discussed was God's command that Abraham sacrifice his son Isaac), but for Ockham, as for the medieval tradition generally, such overriding is itself reasonable, whatever fear and trembling it provokes or whatever trust in God it requires. The question remains, however, whether we have any

[8] "Quartus gradus est quando vult tale opus facere secundum omnes condiciones et circumstantias praedictas, et praeter hoc propter amorem Dei praecise." In Wood 1997, 82. The second and fifth degrees vary according to the intensity of commitment. The second degree involves an intention never to give up the action for any cause whatever that is contrary to right reason, even to avoid death, while virtue in the fifth degree, heroic virtue, involves actually willing an action that exceeds ordinary human limits and is contrary to the agent's natural inclination. Op. cit., 82, 84.

[9] As Marilyn Adams (1996, 522) puts it in her acute comparison of Scotus and Ockham, "His [Ockham's] insistence that at the crown of human morality, commitment to right reason and to God are, not merely external organizing principles of independently perfectible habits, but integrated into the intensions of every third-, fourth-, or fifth-degree moral act and habit, makes for homogeneity in the agent's orientation to what is intrinsically valuable above all! In my judgment, this is 'more than subtle'!"

basis for moral judgments apart from special revelations of God's will. Ockham's answer, given both early and late, is that we do.[10]

The most direct early indication of Ockham's commitment to a body of ethical knowledge independent of divine command is his quodlibetal treatment of the question: "Can there be a demonstrative science about morals?"[11] Besides confirming the commitment to reason evident in material we have already considered, a look at this passage will provide a useful framework for determining Ockham's view of the basis and content of our natural rights, the final task for this section of the paper.

The key move in *Quodlibet* II, question 14, is a distinction between two kinds of moral science, positive and nonpositive:

> Positive moral science is the science that contains human and divine laws that obligate one to pursue or avoid what is neither good nor evil except because it is commanded or prohibited by a superior whose role it is to establish laws. Nonpositive moral science is the science that directs human acts apart from any precept of a superior, in the way that principles known either per se or through experience direct them – principles that Aristotle talks about in moral philosophy.[12]

Ockham argues that positive moral science – jurisprudence in the usual sense – is not demonstrative, but nonpositive moral science is, for it "deduces conclusions syllogistically from principles that are known either *per se* or through experience".[13] "In moral philosophy", he asserts, "there are many principles that are known per se: e.g., that the will ought to conform itself to right reason, that every blameworthy evil is to be avoided, etc. Similarly, many principles are known through experience, as is manifestly obvious to anyone who pays attention to experience". Ockham's ethical cognitivism is emphatic: "I claim further that this science is more certain than many others, because everyone can have greater experience of his own

[10] On these issues see McGrade 1999; Adams 1999; King 1999. See also Adams 1986 and Kilcullen 1993.

[11] *Quodlibet* II, q. 14, in William of Ockham 1991, 148–150; Latin text at Ockham, *OTh* IX, 176–178.

[12] *OTh* IX, 177: "Scientia moralis positiva est illa quae continet leges humanas et divinas, quae obligant ad prosequendum vel fugiendum illa quae nec sunt bona nec mala nisi quia sunt prohibita vel imperata a superiore, cuius est leges statuere. Scientia moralis non positiva est illa quae sine omni praecepto superioris dirigit humanos actus; sicut principia per se nota vel nota per experientiam sic dirigunt ... de quibus loquitur Aristoteles in morali philosophia." Translation in William of Ockham 1991, 149.

[13] *OTh* IX, 177: "Sed disciplina moralis non positiva est scientia demonstrativa. Probo, quia notitia deducens conclusiones syllogistice ex principiis per se notis vel per experientiam scitis est demonstrativa; huiusmodi est disciplina moralis." Translation in William of Ockham 1991, 149.

acts than of other things – from which it is clear that this science is very subtle, useful and evident."[14]

Even from this brief account of reason in Ockham's earlier writings, a number of points are clear. First, reason is not purely instrumental for Ockham. It has to do with discerning what is good as an end, as well as with choosing means. Second, the project of living reasonably as presented by Ockham involves recognition of a variety of intrinsic goods and a range of rational moral motives or degrees of virtue. God is the supreme good, and love of God is the highest rational motive for Ockham, but less exalted ends and principles of action are also given their due. Finally, Ockham clearly distinguished between actions that are intrinsically reasonable and those that are obligatory because they are commanded by an appropriate superior. All of these points have a bearing on his idea of natural rights.

Ockham's distinction between nonpositive and positive moral science in *Quodlibet* II, question 14, suggests two ways of grounding natural rights. Such rights could be regarded as matters of divine positive moral science or, alternatively, as based on demonstrative, nonpositive moral science. Ockham takes both routes.

Ockham's career as a polemicist and political theorist originated in his conviction that Pope John XXII had fallen into heresy in denying the complete legal poverty of Christ and his apostles. Ockham and most other Franciscans of the time believed that this doctrine had been formally confirmed as part of the Christian faith, and they claimed it as the special foundation for their own way of life. Accordingly, a principal aim of Ockham's first substantial political work, the *Opus nonaginta dierum* (*The Work of Ninety Days*) was to conceptualise a way of using material things that was licit but did not in any way implicate the user in ownership or in the world of courts and litigants, something John XXII deemed impossible. In the course of the *Opus nonaginta dierum*, Ockham came to describe the 'licit power' to use or consume things with the permission of their owners as a natural right. Retrospectively, then, what Ockham has to say about the basis for such a power provides justification for natural rights.

At one point in the *Opus nonaginta dierum* Ockham refers to the power in question as being given by God to the human race in the persons of Adam

[14] *OTh* IX, 177–178: "Multa sunt principia per se nota in morali philosophia; puta quod voluntas debet se conformare rectae rationi, omne malum vituperabile est fugiendum, et huiusmodi. Similiter per experientiam sciuntur multa principia, sicut manifeste patet sequenti experientiam. Et ultra dico quod ista scientia est certior multis aliis, pro quanto quilibet potest habere maiorem experientiam de actibus suis quam de aliis. Ex quo patet quod ista scientia est multum subtilis, utilis, et evidens." Translation in William of Ockham 1991, 149–150.

and Eve, either after sin or before it.[15] Further on, more expansively and with reference to Genesis 1, he refers to such power as given not only to our first parents but to all living things on earth.[16] In a later work, the *Breviloquium*, where he is concerned with the powers to establish property and political jurisdictions, Ockham offers a rationale for basing such powers on divine grants: "All things were and are his [God's], both by right of creation and by right of conservation." Biblical references are given to support the claim of a "special grant" (*ex speciali collatione*) from God.[17] In these passages, the basis for calling such powers 'natural' rights is that they pertain to all humanity (or to all living things). In the *Breviloquium* Ockham is especially insistent on this, repeatedly citing scriptural texts recognizing the legitimacy of property rights and political authority exercised by unbelievers (notably the legitimacy of the pagan Roman empire). Such pan-human or pan-animate rights stand in contrast to the numerous divine grants of land to specific individuals or groups also recorded in scripture. Ockham cites these latter precisely in order to deny that such grants are the basis for any currently existing property or jurisdictional right.[18] Still, the framework of justification for both common and specific rights in these passages is the same: the will of a superior. In terms of the two types of moral science sketched in *Quodlibet* II, question 14, this is positive (divine-positive) moral science.

Such an approach has the advantage of offering a straightforward answer to the question of where natural rights come from. They are given by God. This is what we might expect Ockham to say, given the common perception of him as purely a divine command theorist. In fact, however, the great majority of relevant passages in Ockham's political works offer 'natural reason' or 'natural equity', rather than direct divine grant, as the basis for natural rights. Thus, at *Opus nonaginta dierum*, chapter fourteenth, discussing the power of appropriating temporal things and acquiring common ownership possessed by Adam and Eve after sin (a power they did not have before the fall, when there would have been no ownership), he anticipates the question of where such power came from and answers it

[15] *OND* c. 4, 333, ll. 197–202 (*editio altera*): "Sed licita potestas utendi communissima est potestas utendi, quam Deus in primis parentibus post peccatum vel ante toti humano generi dedit."

[16] *OND* c. 14, 432, ll. 74–77: "Fuit data ipsis et animantibus terrae potestas utendi quibusdam rebus determinatis, ita quod aliquibus uti poterant et non aliis."

[17] *Breviloquium* III c. 7, 179, ll. 34–37: "Istud autem dominium commune toti generi humano cum potestate tali appropriandi temporalia fuit introductum ex iure divino, quia ex speciali collatione Dei, cuius erant et sunt omnia tam iure creationis, quam iure conservationis, sine cuius manutenentia omnia in nichilum v[er]terentur." Translation in William of Ockham 1992, 89. Ockham cites Aristotle's defense of private property later in the same chapter. Divine grant and the Philosopher's reasoning are congruent.

[18] *OND* c. 88, 657–659, ll. 142–222. Translation in William of Ockham 1995, 64–66.

rather briskly in terms of natural reason suitable to their fallen nature: "And if it be asked whence, then, the first parents had such a power of appropriating temporal things . . . they [the Franciscan rebels, including himself, for whom he is writing] say that they have such power from corrupt nature (*ex natura corrupta*). Because it follows clearly from a dictate of natural reason (*ex dictamine rationis naturalis convincitur*) that it is beneficial for sinners to be able to have power of appropriating [things] to themselves."[19]

The most important text in the *Opus nonaginta dierum* for natural rights theory is chapter 65, where Ockham grounds the Franciscan mode of using temporal things in the 'right of heaven' (*ius poli*), which he distinguishes from the right of law courts (the 'right of the forum', *ius fori*). Ockham defines the right of heaven solely as natural equity in harmony with right reason: "But the natural equity that is, without any human ordinance or any merely positive divine ordinance, in harmony with right reason is called 'the right of heaven'."[20] Ockham here describes in terms of natural rightness – as, indeed, a natural right of using – what he had previously referred to as a licit power to use temporal things.[21] Except in case of extreme need, an

[19] *OND* c. 14, 435, ll. 188–192, 200–204: "Et si quaeratur unde ergo habuerunt primi parentes talem potestatem appropriandi res temporales, quam non habuerunt ante peccatum, dicunt isti quod habuerunt talem potestatem ex natura corrupta. Quia ex dictamine rationis naturalis convincitur quod expedit posse peccantibus quod etiam habeant potestatem appropriandi sibi."

[20] *OND* c. 65, 574, ll. 76–77: "Ius autem poli vocatur aequitas naturalis, quae absque omni ordinatione humana et etiam divina pure positiva est consona rationi rectae." Translation in William of Ockham 1995, 51. On the source of the distinction between *ius poli* and *ius fori* in Augustine and the canon law, see Brett 1997, 66–67, n. 57.

[21] Brett (1997, 64–68) has called attention to a degree of confusion here, arising from Ockham's attempt to accommodate earlier Franciscan formulations to changed argumentative circumstances. The friars had traditionally wanted to insist that they had no rights at all, that their use of things owned by others was 'licit' because permitted (licensed) by the owner but that this did not involve their having any *rights* to what they used. Accordingly, at the beginning of the *OND* Ockham defined the term 'right of using' (*ius utendi*) as a *legally protected* power: "Ius utendi est potestas licita utendi re extrinseca, qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et privatus fuerit, privantem poterit in iudicio convenire." *OND* c. 2, 302, ll. 155–158 (*editio altera*). Translation in William of Ockham 1995, 24. In chapter 65, however, Ockham had to confront John XXII's challenging contention that if the friars had no rights in the things they used, their use of them was unjust and hence not licit. Ockham's grounding of Franciscan use in *ius poli* was meant to meet this challenge, but it led him to use the language of rights, at least a linguistic embarrassment for a Franciscan, however fruitful for natural rights discourse. It is not clear how serious a difficulty Ockham himself is in here. In using things "by right of heaven" the friars would be exercising a power possessed by humans and other living things prior to the establishment of legal institutions. In that situation, exercise of that power would not have had, or needed, legal protection (at *OND* c. 26, 485, ll. 88–89 Ockham observes that there would have been no right to litigate in the

individual's natural right of using things owned by others is limited by the owners' positive legal rights in them. When an owner permits the friars to use his property, however, that limitation is removed: "with respect to such a thing there is no impediment prohibiting their natural right of using from issuing into an act of using."[22] Indeed, as Ockham presents it, the right of heaven covers not only the friars' use of temporal things when licensed by their owners but *any* reasonable action not warranted by positive law: "Everything done rightly without a right of the forum is done by right of heaven."[23]

Ockham takes special care to emphasise reason as the essence of natural right(s) in a number of passages. For example, he makes clear that his account of the right of heaven as natural equity in harmony with right reason holds even in cases where divine revelation provides factual premises for reason to take into account. Sometimes, he says, the right of heaven is called natural right, because all natural right pertains to the right of heaven; sometimes it is called divine right, "for many things are in harmony with right reason taken from things revealed to us by God which are not in harmony with purely natural reason". Ockham gives as an example the proposition that preachers of the gospel should be sustained from the goods of those to whom they preach (at least if they have no other means of sustenance). Here what is "taken from" (*accepta ex*) revelation is the fact that "the things they preach are true, useful and necessary to those to whom they preach", which cannot be proved by pure natural reason. Given this

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state of innocence). Thus the original use by right of heaven would not have involved a *ius utendi* in the sense Ockham had earlier given that term. The question was whether such a power could be exercised in the Franciscans' post-lapsarian circumstances without involving them in the juridical web they had sought to avoid. Ockham apparently thought it could. Such use would be 'just' in the sense of according with right reason and 'by right' in the sense given in Ockham's account of the right of heaven in purely reasonable terms, but it would still be unprotected by any positive legal right of the friars, though occurring in a world where others operated by positive law. The owners of things used by the friars would, in effect, have thrown a veil of innocence over those things as far as the friars were concerned. The sense of 'just' as according with right reason and hence covering every morally good act, was introduced at *OND* c. 60, 557, ll. 126–142 and 158–160 and recalled in the present chapter (Op. cit., 577, ll. 163–166: translation in William of Ockham 1995, 54), where doing, using or possessing by right of heaven are explicitly equated with doing, using, or possessing well morally (Op. cit., 577, ll. 181–183; translation in William of Ockham 1995, 55). Ockham remarks (at *OND* c. 65, 579, ll. 274–276; translation in William of Ockham 1995, 57–58) that *ius fori* sometimes conforms with right reason and is sometimes discordant with it.

[22] *OND* c. 65, 579, ll. 250–251: "Respectu talis rei nullum est impedimentum prohibens ne ius naturale utendi in eis exiret in actum utendi." Translation in William of Ockham 1995, 57.

[23] *OND* c. 65, 577, l. 181: "Omne quod recte absque iure fori fit, iure poli fit." Translation in William of Ockham 1995, 54–55.

article of faith, natural equity supplies the normative conclusion.[24] In the *Dialogus* between Master and Student, his longest political work, Ockham, in contrast with Marsilius of Padua, is prepared to count as natural right not only what is universally or widely recognised as reasonable but also instances of natural right that are inferred from the primary principles of natural right (*prima iura naturalia*) "by few even of the experts, with great attention and study, and through many intermediate propositions".[25] A similar emphasis on reason is evident in Ockham's exposition elsewhere in the *Dialogus* of a novel threefold division of natural right, where he repeatedly glosses the phrase "instinct of nature" in Isidore of Seville's account of natural right as "natural reason".[26]

The major thesis of the *Dialogus* chapter just cited is that all natural right, parsed as natural reason, can be considered divine right, for God is the author of nature, and besides, all natural right is contained either explicitly or implicitly in Scripture.[27] Once again, as in the degrees of moral virtue in the *De connexione virtutum*, reason and religion coalesce. In according natural

[24] *OND* c. 65, 575, ll. 80–89: "Hoc ius aliquando vocatur ius naturale; quia omne ius naturale pertinet ad ius poli. Aliquando vocatur ius divinum; quia multa sunt consona rationi rectae acceptae ex illis, quae sunt nobis divinitus revelata, quae non sunt consona rationi pure naturali [...] hoc tamen per rationem puram naturalem probari non potest: sicut per talem rationem probari sufficienter non potest quod illa, quae praedicant, sunt vera, utilia et necessaria illis, quibus praedicant." Translation in William of Ockham 1995, 51. Ockham gives "Every benefactor is to be benefited" as an example of a self-evident proposition at *On the connection of the virtues*, Wood 1997, 74, ll. 11–12.

[25] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 15: "... iura naturalia quae a paucis, etiam peritis, et cum magna attentione et studio per multa media colliguntur ex primis iuribus naturalibus." I cite passages from the *Dialogus* in the edition in preparation for the British Academy by John Kilcullen, John Scott, and George Knysh, as posted to date (31 August 2003) on the Internet at http://www.britac.ac.uk/pubs/dialogus/ockdial.html. The present passage is translated in William of Ockham 1995, 274. In this paper I translate Ockham's *ius naturale* in the objective sense – what is naturally right or just – as 'natural right' and, in the plural, 'instances of natural right' (for *iura naturalia*) or 'primary principles of natural right' (for *prima iura naturalia*). The more common translation of objective *ius naturale* in medieval scholarship in English is 'natural law', but for the purposes of this essay the connotations of universality, immutability, and (especially) commandment by a law-giver attaching to 'law' seem worth avoiding. For Marsilius of Padua's restriction of natural law to only those dictates of right reason that are in fact widely recognized, see Annabel Brett's essay in this volume.

[26] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "instinctu rationis, hoc est rationis naturalis." Translation in William of Ockham 1995, 289.

[27] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "Omne ius quod est a Deo, qui est conditor naturae, potest vocari ius divinum, omne autem ius naturale est a Deo, qui est conditor naturae." "Omne ius quod explicite vel implicite continetur in scripturis divinis potest vocari ius divinum [...] omne autem ius naturale in scripturis divinis explicite vel implicite continetur." Translation in William of Ockham 1995, 290.

right the status of divine right, Ockham invites Christians to regard the dictates of natural reason as divine precepts.[28]

What, then, according to Ockham, is the basis of our natural rights, and what are these rights? Ockham's account of the source of natural rights is complex, although not as difficult to interpret as what he says about their character or extent. As author of nature, God is the source of our capacities for free and reasonable activity. When individuals are aware of their dependence on God, the exercise of these distinctively human capacities can be an expression of religious devotion, but even those who do not see themselves in relation to God act rightly and, so to speak, 'divine-rightly', when they act as pure natural reason dictates.[29] According to Christian tradition, however, God sometimes speaks more directly to his creatures. As recorded in the Bible, such special revelations sometimes confirm or endorse what could be grasped as reasonable independently of them, sometimes they provide information on the basis of which natural reason dictates actions it would not dictate without such information, and sometimes they provide direct or 'positive' divine commands. As we have seen, each of these types of revelation is recognized by Ockham, but none of them compromises the intrinsic reasonableness of natural rights.

As to content – what these rights are – Ockham began modestly in the *Opus nonaginta dierum* but ended, not with a list of particular natural rights, but with what looks like a characterisation of all human activity in relation to that normative category. His initial concern was to maintain the licitness and morality and at the same time the legal rightlessness of the Franciscan use of material goods belonging to others. This led him to characterise licitness in terms of natural right. Use in virtue of a licit power of using became use "by right of heaven", a "natural right of using". But *any* reasonable action, Ockham went on to say, is performed by right of heaven. Any reasonable action not dependent on divine revelation would thus seem to be a matter of natural right. Given the breathtaking scope of natural rights so conceived, it is important to note that at least some such rights are inherently subject to limitation. Private property limits the common natural right to reasonable use of *temporalia*, a limitation which is itself reasonable in our present condition but was not necessary or reasonable in the state of innocence. But Ockham also held that this limitation itself has limits. In case of extreme need, one has a right to sustenance from goods belonging to another. We shall see more of this interplay between naturally reasonable activity and the

[28] I develop this point more fully in the article cited in note 10 above.

[29] Cf. Aquinas on natural law as the rational creature's participation in eternal law (*Sth*, 1a 2ae, q. 91, a. 2). This holds, presumably, even for rational creatures who do not know that there is an eternal law. They can participate in it without knowing they are doing so.

reasonable positive-legal limitation of such activity below, when discussing the role of natural right(s) in Ockham's view of political life.

For the present, an example from modern life may give some substance to what can appear a rather evanescent idea of natural rights. When I receive a driving license I acquire the legal right to drive on public roads, a right I did not have before being licensed. But if I have the prescribed qualifications, I have a right to the license (a right to the right to drive). This, too, is a positive-legal right, at least if I have redress against denial of the license when I have shown the qualifications. Naturalness (that is, reasonableness, in contrast with, although not necessarily in opposition to, positive prescription) enters in when we ask whether the qualifications specified are fair. I suppose that this depends, roughly, on whether individuals with such qualifications have the moral and physical capacity to drive without excessive risk of harm to themselves or others. In the suggested reading of Ockham, he would hold that such a capacity – such a *power* – just *is* my natural right to drive. It is easy to think of considerations that might reasonably be invoked to limit the exercise of such a natural right in various circumstances, but that, too, fits the suggested view.

There is reason to wonder whether Ockham *meant* to suggest so broad a conception of natural rights. Even if all natural right is by right of heaven, it does not follow that everything that is by right of heaven is a natural right. Setting aside cases like the obligation of Christians to support their clergy, one might wish to restrict the idea of natural rights to basic and universal entitlements grounded either in the impersonal nature of things or in fundamental features of human nature. Indeed, did not Ockham himself need such a stronger notion of natural rights to answer John XXII's charge that Franciscan use of material things without owning them was unjust? And looking ahead to later uses of scholastic ideas, we may question the effectiveness of a conception of natural rights as warrants for all reasonable acts. So broad a concept may seem to trivialise the idea and hence dilute its usefulness in cases where it is needed to combat serious violations of human well-being. Better to secure my right to freedom of conscience, for example, than to insist that I have a natural right to a driving license. And if I push the latter claim, where will my sense of entitlement end?

In response to these doubts, it must be conceded at once that a narrower but 'heavier' concept of natural rights fits much medieval as well as modern discourse better than the broad notion I have taken from Ockham's text. Ockham himself often seems to have a narrower idea in mind. For example, in his strenuous and extensive attacks on the conception of papal power as power to do anything not contrary to divine law or natural right, he never suggests that any unreasonable papal act whatever would *ipso facto* be a

violation of natural right(s).[30] In the context of the poverty controversy, however, the seemingly weaker notion was arguably all that Ockham needed. He did not need to attribute to the friars a natural right strong enough to stand up against positive-legal challenges. Their licenses to use material goods were revocable at the pleasure of the owners who granted them, and Ockham never suggests that their natural right of using would have entitled them to anything more than a moral protest at such revocation. To the objection that regarding any capacity for reasonable activity as a natural right dilutes the idea and thus robs it of potential practical effectiveness, it can be said that the broader notion is indeed supple but not necessarily any the weaker for that. When qualified individuals are denied driving licenses or other means of mobility, not for good reason but arbitrarily, the rhetoric of natural rights may not be the most effective medium of protest and there may indeed be more important matters about which to take action. It is a point in favour of the broader notion, however, that it helps us see what is wrong in such a situation in the same general terms as apply to violations of more fundamental rights. What is being unreasonably limited in the whole range of cases is not a brute power to do whatever one wants as the unreasoning master of a private moral domain – subjective right as critics of the idea seem to see it – but the exercise of a power for reasonable activity. (And in some circumstances, of course, denial of a driving license is a serious matter.)

Whatever Ockham's intentions may have been, the suggestion that his conversion of a 'licit power of using' into a 'natural right of using' can be generalised to yield the principle that every reasonable act is the exercise of a natural right deserves attention. The suggestion is at least 'in' Ockham as something that can be picked up from his text, and as such it apparently played a part in the transformations of rights discourse with which this volume is concerned.[31] In any case, the suggestion is interesting enough on its merits to deserve further comment.

Michel Villey objected to Ockham's 'sanctification' of powers as rights on the ground that powers are merely facts of the natural order which it is the

[30] On this major theme of Ockham's later political writings, see McGrade 2002 (1974), 20–21, 177–178.

[31] It is likely enough, for example, that this passage was a source for Jean Gerson's general definition of a right as "an immediate faculty or power pertaining to a thing according to a dictate of right reason". (*Jus est facultas seu potestas propinqua conveniens alicui secundum dictamen rectae rationis*). Jean Gerson, *De vita spirituali animae* (1402), lectio 3, as quoted in Brett 1997, 81, with a fine analysis of sources. Gerson's extension of this idea of a right to the activities of sky, sun, fire and swallows (Brett 1997, 83; Tierney 2001 (1997), 227) may owe something to the passage from Ockham's *OND* quoted in note 16 above.

business of jurisprudence to limit.[32] Purely physical capacities can indeed be regarded as facts, with something else needed to set limits and give direction to their exercise. But that something else is not necessarily the sole possession of jurists, as Villey seems to suggest. The 'right reason' of an individual agent may suffice. Not every agent has the moral capacity required for reasonable action in every situation. Given an appropriate combination of moral and physical capacity, however, the resultant 'power' for reasonable action has a strong claim to be recognized as a natural right. Ockham would remind us here that an individual's power to act reasonably does not guarantee that the individual will so act, but moral failings can be found among jurists and legislators as well as ordinary individuals.

Any view of rights as powers places rights 'in' the subjects having those powers,[33] but variables among subjects and circumstances make for variation in the degree to which a right can be described as pertaining to the 'essence' of the subject bearing it. Perhaps every human being has a capacity for making reasonable use of the bare necessities of shelter and nourishment, the sort of licit power with which Ockham was immediately concerned in the *Opus nonaginta dierum*, but in most cases there is some distance between innate power or potentiality and a capacity for reasonable action. For example, most human beings have at least a remote potentiality for being responsible drivers, but being actually qualified to drive a car requires maturation, education and training. The capacity to make best use of a particular research grant – the 'natural right' to be awarded the grant – is still further from a basic and universal human endowment. The point is that for Ockham the 'natural' in 'natural right' designates what accords with natural *reason*. As what is reasonable varies, so do natural rights. As far as the idea we are taking from Ockham is concerned, the alarmist prospect of naturally antagonistic individuals equipped with arbitrary, unvarying moral powers that claim legitimacy from being embedded in each individual's essence is only a specter.

When Ockham's 'reasonable' account of natural rights is read in conjunction with his clear commitment to the classical and Christian traditions in moral philosophy, it is hard to find in him the litigious egoism commonly associated with individual rights theory. It would seem that, for Ockham, our capacities or powers to live reasonably may constitute natural rights to live reasonably. To be sure, such capacities can be misused, even radically. Nevertheless, when individuals and their rights are understood as Ockham understood them, human community can be more than a power struggle among self-interested, naturally antagonistic holders of individual rights.

[32] See note 1 above.
[33] On this important point, see Brett 1997, 62–63.

NATURAL RIGHT AND HUMAN CONDITIONS

The threefold division of natural right put forward by Ockham in the *Dialogus*, briefly referred to above, provides a useful framework for discussing the place of natural right(s) throughout his political theory. Any such discussion presupposes, however, that Ockham was capable of having a genuine political theory. This has been doubted. It is sometimes thought that nominalism regards human beings as isolated from one another in a distinctively radical way and therefore considers any apparent togetherness illusory. Before considering particulars about Ockham and community, therefore, it must be made clear that both epistemologically and metaphysically Ockham was a spokesman for togetherness.

In epistemology he was a direct realist. That is, he held that in perception and thought we are directly aware of real objects in a common world and that our language is a public one, bearing on this shared world.[34] In metaphysics he emphatically asserted the reality of communities. It was John XXII, not Ockham, who referred to the Franciscan Order as a *persona imaginaria*, and Ockham accuses him of blasphemy for doing so. Ockham argues that if the Franciscan Order were only imaginary, by the same reasoning the Church and any community whatever would be imaginary, "which is absurd" and would imply the blasphemous conclusion that the Church could not exercise real power.[35] To be sure, Ockham was a methodological individualist, to use a term from later political theory. That is, he denied that what unites the members of a community (for example, agreeing to follow the same monastic rule) was a reality over and above the members themselves. This does not mean, however, that the members' unity

[34] On Ockham's direct-realist epistemology as more immune than Aquinas's representationalism to at least the 'veil-of-ideas' variety of skepticism associated with Descartes and Locke, see Pasnau 1997. Pasnau finds, *contra* Joseph Owens, that Aquinas "shares the presupposition, characteristic of seventeenth-century philosophy, that the immediate and direct objects of cognitive apprehension are our internal impressions" (293). On the key terms of written and spoken language as directly signifying extra-mental realities in Ockham's semantics, see Panaccio 1999, 54–55.

[35] *OND* c. 62, 568, ll. 206–218: "Secundus error [...] est quod ordo Fratrum Minorum est persona repraesentata et imaginaria. Quod enim hoc sit erroneum ostendunt. Quia si ordo Fratrum Minorum est persona repraesentata et imaginaria, eadem ratione ecclesia et quaelibet communitas esset persona repraesentata et imaginaria: quod est absurdum. Quod enim est tantum repraesentatum et imaginariam est fantasticum, et non est in re extra animam. Sed ecclesia non est quid fantasticum non existens extra animam; ergo non est persona repraesentata et imaginaria. Confirmatur [...] Si est in anima tantum, vel aliquid compositum ex ente in anima et ente extra animam, ergo nullum reale nec iurisdictionem realem potest habere: quae dicere de ecclesia est impium et blasphemum." Cf. Op. cit. c. 6, 365, ll. 420–426 (*editio altera*).

is a fiction, something existing only in the mind. It means that the fact of their being united, the reality of their being a community, can be adequately expressed in statements about the members. Full clarity on this matter requires following Ockham through some dense argumentation on the metaphysical question of whether relations have a reality distinct from their *relata*. Ockham thought not. But again, he did not take this to mean that nothing is related to anything else, or that no one is related to anyone else. The mantra here is this. For Ockham things are related, but relations are not things.

There is thus no reason to doubt that Ockham's political writings are genuinely concerned with human communities and community. The three modes of natural right laid out in the third part of his *Dialogus* indicate principles of rightness – of what is right, *ius* in the objective sense – for community in a variety of conditions.[36] Among them, the three modes cover, at a very abstract level, the whole field of politics. They also fill out to some extent the relationship between natural rights and reasonable activity suggested by Ockham, intentionally or unintentionally, in *Opus nonaginta dierum*, chapter 65.

"In one way", according to the Master in the *Dialogus*, "that is called natural right which is in conformity with natural reason that in no case fails, such as 'Do not commit adultery', 'Do not lie', and the like".[37] All nations are "indispensably obliged" to natural right spoken of in this way.[38] Just enough is said about this mode of natural right for us to recognize in it the universality and immutability commonly associated with the idea of natural rightness. We have here rational norms that "in no case fail". For Ockham, however, this is not the whole story.

Ockham believed that there was once a world in which at least two human beings lived together reasonably: the age of innocence, before sin. In the threefold division of natural right proposed in the *Dialogus*, he assigned one member of the division to the distinctive features of that condition or of a situation governed "by natural equity alone without any custom and human legislation (*sola aequitate naturali absque omni consuetudine et*

[36] On *ius* in the objective sense, see above. On the place of Ockham's division of natural right in the *Dialogus* and its relation to canon law, see Tierney 2001 (1997), 175–182. See also McGrade 2002 (1974), 174–185. For reasons indicated in note 25 above, I translate *ius naturale* in the objective sense as 'natural right' in some passages where 'natural law' is more usual, as in William of Ockham 1995.

[37] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "Uno enim modo dicitur ius naturale illud quod est conforme rationi naturali quae in nullo casu fallit, sicut est 'Non moechaberis', 'Non mentieris', et huiusmodi." Translation in William of Ockham 1995, 286.

[38] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "Omnes nationes indispensabiliter obligantur ad ipsum." Translation in William of Ockham 1995, 288.

constitutione humana)".[39] This sort of natural right is called 'natural', the Master says, "because its contrary is contrary to the state of nature as originally established, and if all men lived according to natural reason or divine law, it [i.e., the contrary] should not be observed or done".[40] There would be no private property in such circumstances. There would also be no servitude but "one liberty of all".[41]

Finally, there is a third mode of natural right, natural right 'on supposition': "that which is gathered by evident reasoning from the law of nations or another [law] or from some act, divine or human, unless the contrary is enacted with the consent of those concerned."[42] As examples of this kind of natural right the Master gives the obligation to return a thing deposited ('supposing' property divisions have been made), the right of a community to choose its ruler (supposing that a ruler is to be chosen), and the right to use force to repel violence (supposing violence has occurred). Ockham's association of the 'natural' with what is reasonable is especially salient in his account of this third mode, for none of the suppositions mentioned as points of departure for a right of this type is natural in the sense of primitive innocence or universal necessity. Naturalness enters as reasoning *from* such contingent suppositions to an appropriate, non-arbitrary response.

What are the implications of the three modes for politics? Regarding the unfailing norms of the first mode, Ockham apparently expected his readers to agree that nothing could rationally justify acting contrary to them. When he assumes that even an inordinately expansive conception of papal *plenitudo potestatis* would recognise natural right as setting limits to the pope's power, this is the mode of natural right he presumably had in mind. The need for a 'heavy' idea of natural right recognised earlier in this paper is satisfied here with the concept of universally valid moral norms. The remaining two modes of natural right fill another need left by our earlier discussion. They provide an explicit basis for thinking about rights in ways that are sensitive to differences among agents and circumstances.[43]

[39] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6. Translation in William of Ockham 1995, 286.

[40] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "quia contrarium est contra statum naturae institutae et, si homines omnes viverent secundum rationem naturalem aut legem divinam, non est servandum nec faciendum." Translation in William of Ockham 1995, 286.

[41] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "communis omnium possessio et omnium una libertas." Translation in William of Ockham 1995, 287.

[42] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "illud quod ex iure gentium vel alio, aut ex aliquo facto (divino vel humano), evidenti ratione colligitur, nisi de consensu illorum quorum interest contrarium statuatur."

[43] Ockham's suggestive texts on right(s) leave a number of other questions unanswered. What, for example, is the relation of objective right to subjective rights in his way of thinking? He never wrote in general terms on this question. With regard to the natural right of using

How relevant did Ockham think the second mode of natural right is to our life after sin? He clearly regarded it as a model for the ideal life pursued by St. Francis and his followers, but what about the larger world? In at least one case presented by Ockham, the right of nature as originally established seems to have abiding general relevance. At *Opus nonaginta dierum*, chapter 27, Ockham debates with John XXII Adam's relationship to the world when he was the only human being in it. Was Adam sole proprietor at that point? Did he own the world, as the pope claimed? Ockham answers that, whatever dominion or lordship Adam may have had when he was alone, it was not exclusive to him. "That lordship was not given to him for himself alone, but for himself and the woman to be formed from him and all their posterity." No act of Adam's was necessary to make Eve a participant in that lordship.[44] She was not an economic creature of her husband, nor, it would seem, are later generations economic creatures of those before them, gleaning whatever is left from the previous generation's enjoyment of its own private property. The whole human race, from Adam to the end of time is thus a community unified by God's grant to it, as a whole, of reasonable use of the earth's resources. Ockham has essentially enunciated Locke's celebrated requirement that appropriation of the world's resources for private use must leave "as much and as good for others", a fundamental principle of environmentalism and just resource management.

Does this go too far? In the *Opus nonaginta dierum*, after all, Ockham's primary concern with Adam's lack of ownership was as a model for the use of material things without ownership by Christ, the apostles, and their Franciscan imitators. There is no hint of a campaign to disestablish property in general, nor do I know of any place where Ockham recommends changes in particular existing provisions regulating property. There are, however, two passages in the *Dialogus* that seem to give state-of-innocence natural right a general application in present circumstances. When linked with Ockham's account of nonpositive and positive moral science in *Quodlibet* II, question 16, these texts place natural right in both the subjective and objective senses at the foundation of practical politics.

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contended for in *OND* c. 65, he held that an individual has a (subjective) natural right of using 'by' the (objective) right of heaven and that every reasonable act is just by the right of heaven. Hence, it would seem, one has the right to act reasonably 'by' the right of heaven. Since, however, the right of heaven is natural equity, this seems to be a matter of saying that it is a matter of natural equity that people may act reasonably or that the power to act reasonably is a right so to act. Is *all* objective natural right a matter of grounding subjective power-rights of action in this way?

[44] *OND* c. 27, 488, ll. 92–95: "Illud dominium non fuit sibi datum pro se solo, sed pro se et muliere formanda de ipso ac pro omnibus posteris eorundem. Nec ad ipsum pertinebat, Eva formata, sibi aliquod conferre dominium." Translation in William of Ockham 1995, 40.

One of these *Dialogus* passages is from the Master's exposition of the three modes of natural right: natural right spoken of in the second way is common to all nations in such a way that all nations are obliged to it, "*unless* for reasonable cause" they decide on the contrary. It is never unjust but is regarded as natural and fair "*unless* for some reasonable cause" the contrary is established by some human law.[45] This requirement that there be *reasonable* cause for going against arrangements appropriate to a world governed only by natural equity suggests that existing laws on such matters depend for their legitimacy, not only on a general need for property after the Fall, but on the character of specific laws about property in relation to the circumstances in which they apply.

The other *Dialogus* text that appears to suggest current relevance for second-mode natural right (as well as for the other modes) is the passage, referred to earlier, where natural right is held to include instances about which even experts can disagree, those that are inferred from primary principles of natural right "by few even of the experts, with great attention and study, and through many intermediate propositions". This fine-grained account of natural right is put forward as part of an emphatic recommendation that "after someone has been appointed to empire or to the government of a kingdom, he should apply himself to skill in secular affairs and to knowledge of natural right".[46] For this purpose a ruler will need many wise advisers, and the Master goes on to praise the Romans, "who appointed three hundred and twenty men, who used to deliberate every day, giving advice about the multitude".[47]

Both the extension of natural right to include conclusions carefully deduced from first principles and the urgent proposal that rulers acquire knowledge of such conclusions echo Ockham's account of demonstrative, nonpositive moral science in *Quodlibet* II, question 14. That science, he had said, is "very subtle, useful, and evident". He had also asserted that "positive moral science, e.g., the science of jurists", which is not demonstrative, "is

[45] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "nisi ex causa rationabili." Translation in William of Ockham 1995, 289.

[46] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 15: "Postquam autem ad imperium aut ad regni gubernacula fuerit quis assumptus, peritiae secularium negotiorum et notitiae iuris naturalis, et praecipue illius circa quot contingit errare vel dubitare etiam eruditum et cuius notitia ad suum spectat officium, principaliter debet insistere." Translation in William of Ockham 1995, 272. In translating *iura naturalia* in this passage as 'instances of natural right', I am again departing from the more usual 'natural laws'.

[47] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 15: "Expedit quamplures consiliaros secum habeat sapientes, exemplo Romanorum, qui [...] constituerunt 320 qui quotidie consulebant, consilium agentes de multitudine." Translation in William of Ockham 1995, 274.

regulated by demonstrative science in many ways".[48] Allowance must be made for the lapse of time between the *Quodlibeta* and the *Dialogus*, as well as for the impersonal format of the latter, but it seems clear that Ockham, like St. Thomas, albeit in his own way, held that human law ought to be regulated by rational determination of natural right(s).

A general structure for making such determinations is provided by the third mode of natural right in Ockham's division, natural right "on supposition": "that which is gathered by evident reasoning from the law of nations or another [law] or from some act, divine or human, unless the contrary is enacted with the consent of those concerned".[49] The examples Ockham gives of this mode of natural right cover some political fundamentals: the obligation to return deposits ('supposing' property divisions have been made), a community's right to choose its ruler (supposing that a ruler is to be chosen), and the right to use force against violence (supposing violence has occurred). None of the suppositions in these examples would hold in the state of innocence or in a world where everyone acted reasonably, and in that sense all three suppositions are unnatural, but there is a difference between the first two and the third. Private property and government are, in principle, reasonable human responses to the fact that we do not all always act reasonably. As we shall see, social organization in a state of innocence is not ruled out by Ockham, but he is also attuned to St. Augustine's view of coercive political institutions as a result and partial remedy of sin. On this account, violence, the supposition underlying the last example above, grounds the reasonableness of the suppositions behind the others. The indicated *responses* to what is supposed in the three examples are, however, all 'natural' on Ockham's view, because they are "gathered by evident reasoning".

Combing Ockham's works for everything he might propose as "evident reasoning" from contingencies in human affairs (suppositions) to rationally appropriate responses is far beyond the scope of this paper. Two points about his treatment of the major topic of Tract 2 of Part 3 of the *Dialogus* will, however, indicate the approach we might expect to find in a more detailed study. The topic being discussed is nothing less than the proper political organization of the whole world, here addressed in relation to the rights of the Roman Empire.

[48] *Quodlibet* II, c. 14, 177, ll. 30–32: "Circa tertium dico quod moralis scientia positiva, cuiusmodi est scientia iuristarum, non est scientia demonstrativa, quamvis sit a scientia demonstrativa ut in pluribus regulata." Translation in William of Ockham 1991, 150.

[49] *Dialogus*, pt. 3, tr. 2, bk. 3, c. 6: "illud quod ex iure gentium vel alio, aut ex aliquo facto (divino vel humano), evidenti ratione colligitur, nisi de consensu illorum quorum interest contrarium statuatur." Translation in William of Ockham 1995, 287.

The first point about Ockham's treatment of this topic is that he immediately makes the rights of government dependent on benefits to the governed. The Student observes that the Empire's rights would not *be* rights but wrongs, injustices and cruel tyrannies unless it is beneficial to have one ruler over all the world's provinces. Accordingly, the question he wants treated before all others is "whether it belongs to the advantage and utility of the whole human race for the whole world to be under one emperor or secular ruler in temporal matters".[50] Ockham's position, as indicated by the weight of the following discussion, is that the benefits of government are, as a rule but not always, best realized under a single ruler. The world monarchy Ockham has in mind is clearly not one in which the supreme ruler has a monopoly on power. He would be more like a strong Secretary-General of the United Nations, with a fair amount of force at his own disposal and the Security Council and General Assembly reduced to advisory status (on the model of the Roman senate praised above). He would not, however, be the source of all law and jurisdiction like a Hobbesian sovereign in relation to the commonwealth under him. In any case, the 'rightfulness' of a world government would be subject to variation due to historical circumstances.

There are, then, three levels of reasonableness in Ockham's thinking about this issue. Ideally – most reasonably, in a world where everyone followed reason – there would be no coercive machinery of government at all. Much less ideally – but most reasonably in terms of benefits in a world where not everyone does act reasonably – there would be a single well-advised governor for the world. Still less ideally – but reasonably in various situations where the second-level ideal cannot be realised – it would be appropriate to accept a less unified world order. The moral is that, for Ockham, wisdom about world government is a matter of reasoning both from the general supposition that government is needed for fallen humanity and from suppositions provided by particular historical circumstances (third-mode natural right), with reasoning at both levels carried on against the backdrop of a high ideal of what our life together could be (second-mode natural right) and within the bounds of moral universals valid for all circumstances (first-mode natural right).

My second point about Ockham's treatment of world government has to do with the kind of benefits such government or governments should yield

[50] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 1: "Romani iura imperii non iura sed iniuriae et iniusticiae ac crudeles tyrannides non indigne censeri deberent, si nullatenus expediret unum imperatorem seu principem cunctas mundi provincias gubernare, cum Romani super universum orbem sibi usurpaverint principatum. Quo circa de iuribus Romani imperii plurima quaesiturus, ante omnia interrogare decrevi, an ad totius generis humani commodum et utilitatem pertineat totum orbem terrarum in temporalibus uni imperatori seu principi seculari subesse." Translation in William of Ockham 1995, 237.

for humanity. These are spelled out most directly in eleven arguments offered in the *Dialogus* in favour of one ruler for the world. The fourth of these is especially interesting in relation to this paper's themes. In outline it runs as follows:

> All who have, or can have, community with one another in temporal matters, so that each can alike help and harm the other, are not best governed unless they are subject in temporal matters to one highest ruler. [...] But all mortals, however distant they are from one another geographically, can have community with one another, so that they become, or should become, unless wickedness separates them, one people, one fold, one flock, one body, one city, one college, one nation, one kingdom [...] But such a connection does not exist among all mortals unless one presides over all the others. It is therefore beneficial to the totality of mortals for the world to be governed by one ruler.[51]

Ockham's deployment of no fewer than eight richly significant terms for community, ranging from 'people' to 'kingdom', to describe a global network of relationships in which individuals "can alike help and harm one another" expresses a powerful commitment to human sociality, with a corresponding limitation of government to the instrumental functions of protecting helpful activities and minimising harmful ones. Ockham's globalism with respect to secular matters was even-handed as regards religious divisions. He insisted, as we have seen, on the legitimacy of the rights of non-Christians, and in his discussion of world government he cited past examples of believers having "community and peaceful society with unbelievers" in order to argue that "it could on ocasion be beneficial that even [in future] an unbelieving emperor should preside over all mortals".[52] This vision incorporates both Ockham's ideal of a human world in which reasonable individuals *want* to help one another and his recognition that our capacity to act reasonably does not guarantee its own exercise.[53] Once again,

[51] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 1: "Omnes qui communionem in temporalibus habent adinvicem, vel habere possunt, ut quilibet possit cuilibet subvenire pariter et nocere, non optime gubernantur nisi uni summo principi quo ad temporalia sint subiecti. [...] Sed omnes mortales quocunque spacio terrarum distantes ab invicem possunt communionem habere adinvicem, ita ut unum populum, unum ovile, unum gregem, unum corpus, unam civitatem, unum collegium, unam gentem, unum regnum efficiant vel efficere debeant nisi eos disiungat malitia [...] quare quo ad temporalia unum principem secularem debet habere." Translation in William of Ockham 1995, 240–241.

[52] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 11: "Fideles etiam licite communionem et pacificam societatem possunt habere cum infidelibus, sicut multi sanctis habuerunt. [...] Et ita posset esse expediens in casu quod etiam unus imperator infidelis cunctis mortalibus praesideret." Translation in William of Ockham 1995, 265.

[53] On one occasion Ockham includes "commanding the acts of all the virtues" in a list of functions appropriate to lay rulers, but the same passage states that their "most principal"

it is useful to read Ockham's political theory in the light of his ethics. We then see that 'helping', for Ockham, properly includes not only mutual material assistance by fairly sharing natural resources meant for the whole of humanity but also mutual assistance in cultivating the virtues and, ultimately, whatever assistance one person can give another toward finding and loving God.

In attempting to clarify the distinctive character of Ockham's idea of natural rights, I have gone well beyond the letter of any single Ockhamist text. The picture I have drawn by combining texts and using some to elicit the implications of others is thus, to some degree, a reconstruction or transformation. In particular, my use of the three modes of natural right in the *Dialogus* to fill out the idea of natural rights suggested in the *Opus nonaginta dierum* hardly demonstrates that Ockham had such a combined view in mind when he wrote either text. Further, the elements of his thought are doubtless susceptible of other, more radical transformations, some more wholesome than others (as could be said concerning other medieval thinkers). I would only claim for my own account that its elements are 'in' Ockham literally and that I am aware of no text of his that contradicts the synthesis I have made of them. To be sure, even if we do take it that Ockham regarded reasonable use of material resources, morally virtuous actions, and love of God as exercises of natural rights, he certainly had no simple program for optimising our opportunities for such activities. He thought that even experts could disagree about some instances of the objective natural right that should regulate governmental action. Still, in our current situation, where even the idea of human beings as mutually helpful at the material level is often in question, approaching disputed issues about rights with something like Ockham's idea of what our natural rights are – and who 'we' are – has much to commend it.

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function is to correct and punish wrongdoers. See *Octo quaestiones de potestate papae*, q. III, c. 8, 109–110, ll. 4–10 (*editio altera*). Translation in William of Ockham 1995, 319. In conjunction with other passages and especially with Ockham's conception of the Church as a vital moral and spiritual force normally independent of secular government, I take this passage to suggest relatively modest positive ambitions for such government. In the introduction to her edition of Ockham's *De imperatorum et pontificum potestate* (*On the Power of Emperors and Popes*) Annabel Brett notes a darker view of secular politics in that late work than, for example, in the *Breviloquium* – a sharper contrast with the high standard Ockham demands for the papal government of the Church. See William of Ockham 1998, 41–51.

RIGHT(S) AND POINT OF VIEW

If the preceding account of right(s) in Ockham is at all plausible, we may wonder whether controversy about subjective rights as against objective right has to some extent been misguided, at least with respect to Ockham. I think it has been. I suspect there has been underlying disagreement about whether individuals have the capacities for reasonable activity ascribed to them by some medieval and modern thinkers.[54] To this extent, the issue is not really whether subjective powers can be rights but whether individuals actually have specific powers that can plausibly be seen as rights. Perhaps, however, something else is also going on beneath the surface of these debates. To capture this we may return to the intuition that a subjective conception of *ius* is essentially disorderly, inevitably spawning a multiplicity of competing and conflicting rights, while an objective conception yields something more unified, perhaps a single right situation. Thus, Oliver O'Donovan laments the "fissiparation of a singular notion of 'right' into a plurality of subjective 'rights'".[55] The concern here seems to be that the idea of natural or human rights, or even of rights in general, is inherently anarchic – that there is no intrinsic order among the supposed rights of individuals, whereas the objective conception of "what is right" seems to have order built into it.

Is there anything to this impression of subjective disorder as against objective order? In strict logic, it seems mistaken. If justice and its institutional embodiments work from a recognition of what is *due* those to whom justice is done, then the objective conception – natural right or natural law – will have consequences every bit as untidy as those flowing from the subjective idea construed along Ockhamist lines. For what is due to individuals depends on features of the individuals themselves, singly or collectively (where 'collectively' may amount to the whole of humanity), and capacities for reasonable action (the 'power-rights' suggested in Ockham) have a strong claim to being fundamental features justice must recognise. Where justice involves allocating benefits or burdens to multiple individuals, it is necessary to discern accurately what each individual is owed. From either the objective or the subjective point of view, the right(s) and wrong(s) of our relationships to one another and to material things are not simple.

[54] Thus, one of the examples Villey offers of the classical idea of natural right, based on the nature of the cosmos, is the relation between the powers of the Guardians and other classes in Plato's *Republic*, a polity in which only very limited powers of moral discernment are attributed to the latter. Villey 1964, 103.

[55] O'Donovan 1996, 276.

In theory, then, the appeal to simplicity and order as a basis for preferring objective right to subjective rights is questionable. It does, however, suggest why speaking in terms of one conception rather than the other might, in different circumstances, be preferable rhetorically. The objective conception *focuses* on the just judge or institution responsible for maintaining or achieving a situation in which everyone enjoys a proper share of the common good, while the subjective conception *focuses* on the recipients of justice.[56] Now although everyone is to some extent a dispenser as well as a recipient of justice, *official* dispensers of justice in a society are far less numerous than recipients. This, I conjecture, contributes to the impression of greater simplicity in the objective idea of *ius*. At the limit, if there is only one dispenser of justice, one source for every official declaration and enforcement of what is right, the appearance of order can be impressive. If, on the other hand, we think of what is due to individuals as coming to them in response to their own assertions of rights, there can be an equally impressive appearance of disorder. In a western democracy, for example, laws declaring what is right, that is, what is due to the individuals making up the society, emerge from the untidy and often acrimonious deliberations of representatives whose job, at least in part, is to press the rights claims of their constitutents.

We can slide into error from either of the two basic ideas, but the easiest errors differ. If we think or talk in terms of subjective rights, it is especially easy to confuse desires with entitlements and to suppose that if I want X, I have a right to X (if I want a driver's license, I should have one, no matter how poor my vision). It is also easy to make mistakes in ranking rights, especially giving undue weight to one's own in relation to those of others. If we operate in terms of objective right and the virtue and institutions of justice, the most obvious danger is that we may confuse the *recognition* of rights (the recognition of what is due to the recipients of just acts) with the *creation* of rights by grace or favor of the dispenser, a confusion of justice with charity or some parallel secular idea.

What it should come down to, then, is this. If the idea of rights is being abused in a particular situation – if, for example, the distinction between

[56] In "La genèse du droit subjectif chez Guillaume d'Occam", Villey recognised change of focus or viewpoint as involved in the shift from objective to subjective conceptions of right(s), but he saw this as a matter of each individual's considering everything in relation to his own interests, at the expense of considering the common good. "Il est naturel que chacun pense toute chose en fonction de son moi, et capte au service de son moi ce qui devrait être conçu en fonction de l'intéret commun, et l'accomode aux besoins de son égoïsme" (97). But one individual can, of course, consider the legitimate interests or rights of other individuals, not only his own interests. It seems excessive to suppose that the bare idea that individuals have rights caters solely to egoism.

desires and entitlements is habitually ignored – it is prudent to emphasize the need for judges and other institutions to provide some measure of 'objectivity', in the modern sense of reasonableness, impartiality, or correctness. On the other hand, if the individuals and institutions responsible for dispensing justice in a society are not reasonable and impartial, it will make sense to deploy the subjective conception, *not* as being subjective in the modern sense of the term, but rather as a way of highlighting claims to benefits that are objectively deserved but not received.[57]

In suggesting that objective right discourse might be rhetorically appropriate in some circumstances and subjective rights discourse in others, I have assumed that circumstances may in fact vary in the ways indicated. Many political theorists seem to believe that the situation is everywhere the same and hence that one way of talking is always required. Different thinkers have different views of the paradigmatic situation. I suspect that Aquinas's failure to assimilate the subjective rights discourse of the canonists was not entirely due to his loyalty to Aristotle. James Blythe sees Aquinas's toleration of popular participation in government as a way of avoiding strife rather than as intrinsically good. In this Aquinas differs from some of the other thirteenth- and fourteenth-century figures Blythe discusses.[58] These differences are connected with a distinction made by Aristotle and noted by his scholastic commentators between 'temperate' multitudes and 'bestial' or intemperate multitudes. Some writers argued that it would be right for a temperate multitude to choose its rulers, for example, but not right for a bestial one to have such power.[59] St. Thomas himself makes this distinction, quoting Augustine rather than Aristotle,[60] but he seems to have had less confidence than, for example, Marsilius of Padua in the likelihood of finding enough temperate multitudes to justify giving republican government a prominent place in his political theory.[61] Ockham,

[57] Obviously, in terms of this paper, the claims of individuals *can* be pursued as matters of justice, and the need for communal order *can* be pressed as a right of the community against the individual. For a study of a very large body of political debate in which outcomes are arguably not determined by the debate's being carried on in the language of rights, see Primus 1999.

[58] Blythe 1992.

[59] See, for example, Peter of Auvergne, *Quaestiones supra libros politicorum*, bk. 3, q. 17, 214–215. Translated in McGrade, Kilcullen and Kempshall 2001, 249–251.

[60] Thomas Aquinas, *Sth*, 1a 2ae, q. 97, a. 1.

[61] Thomas wrote clearly and cogently against the evil of tyranny, but he apparently judged it better in general to endure a tyrant than to foment revolution. Thus, in his treatise *On Kingship* addressed to the King of Cyprus, he trenchantly warns his royal advisee against tyranny but then offers the following story from the Roman anecdotalist Valerius Maximus: "In Syracuse, at a time when everyone desired the death of Dionysius, a certain old woman kept constantly praying that he might be unharmed and that he might survive her. When the tyrant learned this he asked why she did it. Then she said: 'When I was a

as we have seen, gave considerable political importance to variations in particular circumstances, but he did not use the possibility of a temperate multitude as a basis for commending ongoing popular participation in politics. On the contrary, although, as we have seen, he thought it a matter of natural right that a people should choose its own rulers, he seems to have thought that if the peoples of the world were reasonable, they would be happy to accept a non-tyrannical monarch. But "Sometimes", he wrote, "the great multitude of mortals would not bear the lordship of one but would willingly subject themselves to the lordship of many [...] and consequently the common advantage would then be taken care of better by many than by one".[62]

A THIRD IDEA

The moral of the preceding section is that conservative or establishment thinkers have some reason to speak the language of objective right, while populist or anti-establishment thinkers have reason to speak in terms of subjective rights. If, however, the two ways of speaking are not fundamentally at odds, temperate conservatives and temperate populists should be able to find honorable accommodation in practice. Of course, despots, demagogues, and mobs (intemperate or bestial conservatives and populists?) do not want accommodation but dominance. What sort of idea is that?

Besides the subjective and objective ideas of right(s) with which this paper has been concerned, there is a third view, in which the only thing that matters is who has supreme power and who is subject to that power. For some who think this way – most cogently and influentially Hobbes – all that matters is that *someone* should have effective comprehensive authority. For others – those who press the divine or natural sovereign right(s) of popes, emperors, kings or peoples – it matters crucially who the someone is. For both pragmatic and more idealistic theorists of sovereignty, however, once the question of dominance is settled, the rest is silence as far as fundamental

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girl we had a harsh tyrant and I wished for his death; when he was killed, there succeeded him one who was a little harsher. I was very eager to see the end of his dominion also, and we began to have a third ruler still more harsh – that was you. So if you should be taken away, a worse would succeed in your place.'" See Thomas Aquinas, *On Kingship to the King of Cyprus*, 25.

[62] *Dialogus*, pt. 3, tr. 2, bk. 1, c. 5: "Nonnunquam autem magna multitudo mortalium nullatenus sustineret dominium unius, sed voluntarie se subderet dominio multorum [...] et per consequens tunc per plures melius procuraretur communis utilitas quam per unum solum." Translation in William of Ockham 1995, 250.

theory is concerned. This looks like a very anti-political approach to politics, but it certainly deserves attention in both medieval and modern thought, and in some situations it may be the only hopeful path to take.[63] In general, however, it seems undesirable to reduce all political problems to issues of dominance. The two ideas considered in the body of this paper offer ways of avoiding such reduction. If the ideas of right and rights are theoretically compatible but differently weighted rhetorically, as I have argued, the mutually critical use of both ideas might significantly raise the quality of our political discourse.

[63] For a medieval example of this approach see Janet Coleman's contribution to the present volume.

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Chapter 4

POLITICS, RIGHT(S) AND HUMAN FREEDOM IN MARSILIUS OF PADUA

Annabel Brett (University of Cambridge, U.K.)

Let me begin by clarifying the sense of my title within a volume dedicated to exploring the development of the notion of individual rights between the late-medieval and the early-modern periods. It is intended in the first place to call attention to a distinctive feature of Marsilius' treatment of rights, which I shall argue is in many ways authentically Aristotelian (despite the lack of subjective or individual rights in Aristotle): and that is the interdependence of rights (and the juridical generally) and the political. This lies in contrast to the classic early-modern theories of individual rights, the distinctive feature of which is that they involve a notion of *natural* rights: rights as the adjunct of human nature or the human individual subject independent of, or prior to, the political. Thus, whereas Marsilius' theory has been seen as a precursor of early-modern notions of rights – in the sense that he does indeed have a subjective notion of rights – there are questions to be asked over how far this genealogy is valid. As part of this enquiry, however, there also turn out to be more basic issues about the very nature of the human subject or individual in Marsilius, which is the second theme of this paper indicated in my title by the reference to human freedom. Again these issues put the question of Marsilius' relation to early-modern rights theories in an interesting light.

In *Politics* Book I, Aristotle presents a view of human development from the almost animal-like coupling of male and female to the fully human life of the political community or *polis*. Although it is clear that this development has to be "read back" from the existence of the political community, there are hints that he sees it as a genuine historical, i.e., temporal development. However, whether we take the genesis of the *polis* as a genuine temporal

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 95-116.

development or as an analytical device, it is not handled in juridical terms but presented as the increasingly-rational human pursuit of an increasingly-rational human end. In Book V of the *Ethics*, Aristotle does mention some sort of natural right, but sees it as a subdivision of political right rather than anything pre-political or a-political. Indeed he argues here that there is no right, properly speaking, in non-political communities. Secondly, his notion of right here is not framed subjectively in terms man acting in pursuit of his own good, as is Book I of the *Politics*, nor is there any sense that natural right accounts for or grounds conventional or positive right.

Aristotle's account thus contrasts starkly with later medieval and early-modern theorists of natural *ius* – law and rights – who see the human subject in pursuit of his end as, precisely, the subject of natural law or natural rights; and how to fit these two books of Aristotle together presented an interpretative problem for many commentators on "the Philosopher" from the late middle ages to the early seventeenth century. Marsilius of Padua is interesting in this respect because he explicitly connects the two discussions through his concept of human law, which is the political standard of human agency and also the keystone of the juridical. Marsilius thereby departs from Aristotle by involving the account of what is right in the account of human agency and by developing, in consequence, a subjective sense of right – as Professor Tierney showed in a paper published in 1991 to which I am much indebted.[1] He remains authentically Aristotelian, however, in tying human right to the political community and thus denying the existence of a natural human law or natural human rights. The genesis of the political community is governed by man's natural desire for the human sufficient life, not by a natural law commanding or directing him to achieve that end. Human law is political, but nature is not. Political science does not study human nature in itself, but only insofar as it is perfected by the virtues and arts which are the perfections of the human will and human reason, "by which the human race lives" as Marsilius says. Unperfected or untempered natural human characteristics are instead the object of the natural science which considers the characteristics of all natural things.[2]

The question of right(s) in Marsilius cannot therefore be detached from the question of politics. However, I cannot address both equally in this short space and so – given the interests of this volume – the focus of my inquiry will be Marsilius' understanding of right (*ius*) as set out in chapter 12 of Discourse II of the *Defensor pacis*. The paper has three sections: the first considers right and rights *per se*; the second the question of natural right; the third considers *dominium* and its relation to rights. Running through all these

[1] Tierney 1991.

[2] *Defensor pacis* (henceforth *DP*), I. 5. 2–3. All references are to the Latin text as edited by Previté-Orton.

sections is, as I indicated at the outset, an underlying question mark over the nature of the human *subject* in Marsilius – the subject of law, the subject of rights and the subject of politics – who is consistently indicated to be a *free* subject.[3] This freedom, however, remains curiously under-articulated and introduced in an almost off-hand manner – something we believe from the Christian religion, something so obvious to us all by experience that it is not worth further discussion, or something that Aristotle says must be true of the citizen by definition. I shall suggest that a full articulation of human freedom would cut across Marsilius' carefully delineated distinctions between the natural, the political and the divine, threatening the autonomy and self-sufficiency of the political which it is his entire enterprise to establish.

RIGHT AND RIGHTS

Chapter 12 of Discourse II of the *Defensor pacis* is entitled "On the distinction between certain terms, which must necessarily be made in order to determine questions relating to the status of supreme poverty".[4] The implication is that failure to make the relevant distinctions, principally between *ius* and *dominium*, has enveloped a point that Marsilius presents in chapter 13 as patently obvious – that it is possible to have right without *dominium*, and therefore that the perfect can use things rightfully while observing the status of supreme poverty – in a fog of needless obscurity. In order, however, to establish the distinction between right and *dominium*, Marsilius must first clarify the nature of *ius* or right, and this involves distinguishing *within* the possible senses of that term.

> Let us begin, then, by distinguishing the significations of 'right', since we shall need them in distinguishing and demarcating the other terms, but not *vice versa*. Thus, 'right' in one of its significations is predicated of law so-called in the third and final signification of law, as discussed in the tenth chapter of the first discourse. Law is of course twofold, one

[3] This bald statement begs the question, I am aware, of whether all these subjects are said to be free in the same way. I tackle this issue in the final section of this paper. Suffice it to say meanwhile that I believe that political or republican liberty in Marsilius is not just a collective but an individual property, and hence is not self-evidently clearly demarcated from the personal freedom of the individual.

[4] Tierney points out the significance of this context in Tierney 1991, 7. My discussion presupposes and relies on several studies of rights and Franciscan poverty to which it would be tedious to refer at every point. Besides Tierney's article on Marsilius, there is his fundamental collection of studies (Tierney 1997). I also draw upon my own earlier works, Brett 1997 and Brett 1998. Latterly there have been added two excellent studies: Lambertini 2000 and Mäkinen 2001.

> human, the other divine – which also, in respect of a particular time and circumstance, comes under the last signification of law, as said above. We have said enough on the subject of the nature and quality of these laws, and their convergence and divergence, in the eighth and ninth chapters of this discourse.[5]

The first reference in this passage is to the tenth chapter of the first discourse, where Marsilius famously argues that law, understood as a standard or rule of human actions, cannot simply be taken as a cognition or indication of what is just and unjust. Taken properly, law involves on top of this a coercive command obliging those subject to it to obedience by means of penalty or punishment.[6] The agent responsible for bringing this law into being is by definition the legislator[7], which (again by definition) is the agent with the authority to issue coercive commands.[8] Even more famously, Marsilius goes on to argue that in the case of human law, the legislator is none other than the citizen-body: only the citizen-body has the authority to issue coercive commands over itself.[9] I leave this argument to one side for the present, although I shall have cause to return to it later.

The passage of chapter 12 refers secondly to the eighth and ninth chapters of Discourse II. The eighth chapter lays it down that law concerns actions which come about through the human cognitive or appetitive faculties, following on from the discussion in Discourse I, chapter 5, where these actions are contrasted with those that are the result of natural causes without our knowledge.[10] Chapter 8 of Discourse II, however, specifies beyond this basic distinction that actions which come about through human cognitive or appetitive faculties can be of two kinds: those that are the result of the *imperium* – let us say, an imperative or command – of the human mind, and those that are not.

> The difference between these 'commanded' and 'non-commanded' acts stems from what we said before: that we do not have full liberty or empire over non-commanded acts as to whether they happen or not, whereas according to the Christian religion, power over commanded acts lies in us.[11]

[5] *DP* II, 12. 2. All translations are my own and form part of a new translation of the entire *Defensor pacis* in preparation for the series *Cambridge texts in the history of political thought*.
[6] *DP* I, 10. 4.
[7] Op. cit., 10. 1.
[8] Op.cit., 12. 2.
[9] Op. cit., 12. 3.
[10] Op. cit., 5. 4
[11] *DP* II, 8. 3.

Marsilius is unwilling to locate non-commanded acts entirely outside the purview of law, at least of divine law, because by our commanded acts we can train ourselves in the matter of non-commanded acts. Still, law is indicated primarily to concern actions which are the result of mental command, those which we have full liberty to do or not to do. The primary subject of law as command, therefore, is the individual human agent understood as a *self*-commander or free. Interestingly, this understanding of the human agent is not presented here as a truth of natural science but of religion, and not simply of all religions (the expressly political nature of which Marsilius highlighted in Discourse I, chapter 6) but of the Christian religion which transcends the political because it contains *true* teachings of a life beyond the human city. Thus, the subject of human law is here an individual and actions the conception of which is imported from divine law – essentially, the man of *free will*, man capable of sin – even though (as we shall see) Marsilius later on presents the human ability to control our own actions as a natural characteristic which is evident to all.[12]

Again following the discussion in Discourse I, chapter 5, Marsilius specifies that commanded acts can be either 'immanent' within the subject or 'transitive' upon another subject. Human law covers only transitive acts; divine law covers both transitive and immanent acts, but for the status of the life to come rather than that of this world.[13] However in chapter 12 of Discourse II, Marsilius emphasises that despite their differences, human and divine law converge in their nature as *command* (*praeceptum*). Commands can be either positive or negative (in which case they are called prohibitions). As well as commands and prohibitions, however, the law also includes permissions – although these are "for the most part not expressed in the laws (especially human laws) in their own specificity, because they are so many, and because a general ordinance concerning them is adequate in

[12] This *natural* dominion is ignored by Alan Gewirth in his insistence on the natural necessity of desire in Marsilius: see his seminal study of Marsilius' thought, Gewirth 1951.

[13] *DP* II, 8. 5: "For the life or sufficient living of this world, therefore, a standard has been laid down for those transitive human acts which are the result of an imperative and which can take place to the advantage or disadvantage, right or injury of someone other than the doer, a rule which commands and coerces its transgressors with punishment or penalty for the status of the present world alone. And this we called by the common name of "human law" in the tenth chapter of the first discourse [...] Now for life or living in this world, but for the status of the world to come, a law was handed down and set in place by Christ. This law is a rule of human acts which are the result of an imperative and in the active power of our mind, both immanent and transitive, insofar as they can be done or omitted in due or undue fashion in this world, but which nevertheless coerces and metes out penalty or reward for the status or end of the future world; and it will impose these in the future world, not in this one, according to the merits or demerits of those who observe or transgress it in the present life."

this matter. For everything that is not commanded or prohibited by law is understood to be permitted by the ordinance of the legislator".[14] All three acts of law – command, prohibition, permission – can be understood either in an active or a passive sense: active, as being the willed imperative of one in a position to issue such a command; passive, as being what is commanded, prohibited or permitted by such an act of will.

This typically gritty discussion yields the definition of another key term in the Franciscan poverty literature, that of the 'licit'. "As a result of this", Marsilius declares, "it can conveniently be clarified, what is this thing that is called 'licit'; since everything that has been done according to a command or permission of the law, or omitted according to a prohibition or permission of the law, has been licitly done or omitted, and can be called 'licit', and its contrary or opposite 'illicit'."[15] It is noteworthy that the 'licit' for Marsilius is not simply a category of what may or may not be done, what we have a licence to do but do not have to do. Something that we are commanded to do or prohibited from doing is equally licit as something we are permitted to do.

All of this, to repeat, amounts to a complete elaboration of the first sense of *ius*, i.e., 'law', which Marsilius had begun from chapter 10 of Discourse I. The elements which occur in chapter 12 for the first time are: the specification of the three acts of law; the distinction between active and passive senses of these three acts; and the definition of the 'licit'. The rationale of all this 'distinguishing' is revealed when Marsilius turns to offer a definition of *ius* in its second sense.

> In a second way, 'right' is predicated of every human act, power, or acquired disposition that issues from an imperative of the human mind, be it internal or external, immanent or transitive upon some external thing or an aspect of it – for example use or usufruct, acquisition, detention or keeping, exchange, and others similar – in conformity with 'right' so-called in its first signification. It is in this signification that we are accustomed to say: 'this is someone's right', when he wills or handles a particular thing in conformity with right so-called in the first sense. Whence such handling or will is called 'right', because it is in conformity with what right commands, prohibits or permits; just as a column is said to be right-hand or left-hand when it is closer in position to the right or left of an animal. Thus 'right' so-called in this second sense is nothing other than that which is willed by the active command or prohibition or permission of the legislator; and this we said earlier was a command,

[14] Op. cit., 12. 4.
[15] Op.cit., 12. 5.

> prohibition or permission in a passive sense. And this is also what we earlier called 'licit'.[16]

In place of the familiar medieval metonymy between *ius* in the sense of law and *ius* in the sense of right, Marsilius here clearly delineates, as Tierney points out, a subjective sense of right specifically distinguished from law.[17] As we can see, however, this second sense of *ius* – the subjective sense – is in fact already contained in the first, since it is the same as the passive sense of command, prohibition and permission, and the same as the 'licit'. The point that Marsilius clearly wants to stress is that *ius* in the second, subjective sense is purely a function, the flipside, of *ius* in the sense of law. It does not delineate any distinctive feature of the human world: it is simply any willed human power, disposition or action in its relation to law. This point is emphatically underlined by the comparison with the way we talk about things being 'on the right' or 'on the left'. This has nothing to do with the things themselves, and everything to do with the fact that there is an animal in the offing. Aristotle had illustrated the relationship between natural and conventional right, assuming the changeability of both, with the assertion that "by nature the right hand is stronger, but it is possible for everyone to become ambidextrous"; Averroes commented that "just as the right hand is right-hand by nature, and the left sometimes becomes right-hand in usage: thus it is the case with things that are naturally just and customs."[18] If this is a source for Marsilius, we can see that he develops Averroes' departure from Aristotle in a radical direction: *nothing* is inherently right or a right independent of reference to positive law.

Marsilius' definition of the subjective sense of right could seem to be almost a caricature of Michel Villey's strictures on the whole notion of subjective rights: that, as subjective powers or faculties of action, they are no more than a function of the law which governs our actions, and thus a symptom of the West's decline from the heritage of classical jurisprudence which perceived *ius* as an independent 'thing' (*chose*) and the object of justice in itself.[19] But there are two points that we could make in this regard.

[16] Op.cit., 12. 10.

[17] Tierney 1991, 2.

[18] Aristotle, *Nicomachean Ethics* 1134b34–35; Averroes' commentary can be found in *Aristotelis opera cum Averrois commentaries*, vol. III p. 74, col. 1. Marsilius as an 'Averroist' is of course an old theme in the literature; I do not find the label very helpful, and I am not here attempting to suggest any such view. It seems clear in the context of the *Defensor pacis* that Marsilius would have drawn upon Averroes' understanding of Aristotle's works as a way to get round the deformations of the Latin tradition, which had, in his view, infected the interpretation of all ancient texts, Aristotle as much as the Bible.

[19] Villey's writings on this subject are numerous, and a complete list of all his works can be found in Frison-Roche and Jamin (eds.) 1995, xiii–xv. The study most familiar within the

The first is that Marsilius' subjective rights, unlike the objects of Villey's polemic, are not just powers or faculties, but attitudes or dispositions and actions as well. They do not exclusively mark out a potential for my action in the world, but may actually *be* my action in the world. As such, rights in Marsilius lack the early-modern sense of being powers or spaces for action which can thus be interfered with or taken away, which is what facilitates their association with notions of property or dominion. Indeed, in the context of his peculiar defence of Franciscan poverty, Marsilius is precisely trying to *avoid* any such association. Thus although this sense of *ius* differs from the first in that it can be said to be 'of' a person – 'this is someone's right' – whereas *lex* cannot, Marsilius cannot mean this 'of' in any sense other than that in which we ascribe any action (or power or attitude) to a person, i.e., the sense in which we might say, for example, that writing this paper is my action. *Ius* in this sense is not a 'thing' that I can 'have' in a possessive sense, although such 'having' can itself be a right in this second sense. This is evident from the next chapter, on supreme poverty, where it becomes clear that at least part of the motivation for defining subjective right as a power, disposition or *habitus*, or action, is that the primary object of Marsilius' analysis is the Franciscan 'having' or *habitus* of external goods.[20] This *habitus*, Marsilius explains, is what some call *simple use of fact*. Marsilius is showing how simple factual powers, dispositions and actions can acquire a juridical qualification in relation to the law.

The second point with regard to Villey's analysis concerns the role of *nomos* (Latin *lex*) in Aristotle's own discussion of the *dikaion* or *iustum*. Aristotle defines the virtue of justice as that disposition, "from which men are doers of just things (*praktikoi ton dikaion eisin*) and from which they do what is just (*dikaiopragousi*) and want just things (*boulontai ta dikaia*)".[21] This definition opens Book V of the *Ethics* and therefore apparently covers both types of justice posited therein: general or universal justice (which the Latin commentators call legal justice, because its object is the *iustum legale* or *dikaion nomimon*) and particular justice which is either distributive or commutative. If so – and the Latin commentators certainly take it that way – then the 'just things', *ta dikaia* or *iusta* of this definition (which the Latin commentators equate with *iura* following Isidore of Seville's ubiquitous etymology, *ius quia iustum*[22]) can either be everything generally required by the laws or the specific objects of particular justice. Aristotle in fact makes it

Anglophone discussion is Villey 1964. However, an equally characteristic expression – and more suitable to our purposes here, since it directly handles Aristotle and the early-modern period – is Villey 1976.

[20] *DP* II, 13. 5.

[21] Aristotle, *Nicomachean Ethics* 1129a8–9.

[22] Isidore of Seville, *Etymologiarum libri II*, V. 3.

clear that "all things which are in accordance with the law are just things in some sense" (*panta ta nomima esti pos dikaia*).[23] As the object of particular justice, what is just may be capable of definition independent of the law, but as the object of general or legal justice it is not. An indication that Marsilius has *iustitia legalis* in mind in defining *ius* in both its first and second senses is that he proceeds to offer a fourth sense of *ius* in which he specifically relates it to *iustitia particularis*: "Furthermore, 'right' is predicated of the act or disposition of particular justice; in this way we say that he who wills what is equal or proportionate in exchanges or distribution, wills right (*ius*) or the right thing (*iustum*)."[24]

Villey argued that the specific achievement of Aristotle, inherited by the Roman law and in the middle ages by Thomas Aquinas, was the isolation of the notion of particular justice as distinct from general justice which is simply a function of the law that governs conduct (and hence a kind of morality rather than justice). In his view, it is characteristic of early-modern subjective rights theories that they ignore particular justice and derive individual rights from the law as areas of individual licence. In this sense Marsilius could again be seen as a paradigm case. However, the fact that Marsilius links subjective rights to general rather than particular justice in fact marks his distance from early-modern understandings, which (*pace* Villey) tend to derive the subjective sense of right as a power or faculty from the *iustum* as the object of particular justice. Aquinas is more ambiguous than Villey cares to admit: on the one hand, he does indeed seem to understand the *iustum* purely as the object of particular justice, for he says that "in our action, 'the just thing' is said to be something that corresponds to another person according to an equality of some kind: for example the payment of a reward due for a service rendered".[25] But he also asserts in the same question that "law is not right itself, but in some way the rationale of the right", suggesting a more general sense of *ius* or *iustum* defined by law.[26] Looking forward to the second scholastic, we see that Francisco Suárez is rather more precise, explaining that the *iustum* can be the object of both general justice and particular justice. However, he suggests that the term is more in use as the object of particular justice; "and", he continues, "in accordance with this latter and strict signification of *ius*, what is properly called 'right' is a kind of moral faculty which an individual has either in respect of his own property or with regard to an item which is due to him. In this sense the owner of an object is said to have a right in that thing and the

[23] Aristotle, *Nicomachean Ethics* 1129b12.
[24] *DP* II, 12. 12.
[25] Thomas Aquinas, *Summa theologiae* 2a 2ae, q. 57, a. 1, in corp.
[26] Op. cit., ad 2.

labourer to have a right to his pay …"[27] Hugo Grotius concurs that *ius* or *iustum* understood in a personal or 'subjective' sense as a 'faculty' is the object of Aristotle's particular justice (whether distributive or commutative).[28] Grotius of course famously equates right in this sense with *suum*, one's own. Right as the object of particular justice can be assimilated to the world of 'mine' and 'thine' in a way that right as the object of general justice resists, and it is significant that Marsilius says nothing more on this subject.

It is quite instructive to look at Marsilius' discussion within the context of contemporary commentary on the *Nicomachean Ethics*, where we can see that Marsilius is not alone in insisting upon distinguishing the different senses of *ius*. Although the two Dominicans, Albert and Aquinas, have no such discussion – at least not in such explicit terms – both Gerald Odo and Buridan, who follows him, tackle the issue directly. Odo distinguishes within the senses of *ius* as part of his discussion of Aristotle's definition of justice, which (as we have seen) suggests that the *iustum* is prior to justice because justice is that by which we do and we will just things. The objection they consider is that on the contrary, justice is prior to *ius*. "For the solution of this question", says Odo, "we have to understand":

> that *ius*, whether natural or of nations or civil or divine or human or of whatever nature it may be thought to be, has four parts: of which each is on occasion called '*ius*'. The first is the command of the legislator. The second is the duty of the subject. The third is a piece of writing, either in letters in a book or mental writing in the soul, pointing out both the commands and the duty. The fourth is the deed that is enjoined and due/required. For *ius* necessarily presupposes a legislator, either God as in divine *ius*; or nature as in natural *ius*; or man as in all human *iura* whatever they may be. Again, it presupposes a subject upon whom *ius* is imposed. Again, a piece of writing, either natural or artificial, in order that *ius* may be made known. Again, a good deed that is capable of being done.[29]

All of these are prior to justice, the virtue of the individual whereby he does and wills what is just or right, because (the argument seems to run) to act justly, the individual must understand the relation of what he does to what is commanded and due. Only an action performed and willed under

[27] Francisco Suárez, *De legibus ac Deo legislatore*, ch. 2 (*Quid ius significet et quomodo ad legem comparetur*), nn. 4–5.

[28] Hugo Grotius, *De iure belli ac pacis*, bk. I, c. 1, n. 8. See the excellent remarks by Haakonssen 1985, passim.

[29] Gerald Odo, *Sententia et expositio cum quaestionibus super libros Ethicorum*, fo. 93v–94r.

these conditions can be a *dikaiopragma* or *iustificatio*, the result of the virtue of justice.

It is clear that Odo's second sense of *ius* is simply the passive of the first, as for Marsilius. Buridan, for his part, agrees with Odo that law or *lex* is the written notification (whether in the mind or in letters) of *ius*, that justice is a virtue of the agent (although it is different for lord and for subject) and that the *iustificatio* is the action that results from justice. On the first two of Odo's senses, however, Buridan has the following:

> we need to take a look at what this term '*iustum*' signifies. Let us say therefore, in summary fashion, that right [*ius*], what is just [*iustum*], law [*lex*], justice [*iustitia*], and the doing of what is just [*iustificatio*] are distinct. For *ius* is the command or ordinance of a lord with respect to his subjects and those things which can fall within the power of his subjects. Now that lord can be either God as in divine *ius* or nature as in natural *ius* or man as in all human *ius* [...] The iustum, however, is what is conceded to anyone in accordance with *ius* i.e., the command or ordinance of a lord.[30]

Thus although Buridan shares Odo's voluntarist understanding of *ius* as the command of a superior – although he makes this rather more explicit – his second sense of *ius* has a more 'modern' sense of right as a space for individual agency granted to someone under a law, so that 'what is right' is something which that individual *has* in some sense rather than *does*. Nonetheless this innovation of Buridan's simply underlines the unfamiliarity of Marsilius' and Odo's understandings from a modern point of view: an entirely non-appropriative and non-exclusive sense of *ius* belonging to a subject which is not defined by what it has – the *suum* – but what it does.

NATURAL RIGHT

As a coda to his elucidation of right in its first sense, Marsilius raises the question of a possible further division of *ius*, into natural and civil – a question which (as he makes clear) again involves the distinction between human and divine *ius*. Here too his discussion is prompted by Aristotle's *Ethics*, for Aristotle – after his treatment of general and particular justice – goes on to insist that what is just, absolutely speaking, is what is politically just:

[30] John Buridan, *Questiones super decem libros ethicorum*, bk. V, q. 2.

> It should not escape our notice that the object of our inquiry is both what is just without qualification and what is politically just. And this lies between those who share a life for the purposes of self-sufficiency, free and equal either proportionately or arithmetically; so that with those for whom this is not the case, there is nothing politically just between them, but only what is just in a sense and by similitude.[31]

What is "politically just" has, itself, two subdivisions: what is naturally just (*dikaion physikon*) and what is legally or conventionally just (*dikaion nomikon*):

> Of what is politically just, one is naturally just and the other conventionally just: natural, that which has the same force everywhere, and does not consist in seeming or not seeming so; conventional, that which originally makes no difference whether it is thus or otherwise, but once posited, there is a difference ...[32]

Correspondingly, Marsilius asserts that the question about natural and what he calls civil right (understanding Aristotle's second category to be the positive law of particular cities) is properly speaking about human right: "There exists another division of 'right' – and properly of human 'right' – into natural and civil right."[33] In glossing Aristotle's 'political' as 'human', Marsilius takes for granted the conclusions of his first discourse: that the sphere of the human, properly speaking, just is the sphere of the political. (Thus Marsilius called the legislator of the political community the 'human legislator', not the political legislator, just because there is no human legislator who is not the political legislator.) But this means that 'natural right' cannot be anything other than a universal civil right:

> And according to Aristotle in *Ethics* IV, the treatise on justice, 'natural right' is said to be that statute of a legislator upon which almost all agree as something honest that should be observed, for example that God should be worshipped, parents honoured, human offspring brought up by their parents until they come of age, that no one should be wronged, that injustices should be repulsed in a way that is licit, and others similar. Although they depend on human enactment, they are called 'natural rights' by transposition [*transumptive*] because they are believed to be licit and their opposites illicit in the same way in all lands: just as the actions of natural entities, which lack purpose, are produced in the same

[31] Aristotle, *Nicomachean Ethics* 1134a24–30.
[32] Op. cit., 1134b18 – 21.
[33] *DP* II, 12. 7.

way everywhere, like 'fire' which 'burns here' in the same way as it does 'in Persia'.[34]

Marsilius had implicitly denied the existence of an innate natural law, in the full sense of law, earlier on in the tenth chapter of Discourse I. It follows from his definition of law, properly speaking, as the coercive command of a legislator. Marsilius will not, like Odo, admit nature as a legislator because nature in Marsilius lacks the requisite characteristics of will and authority, nor does Marsilius think that reason is sufficient for law, hence natural reason cannot have any properly legal force. For him, the world of the legal, the world of the political, is a world created by human discoveries and opposed to the unmodified natural world studied by natural science. According to Marsilius, then, natural laws are simply those human laws which are the same everywhere. They are not natural in the sense of innate or deriving from nature. Marsilius resists the widespread association (we find it in Albert, Aquinas, Odo and – although less simply – Buridan) between Aristotle's definition of natural right as that "which has the same force everywhere, and does not consist in seeming or not seeming so" and Cicero's definition of natural *ius* from the *De inventione*: "The law of nature is that which is not born of opinion, but implanted in us by a kind of innate force".[35] Rather, laws are called natural by a *metalepsis* or transposition suggested by the case of natural things like fire, which does burn everywhere in the same way because of its innate characteristic or natural force.[36] One should point out by way of consequence – although Marsilius does not do so

[34] *Ibid*.

[35] Cicero, *De inventione* II, 53, 161, modifying the Loeb translation slightly to capture the basic meaning of '*vis*'.

[36] The rhetorical figure of *transumptio* is technically the Greek *metalepsis* rather than *metaphora* (as Gewirth's translation has it). However, the matter is complicated by the fact that it is hard to find a stable definition of *metalepsis*, now as much as in the medieval and early-modern periods. The most common ideas is that it is a double metonymy, or 'the metonymical substitution of one word for another which is itself figurative' as the *Oxford English Dictionary* has it. More specific definitions and usages involve the idea that it is a metaphor substituted for a cause, or more plainly an effect taken for a cause or vice versa. However, Donatus in *De tropis* adopted Quintilian's definition of the figure (which would not have been directly available to Marsilius) as a kind of medium by which one proceeds from one term to another, and some medieval treatments (perhaps in consequence) appear to associate it or indeed to identify it precisely with metaphor, for example Aquinas: "ea quae metaphorice dicuntur, possunt varie accipi secundum adaptationem ad diversas proprietates eius unde fit transumptio" (*In librum IV Sententiarum*, d. 49, q. 5, a. 1, ad. 1). I myself do not think that the term has the sense of metaphor in Marsilius' handling. What he is trying to say, I think, is that an effect of something's being natural (i.e., being the same everywhere) has been transposed onto the thing itself.

explicitly – that if there are no genuine natural laws, then by Marsilius' definition there cannot be any genuine natural subjective rights either.

Aristotle himself, however, allows for a qualified sense of human right that obtains outside the political community, within the household. Although there is no right at all between master and slave and father and child – because slave and child are equally part of the master and father, and therefore the question of justice does not arise – there is right of a kind ('domestic right') between husband and wife. Marsilius too modifies the exclusively political definition of human *ius* by allowing for human activity outside the political community, within the village and – though in a more imperfect sense – within the household. This is because Marsilius allows for a development within human association from the less to the more perfect, avoiding a clear line between unmodified nature and perfected political community. The village elder rules the community with "something like a natural law", which Marsilius depicts as a notion of equity *almost* immediately apprehensible by common human reason (not immediately, because then it *would* be natural, like sense-perception) and therefore assented to by all. By contrast, the head of household can disregard strict equity among his children, partly because injuries done to them cannot be separated off from injuries done to him: "for what is just in a civil sense does not properly exist between father and son", as he says. The reference is to Aristotle in Book V of the *Ethics*, but as we have seen, Aristotle allows no justice at all between father and child. Interestingly, Marsilius in his account of the primary, imperfect communities also fails to make any mention of Aristotle's natural community between natural master and natural slave. It seems, therefore, that Marsilius is unwilling to think of any human being as totally outside the sphere of human *ius*, at least in a dilute sense: someone who cannot be the victim of injury or injustice at all because they are simply a part of someone else. Marsilius does at one point talk about the barbaric and slavish nature of certain peoples who submit to a certain form of monarchical rule.[37] But even here, the rule they submit to is, precisely, a monarchy – a political form of rule – even though it bears some marks of tyranny or despotical rule.

As I shall suggest in my final remarks, I am tempted to relate this departure from Aristotle, effectively the denial of natural slavery or total natural subordination, to Marsilius' emphasis on human beings as natural self-commanders. Meanwhile, on the subject of natural law, we should notice finally that Marsilius also resists that definition which assimilates it to divine law by way of right reason:

[37] At *DP* I, 9. 4.

> There are those, however, who call 'natural right' the dictate of right reason in respect of things which can be done, and place it under 'divine right': in that everything that is done in accordance with Divine Law and in accordance with the counsel of right reason is licit, without qualification; but not so everything done in accordance with human laws, since in some things these laws are deficient in right reason.[38]

For Marsilius, to call the dictate of right reason natural is to equivocate on the definition of 'natural'. Right reason is neither natural in the sense of part of the constitution of man studied by natural science, nor natural in the sense of universally admitted. 'Natural right' as what is unqualifiedly licit is simply divine right.

> And thence it also arises that there are some things that are licit according to human law which are not licit according to Divine Law, and *vice versa*. But in those commands, prohibitions or permissions in which they are at odds, what is licit and illicit in an unqualified sense should be taken according to the Divine Law rather than the human.[39]

There exists, therefore, an *entirely* extra-political dimension of right, and moreover one which appears to have juridical priority. But it is of the essence of Marsilius' argument that this juridical priority has no legal force in this world.

IUS AND *DOMINIUM*

I suggested at the outset that what motivates Marsilius' discussion of right is a desire to show that the supreme poverty defended by the radical Franciscans as the way of Christ, and thus as the road that anyone who wishes to be perfect must follow, is not illicit or practised without right. In this he is responding specifically to the new terms of the poverty controversy laid down by the challenge of pope John XXII. Like Ockham, he rejects the sort of solution to John XXII's challenge offered by Bonagratia of Bergamo, that the use made by 'the perfect' of the things of this world lacks any juridical qualification at all. Unlike Ockham, however, he is not prepared to say that this use is only quasi- or metaphorically just, or that the perfect do not have any rights in the strict sense even though their actions can be licensed under human law. Nor is he prepared to say that supreme poverty is illicit or not-right in human terms though licit or right in the eyes of God or

[38] Op. cit., II, 12. 8.
[39] *Ibid*.

by divine law. And neither can he say, finally, that the perfect have a natural right of use rather than a human or civil right of use, because he has of course denied the possibility of a natural right in that sense. We have seen one half of his solution: that right in a subjective sense is no more than voluntary human agency (taking agency globally as consisting of power, disposition and acts) in relation to law. The other half is to define *dominium* – what poverty lacks – as sharply and narrowly as possible, so that it ceases to be necessarily implicated in right as the earlier Franciscan understanding of poverty had held.

Marsilius defines *dominium* strictly as:

> the principal power of claiming for oneself something which has been acquired by right so-called in its first signification: the power, I emphasise, of a knowing and consenting individual, whose will it also is that no one should be allowed to handle that thing without his express consent, sc. as its owner, just as long as he has it in his *dominium*. But this power is nothing other than the will, in act or in disposition, to have in this way a thing that has been acquired by right, as we said, and indeed this is said to be an individual's 'right', since it is in conformity with right so-called in the first sense.[40]

More broadly, *dominium* can be understood as the same power, either only over the object itself or only over its use or usufruct or over all of these; and it can also be understood as the same power, not belonging to a knowing and consenting individual, but to one who does not expressly renounce it either, for example an infant or someone absent or ignorant. In all these cases it is the same power, however, and Marsilius generally refers hereafter to "*dominium* in any of the three senses given above".

By this definition, *dominium* is necessarily a right, but the converse is not true. *Dominium* in all of its three legal senses is a power, whereas a right is not necessarily a power, but can be a disposition or act as well. Moreover, *dominium* is the very specific power to claim in a human legal court before a coercive judge. In both Marsilius and Ockham, the power to claim in court is what the Minorites lack. But in Ockham's handling, the power to claim something in court is common to both *dominium* and human legal right: if I have a legal right to use something, then I also have the power to vindicate it against you in court.[41] Marsilius' contrasting thesis has the odd consequence that a Franciscan brother (or in general, one of the perfect) has a human legal right to catch and eat a fish that belongs to no one, but no power to claim it for his own if someone snatches it away, because the fish remains *in bonis*

[40] Op. cit., 12. 13.
[41] William of Ockham, *Opus nonaginta dierum*, c. 2, 302.

nullius and therefore anyone may occupy it by right.[42] Such an act of occupation would, Marsilius emphasises, be wrong by divine law – especially if the Franciscan withheld consent and was in need – even though licit by human law: the two can conflict, as Marsilius had been careful to spell out, and where there is such a conflict, what is absolutely just should be taken from divine law rather than human law. Nonetheless it seems a strange consequence that both the act of the perfect and the act of the snatcher are licit and right under human law. Marsilius' whole claim about human law is that it provides a standard whereby human voluntary acts may be measured and made commensurate. It is one thing to say that something can be right, measured against human law, but wrong measured against divine law – this is an old and familiar idea. It is quite another to say that two directly conflicting acts can both be right measured by the same standard.

"Now the kinds of dominion that we have just mentioned", Marsilius continues, "are legal, in that they are or are capable of being acquired by the ordinance of the law or its legislator and by human choice".[43] That is, they belong in the world of the human political, which is a world of law, of choice or election and of virtue, as opposed the natural world of unchosen and unperfected powers, the science of which is natural science not political science. Marsilius goes on, however, to specify a fourth type of *dominium* which is by implication natural as opposed to legal:

> This term *dominium* is also predicated of human will or freedom in itself, with its organic power of execution or of motion unimpeded. For by these we have the capacity for certain actions and also for their opposites. For this reason, too, man alone among the other animals is said to have *dominium* of his own actions; and this, indeed, is in man by nature, not something acquired voluntarily or by choice.[44]

Again, *dominium* here is a power, but a natural as opposed to a legal power. This *dominium* is not just natural by a *metalepsis*, it is natural as being part of our nature: a natural power over our own actions that (by definition) we have not chosen by an act of will. It is the essence of the will and choice, but it is not itself willed or chosen. As such it cannot be a right, as legal *dominium* is, because it cannot be in accordance with law which only covers the voluntary. Nor can it be abdicated by an act of will. Marsilius makes it plain in the next chapter that although the perfect lack or all legal *dominium*, they cannot lack natural *dominium*:

[42] *DP* II, 14. 19. If the fish belongs to someone else, of course, who has given the perfect a licence to catch and eat his fish, then the snatcher commits an offence against the owner, not the perfect.

[43] Op. cit., 12. 15.

[44] Op. cit., 12. 16.

> But if *dominium* is understood in its final sense, sc. for human will or liberty, together with the natural potential for movement which is connatural to us and not acquired; then I say that we cannot, at our own prompting, handle any thing or any aspect of it, either licitly or illicitly, without such *dominium*, and nor can we abdicate such *dominium*. And because this is familiar to everyone of itself, since without these powers no one can remain in being, I pass over this point without any other proof in order to keep the discussion short.[45]

Natural human freedom is thus the foundation to the entire world of the legal (both human and divine) but does not of itself have any legal, juridical or moral force. We can contrast this with the understanding of two giants of the thirteenth-century poverty controversy, Bonaventure and Aquinas, who both explain the natural God-given dominion over the things of the earth in the first chapter of Genesis – a text which Marsilius passes over in absolute silence! – as the consequence of natural self-dominion which is that whereby we are made in the image of God. For them, the dominion that human beings have over their own actions is founded on the self-dominion or reflexivity of the spiritual powers of intellect and will. Thus, the human will is not unwilled, as Marsilius wants, but wills itself; and human freedom is not just an inescapable natural fact, like having two legs, but a willed phenomenon that in consequence both has moral value of itself and can be abdicated for a higher value.

It is self-dominion in this sense that stands at the heart of the sixteenth-century neo-Thomist handling of rights and dominion, from Vitoria to Suárez. The more humanistically-derived theory of Grotius, too, involves – though in a different way – a claim about the natural moral and juridical force of human liberty. It is not just a fact but a good; and not simply a characteristic of the way all human beings live but something that is involved in pursuing *my* life as distinct from, and possibly as opposed to, *yours*. By contrast, it is both the banality – we might almost say – of subjective human liberty in Marsilius, and the absence of any sense of its being a dimension (or indeed assertion) of the self, that distances his ideas in Discourse II most fundamentally from any early-modern understanding of rights and their human subjects. The commitment to a natural morality and natural rights involved in the latter is anathema to Marsilius' entire understanding of the sphere of the human, and the sphere of the juridical, as the sphere of the political. But I want to finish by turning – precisely – to the political as outlined in Book I, and by attempting to relate Marsilius' deliberately thin understanding of human liberty in Discourse II to the political liberty of Discourse I.

[45] Op. cit., 13. 9.

CODA – POLITICS

So far we have met human freedom in two contexts: the capacity to issue our own mental imperatives that Marsilius posited in Discourse II, chapter 8, and the natural dominion over our own actions that he describes in chapters 12 and 13. Despite the divergent contexts, Marsilius uses the same word, *libertas*, to characterise both, and in both cases it is something that enables us to govern our own actions. However, the word *libertas* is not restricted in Marsilius to the natural characteristic that marks human beings off from things like fish, or the freedom of the will which is a truth of religion. *Libertas* is also a political characteristic that necessarily belongs to the self-sufficient political community. Now one might argue that these are simply two different uses of the word *libertas*. It is not clear to me, however, that Marsilius' political freedom is purely the collective freedom of the *civitas libera*. Let us return to Marsilius' argument that I mentioned at the beginning of this paper, that the authority to issue coercive commands over the citizens with a civil community belongs only to the citizen-body. Justifying this position in Discourse I, chapter 12, Marsilius refers to Aristotle:

> because 'the city is a community of free men', as is written in *Politics* III, chapter 4, any and every (*quilibet*) citizen should be free and not suffer the "mastery" [*despotiam*], i.e. slavish *dominium*, of another. But this would not be the case if some one or few of the citizens passed law upon the body of the citizens on their own authority; for in legislating in this way, they would be the masters of the others.[46]

Only if the legislator is the citizen-body does political rule not violate freedom. But as Gewirth rightly stressed[47], Marsilius makes it plain that we are here talking not of the freedom of the citizens as a body, but as individuals: *quilibet civis* should be free, in the sense of not being subject to slavish dominion (*servile dominium*).[48] Slavish dominion seems, in this passage, to be subjection to the personal authority of another or others in the sense that they can command one's actions. But as such, it appears not merely to be the antithesis of the freedom of the citizen, but also that of the human subject of Discourse II: either as posited by the Christian religion or as a matter of natural fact. Slavery defies the self-command that should

[46] Op. cit., I, 12. 6.

[47] Gewirth 1951, 223.

[48] Most interestingly, although slavery and *servile dominium* are things that Marsilius recognises and appears to admit in his republic (cf. *DP* I, 12. 4), this kind of *dominium* is not offered as one of the possible senses of *dominium* in chapter 12 of Discourse II: it is almost as if this is not a proper use of language, just as it is a phenomenon that defies natural human development.

characterise human beings as natural beings, as citizens and as subjects of divine law.

If this is so, it begins to seem as if liberty is something of a loose cannon in the Marsilian republic, breaking through the clear distinctions he wants to make between the natural, the human-political, and the divine – the natural world, this world, and the next – and thereby threatening the essence of his anti-papal strategy, which is to isolate the political in its legislative self-sufficiency. It is this, I think, that explains an otherwise puzzling feature of the *Defensor pacis*: that in a work which seems so obviously to be about freedom and against slavery – compare the rhetorical sweep of the opening chapter of the book, in which Italians are said to be "deprived of the sufficient life, unceasingly enduring grave troubles instead of the sought-for peace, the harsh yokes of tyrannies instead of liberty"[49] – Marsilius in fact says very little about what freedom actually is and why it is so important. On my analysis, this is not because freedom is not an important value to him. On the contrary, freedom is central to a developed – i.e., a civil – human life: "those who live a civil life do not just live – which beasts or slaves do – but live well, sc. having leisure for the liberal activities that result from the virtues both of the practical and of the theoretical soul." [50] To be a slave, to be at the command of another, leaves individuals with no opportunity to practice (and therefore, on the Aristotelian model of habituation, to develop) their native potentials, which is what it is to live a properly human or what Marsilius calls 'the sufficient' life. But a full analysis of human liberty as self-command must, for the present, be strategically bracketed. Marsilius cannot really say any more on this subject in the context of his argument, for it comes close to acknowledging (like later rights theories) a natural, and indeed religious, value of self-command which compromises the autonomy of the political to set its standards for itself.

It appears, then, that Marsilius deliberately thinned down his analysis of human liberty, just as he thinned down the teleology of moral self-development which is what other Aristotelians, both of his day and since, have found so attractive in Aristotle's ethics and politics. In the situation in which he saw himself and his fellow-citizens, to concentrate on these aspects risked delivering his readership straight back into the welcoming arms of the pope. But that does not necessarily mean they are not there, that Marsilius' politics emphasises the efficient cause almost to the exclusion of the final cause, and that moral and intellectual values are subordinated to the practical ends of the city.[51] Rather, the apparent slide between liberty in each of the three domains (nature, city, religion) may point us to something deeper, the

[49] *DP* I, 1.2.
[50] Op. cit., I, 4.1.
[51] Cf. Gewirth 1951, 32–67.

ultimate continuity of all these spheres that can only be glimpsed once one has disentangled the false continuities made by the papalists as the basis for thinking about politics. To think in purely political terms, including a serious and sustained attempt to think of *ourselves* as political *animals*, was Marsilius' extraordinary achievement among medieval Aristotelians and still makes difficult reading today. But we should understand this less as Marsilius' *theory* of human nature and of politics – a word that implies abstract speculation – and more as a radically new vision that Marsilius gave to every individual as a tool to start thinking and acting for himself in what he saw as a situation of tyranny: a fresh lens through which present political distortions can become clear for what they are. But is it also a ladder that western Christians have to climb up but can then – only when the proper functioning of the political has been restored, and even then always only as individuals and never as officials – throw away?

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Rights and Self-Ownership

Chapter 5

SUMMENHART'S THEORY OF RIGHTS

A Culmination of the Late Medieval Discourse on Individual Rights

Jussi Varkemaa (University of Helsinki, Finland)

Conrad Summenhart's (1455–1502) principal work, *Opus septipartitum de contractibus pro foro conscientiae et theologico* (c. 1500), presents economic life as a phenomena that can in great measure be analyzed in terms of the rights possessed by individuals.[1] The obvious point of departure is that individual subjects have rights in things (*ius in re*). The fact that rights can be priced by and transferred through contracts is the basic prerequisite for economic exchange that also enables the evaluation of economics from the viewpoint of justice. The task of the moral theologian, which Summenhart takes up in the pages of *Opus septipartitum*, lies in analyzing the actual and possible contractual situations into which economic actors enter, and defining the cases in which economic activity meets the requirements of morality. Summenhart's work in *Opus septipartitum* is a skillful demonstration of late medieval moral casuistry, but he also made a direct contribution to the medieval language of rights. In order to emphasize the centrality of rights in conceptualizing economics, Summenhart began *Opus septipartitum* with a preliminary treatise in which the subject matter was the rights of the individuals. His discussion was not confined to the juridical *iura*

[1] Summenhart (born in Calw, c. 1458), studied philosophy in Heidelberg and Paris, and theology in Tübingen. In 1489, he received his degree in theology and three years later (at the latest) he was acting as *ordinarius,* occupying the chair for *via antiqua*. Summenhart also acted as the dean of the faculty of philosophy and was the rector of the university on four occasions. He died in 1502. See Feld 1992.

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 119-147.

in re that were prevailing in economic life, but he delivered a broader account that might with good reason be characterized as a theory of individual rights. Summenhart initiated his discussion by setting forth the general notion or concept of an individual right. In the next phase, he classified the variety of rights and organized these classifications into a comprehensive system. From this broad theory Summenhart moved into more particular and contextual discussions, and finished his inquiry by summarizing contemporary views concerning property rights as defined by civil law: *usus*, *usufructus*, *possessio* and *proprietas*.[2]

In this paper, my aim is to present Summenhart's theory of individual rights as a culmination of the late medieval discourse on rights. This is a twofold task. First, I will shed some light on the late medieval discussions that seem to form the relevant background for Summenhart's own view. The second part will deal with the basic tenets of Summenhart's theory. My aim is thus to locate Summenhart's theory of individual rights within a historical continuum in a way that will both demonstrate the medieval roots of his theory, and enlighten his specific contribution to the history of the theory of rights.[3]

A significant part of the medieval language of rights was created in a series of debates that at first sight were not concerned with rights at all, but instead were focused on the elevated ideal of the perfect state of human life and the Franciscan interpretation of this as apostolic poverty in the thirteenth and fourteenth centuries.[4] The controversy about poverty began in the middle of the thirteenth century, when members of the mendicant orders (Dominicans and Franciscans) were driven to define and justify, morally and juridically, a way of life that was characterized by living in voluntary poverty. In general, the mendicants emphasized voluntary poverty as their expression of religious perfection. Poverty was thought to be an immediate response to Christ's explicit mandates: "If you wish to be perfect, go and sell your possessions and give the money to the poor" (Mtt. 19:21). Despite their common starting points, the Franciscans and the Dominicans provided different interpretations for this call to poverty. The Dominicans laid emphasis upon the appropriate disposition of the soul, rather than on the

[2] *Opus septipartium* is best known for its progressive views on political economy. See Ott 1957 and Noonan 1954, 233–235, 340–344. The work was first published in the year 1500. There were several editions during the 16th century and the work was also known under the titles *Septipartitum opus de contractibus* and *De contractibus licitis atque illicitis*. I have used the 1513 edition by H. Gran (Hagenau).

[3] For two interesting recent studies concerning medieval and early modern discourse of rights, see Brett 1997, and Tierney 1997. Both of these studies include a chapter on Summenhart. For Summenhart's language of rights, see also Seelmann 1979.

[4] There are several studies on the origin and development of this debate. See, e.g., Leff 1967, 51–255, and Mäkinen 2001.

actual renunciation of material things, and adopted a more modest practice: the Dominican brothers did not own anything in private, but everything was commonly held in the sense that they – taken to mean the Order – had common ownership of the things they possessed.[5] The Franciscans, however, completely denied the possibility that either Christ or his apostles would have owned anything at all even in common. They maintained that Christ and his apostles were poor in the explicit sense that they owned absolutely nothing. Their interpretation of the genuine apostolic poverty led them to argue that they, the Franciscans – seen as individual brothers as well as a religious order – did and should not own anything. This was an extreme and legally peculiar position that positioned the Franciscan ideal of apostolic poverty in the centre of a controversy which went on until the middle of the fourteenth century.[6]

The reason for this debate developing into one of the formative discourses on rights was rooted in the way the Franciscan theorists defined and justified their way of life. The Franciscans stressed that they had renounced all of their rights in relation to material property. They did not have any property rights, *iura in re*. This voluntary renouncement of legal titles was also accompanied by the notion that the Franciscans had given up all claims and effort toward holding social power and status. The legal self-understanding of the Franciscans was to promote and depend on a dichotomy between two realms: the factual realm and the realm of rights and dominion. The Franciscans located their relationship to material things within the realm of factuality: they were simply using the things that they needed for their daily life and profession. Rights and dominion, if anything, represented the antonym of the Franciscan way of life: rights and dominion were representative of a possessive and dominating relationship towards the things of this world, which the Franciscans by no means wanted to take part in. They had renounced all rights and they had renounced all dominion in this world. This was the definition of Franciscan poverty in legal terms.[7]

PETER JOHN OLIVI

An interesting example of the use of the term 'right' was given by a Franciscan named Peter John Olivi (1248–1297) in one of his disputed

[5] For the Dominican poverty, see Hinnebusch 1965, 145–168.

[6] For the Franciscan poverty, see Lambert 1961; Mäkinen 2001.

[7] See Brett 1997, 11–20; Mäkinen 2001, 55–94. To be precise, it is actually missleading to speak of the Franciscan or the Dominican view of apostolic poverty because there were several Franciscan as well as Dominican views of dominion and *usus*. See Madigan 1997.

questions (*questio disputata*), which was later named *Quid ponat ius vel dominium* (c. 1295).[8] Olivi's treatise is an academic piece of work in which Olivi operates with the language of rights, but his main interest is in metaphysics. His inquiry concerns the reality of rights and obligations. Olivi points out that when we are dealing with matters of justice, we use such words as 'right' (*ius*), jurisdictional 'power' (*potestas*) and 'authority' (*auctoritas*), or 'debt' (*debitum*) and 'obligation' (*obligatio*). The main question for Olivi here is whether the objects signified by such words have any real existence.[9] After setting forth a scholarly discussion, Olivi presents his own response, which is twofold. On the one hand, he defends the reality of rights and obligations. He maintains the view that the language of rights does indeed posit a specific kind of reality. At the same time, Olivi is denying the possibility that rights and dominion, political authority and power, are 'real' in the physical or essential sense; they do not posit any real accident that could belong to the person who holds the right or obligation.[10]

Olivi's view is that rights and dominion, 'authority' and 'power' do not belong to physical reality. Instead, they are part of what he calls 'the rightful order' (*debitus ordo*). Olivi's point is that the existence of human beings is not an isolated, but a related or ordered mode of being. Human beings are related to God and other creatures (including their fellow men), with obligation-relations and with relations of superiority.[11] The reality of this 'rightful order' derives from the will of God. Olivi seems to think that God wills the actuality of actual beings as well as the rightful order which is meant to regulate the relations of the human beings to each other and to other creatures. Yet, this order of rightful relations 'does not add anything to the essence' of the persons and things involved. So, it is possible to set forth the reality of rights and dominion, obligations and debt, kingly authority and power, without the need to postulate corresponding additional entities to this world.[12]

[8] See Doyle 1987.

[9] Peter John Olivi, *Quid ponat ius vel dominium*, 316: "Quoniam, in omni opere et nogotio iusticie, nomine iuris seu iurisdictionalis auctoritatis et potestatis ac debiti et obligationis utimur, sitque a quibusdam quesitum sepe an huiusmodi addant realiter aliquid supra subiecta vel extrema quibus attribuuntur…"

[10] Op. cit., 323: "…predicte habitudines vere ponunt aliquid reale, non tamen addunt aliquam diversam essentiam realiter informantem illa subiecta, quorum et in quibus esse dicuntur."

[11] Op. cit., 323.

[12] Op. cit., 323: "Et si queratur quid ponit realiter ordo ille, potest dici quod duo sibi invicem connexa, quorum primum est ipsum velle divinum in quantum est talis voliti et in quantum continet in se illud volitum, secundum est entitas et essentia actualis ipsius voliti prout est actualiter subsistens divino velle tanquam eius actuale obiectum seu volitum. Si igitur nichil est realius et divinius divino velle et si post Deum nichil realius aut divinius quam esse actuale volitum Dei et precipue quando est ad hoc volitum ut actu super alios great et

Olivi's treatise was not directly involved in the controversy about the Franciscan legal position, although Olivi shared the basic Franciscan tenets. His treatment equated right with dominion and associated right with political authority or power.[13] In an indirect way the distinction that Olivi draws between the physical order and the rightful order works in favour of the Franciscan ideal. This distinction underlines the nature of the Franciscan *simplex usus* as an activity that belongs to the factual realm and does not involve any rights in use. Olivi's remark concerning power that belongs to the realm of rights gets at the crux of the matter: "royal power or the like, because it is solely a power of right (*potestas iuris*) it is not a natural and naturally agent power." This power of right is, nevertheless, a real power. This is a point Olivi seeks to underline, as he emphasizes in another chapter:

> In order to understand it even more clearly, it is to be known firstly that the royal power or all other similar powers are called powers not because they would originate and impress actions upon a patient in the way that active potencies do, but rather because the king's precept has by the order of divine and human will and justice such a force that the men of his kingdom are obliged to be obedient, and because of this we say that the king has power of promulgating precepts and laws that oblige his subjects in regard to their fulfillment.[14]

The power of right belongs to 'the rightful order'; it is called 'power' because of its obliging force, and is not power in the sense of physical power. Here, we see the distinction between the realm of rights and the realm of fact, as expressed in terms of power.

Like in other thirteenth century Franciscan authors, the interest in rights in Peter John Olivi is indirect in the sense that he is not trying to explain what is meant by the Latin term *ius*?[15] As the controversy continued into the next century, such an indirect and unreflective approach to rights changed. The elementary question about whether or in what sense material things can be used without rights was naturally dependent on another question: What do we mean by 'right' in the context of using material things? In the early

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teneat vicem Dei, patet quod ordo predictus est quid realissimum et divinissimum, quamvis nichil realiter addat super predicta diversum."

[13] Among the Franciscans, Olivi was inclined to a radical interpretation of the Franciscan poverty. See Burr 1989.

[14] Peter John Olivi, *Quid ponat ius vel dominium*, 329: "Ad cuius pleniorem evidentiam sciendum primo quod potestas regia vel quecumque alia consimilis vocatur potestas non quia ad modum potentiarum activarum ex se influat et imprimat actiones in aliquod patiens, set potius quia ex ordine divine et humane voluntatis et iustitie preceptum datum a rege habet talem vim quod homines sui regni tenentur obedire, et ideo dicimus quod rex habet potestatem edendi precepta et leges obligantes subditos suos ab illa implenda."

[15] For the thirteenth century language, see Mäkinen 2001.

decades of the fourteenth century, the relevance of this question was gradually realized and answers were given on both sides of the front line. An example of this stage of discussion is the anti-Franciscan work *De paupertate Christi et apostolorum* by the Dominican Hervaeus Natalis from the beginning of the 1320s.[16]

HERVAEUS NATALIS

In *De paupertate Chisti*, Hervaeus Natalis (d. 1323) paid attention to two central notions which played a fundamental role in the legal self-understanding of the Franciscans. The first notion was the distinction or dichotomy between the factual realm and the legal realm that enabled the Franciscans to claim that they renounced all rights in material things and were committed to simple factual use of things. The second notion was the claim that the Franciscan's way of life imitated the life of Christ and his apostles and was therefore exemplary of the perfect way to live a human life. For Hervaeus, these two idioms were incompatible with each other.

The starting point for Hervaeus's argumentation is his understanding of the idea of perfect living. Hervaeus was a declared Thomist, he acted as the master general of the Dominican Order, and his view of perfect living reflects his Thomistic inclinations. He equates perfect human life with a virtuous moral life, posing charity as the principle virtue.[17] The problem with the distinction between factual activity and action by 'right' is that, from the viewpoint of morality, there is no human action that could be categorized as simply being factual action. Because of this fact, the distinction between factual action and action by 'right' needs to be evaluated in the light of the moral distinction between licit and illicit action. This is what Hervaus intends to do:

> It is to be known that there are two kinds of power by which someone can act something with respect to a thing, namely the power of fact or of execution, as a person can *de facto* eat something eatable or drink something drinkable, whether or not this thing is his in regard to use and *dominium*. A person may have another power with respect to a thing by which he is not merely able *de facto* to use this thing or alienate it, but

[16] For Hervaeus's role in the debate, see Hervaeus Natalis, *The Poverty of Christ and the Apostles*, 1–19.

[17] Hervaeus's interest was focused on the personal perfection (*perfectio personae*) instead of the perfection of a state (*perfectio status*). *De paupertate Christi*, 247: "...ad perfectionem personae pertinet essentialiter caritas et aliae virtutes et actus earum, sicut illud quod est essentialiter perfectio."

> also by which he can alienate and use it licitly and as it were his own, and this power we call the power of right.[18]

Hervaeus assimilates licit human action with action that takes place by the power of right. This entails a twofold argument against the Franciscans. On the one hand, it is admitted that the Franciscan position is indeed a possible one. It is certainly possible for a human being to use material things simply by exercising factual power. On the other hand, however, Hervaeus's account labels simple use without rights as an illicit use. If the Franciscans use material things without any rights, they are acting illicitly, which obviously cannot be consistent with perfect human living.[19]

As distinct from previous theorists involved in the Franciscan case, Hervaeus shows a direct and reflective interest towards rights. The distinction between the power of fact and the power of right is meant to provide an answer to the question of what is a right:

> It is to be known that these names *dominium*, *ius* and *proprietas* mean the same with respect to a thing. For they mean nothing else but to have power in a thing by which one can licitly use a thing or alienate a thing, whether by donation or by sale or by some other way.[20]

To have a right, dominion or property is equal to having licit power of acting. This is not a definition of 'right' in general, or of the concept of a right, but of the juridically understood 'right' in the context of discussion, in

[18] Op. cit., 236: "Unde sciendum quod duplex est potestas qua aliquis potest aliquod agere circa aliquam rem, videlicet potestas facti sive executionis, sicut homo de facto potest comedere aliquid comestibile vel potare aliquid potabile, sive sit suum quantum ad usum et *dominium* sive non. Aliam vero potestatem convenit homini habere circa rem aliquam qua non solum potest de facto uti illa re vel alienare eam, sed etiam qua potest licite et tamquam suam alienare eam et uti ea, et hanc potestatem vocamus potestatem iuris."

[19] Op. cit., 249: "... sed usus in quacumque re sine iure in use et uti rebus quae consumuntur ipso usu et usus in rebus sine iure in ipsis rebus est illicitus [...] Sic ergo patet quod habere temporalia quantum ad ius et dominium, immo ad vivendum licite, necessarium est habere ius in ei et in usu eorum..." Brett (1997, 15) has argued that Hervaeus's "strategy is to accept the old Franciscan dichotomies between *dominium* and poverty, and then to argue that absolute poverty is impossible for a human being as a rational creature". I do not find her interpretation satisfying. In Hervaeus's view, absolute poverty was possible but illicit for a human being.

[20] Hervaeus Natalis, *De paupertate Christi*, 235: "... sciendum quod ista nomina, '*dominium*', '*ius*', et 'proprietas', idem dicunt in re. Nichil enim aliud dicunt quam habere potestatem in aliqua re per quam possit licite re aliqua uti vel rem aliquam alienare, et hoc vel per donationem vel per venditionem vel per quemcumque alium modum."

which the usage of material things is analysed from the viewpoint of moral action.[21]

WILLIAM OCKHAM

In the Franciscans' defence, the next relevant treatise was William Ockham's (c. 1285–1347) *Opus nonaginta dierum* (c. 1334). Ockham's book made a blow-by-blow refutation of the anti-Franciscan arguments that Pope John XXII had introduced in his bull *Quia vir reprobus* (1328). John's arguments were indebted to the Hervaeus Natalis's treatise *De paupertate christi et apostolorum*. In fact, John XXII had approached Hervaus (among others) for advice concerning the Franciscan case and Hervaeus's treatise was an answer to the pope's request.[22] Due to this indirect connection between Ockham and Hervaeus, it is not surprising to find certain similarities between the terminology that these two men employed. As far as the language of rights is concerned, it can be said that Ockham followed the road that Hervaeus built and developed the association of 'right' with the idea of licit power one step further.[23]

The central term for Ockham in *Opus nonaginta dierum* is the right of using (*ius utendi*) which he takes to be the very term corresponding to the notion of a positive juridical right in the context of using extrinsic objects. For Ockham, *ius utendi* is a common denominator for all *iura in re*: "right of using belongs to him who has *usus nudus* and also to him who has *ususfructus* and not only to them, but often belongs to him who has *dominium* and *proprietas*." The right of using is thus a generic notion when speaking of the juridically regulated use of things.[24]

Ockham characterized the right of using with the following definition:

> a right of using is a licit power of using an external thing, of which one ought not be deprived against one's will, without one's own fault and without reasonable cause, and if one has been deprived, one can call the depriver into court.[25]

[21] My view is that Hervaus's definition of right as licit power of acting was determined by the dichotomy between the factual realm and the realm of rights. Licit power and juridical power were identical. Cf. Tierney 1997, 104–108; Kriechbaum 1996, 64–68.

[22] Hervaeus Natalis, *De paupertate Christi*, 217–218.

[23] It is probable, although not certain, that Ockham was familiar with Hervaeus's work. See Tierney 1997, 105–108.

[24] William Ockham, *Opus nonaginta dierum*, c. 2, 304. See Brett 1997, 63.

[25] William Ockham, *Opus nonaginta dierum*, c. 2, 304: "... *ius* utendi est potestas licita utendi re extrinseca qua quis sine culpa sua et absque causa rationabili privari non debet invitus;

There are apparent similarities between Ockham's and Hervaeus's views of 'right'. Like Hervaeus, Ockham is adopting the view that when we are analyzing human action in regard to the use of material things, the relevant distinction is the one between licit and illicit usage. Like Hervaeus, Ockham thinks that when using takes place by juridical 'right', it is licit. In concurring with Hervaeus's formulations, Ockham defines right (or the right of using) as a licit power of using an extrinsic object. Ockham's definition also makes it clear that the right of using is a juridically secured right that gives rise to corresponding legal actions.[26]

There is an aspect, however, in which Ockham differs from both Hervaeus Natalis and also the earlier Franciscan theorists. Ockham did not make use of the dichotomy between the factual realm and the legal realm, which had been the cornerstone of the Franciscan position, establishing a conceptual framework for the analysis of 'right'.[27] Ockham's departure from the traditional dichotomy influenced his view in significant ways. Unlike Hervaeus Natalis, whose description of the right as licit power was conditioned by the distinction between the power of fact and the power of right, Ockham was able to think of right simply as an agent power. For Ockham, right was a licit active potency. Ockham's view was a novelty that would have been implausible within the older Franciscan paradigm, because the dichotomy between factual power and the power of right implied that the power of agency and the power associated to rights are different types of powers. We may recall Peter John Olivi stressing that the "royal power or the like, because it is solely power of right (*potestas iuris*) it is not a natural and naturally agent power". For Ockham then, the language of rights was a language of moral agency: to have a right meant that one was an agent with a legitimate or licit sphere of action. This was a step further along the road in which an individual right is defined by using power as the generic notion.[28]

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et si privatus fuerit, privantem poterit in iudicio convenire." Translation by John Killcullen in William of Ockham 1995, 24.

[26] According to Ockham, *ius utendi* was accompanied with *ius agendi*. See *Opus nonaginta dierum*, c. 61, 562

[27] When explaning his definition of *ius utendi,* Ockham makes it known that the distinction between the illicit and licit power of using does not automatically follow property relations. Although it is true that the robber uses another's things by illicit power, the owner can also sometimes use his own things by an illicit power. Legal power is not identical to licit power of acting. *Opus nonaginta dierum*, c. 2, 304: "Potestas licita ponitur ad differentiam potestatis illicitae qua fur saepe utitur rebus alienis; multi etiam alii frequenter per potestatem illicitam propriis rebus utuntur."

[28] Ockham's contribution to the discourse on medieval rights has been both hailed and downplayed by his modern interpretors. For a summary, see Tierney 1997, 97–103. Among his recent commentators, Brian Tierney does not consider Ockham's usage of 'right' as original, but sees that "Ockham took over his subjective definition of *ius* from

As the discussion of the Franciscan case was now released from the constraints imposed by this dichotomy, it was possible to argue that one could use privately owned material things licitly by some other power besides a juridical right. When licit power was not assimilated with the power of right, Ockham could defend the Franciscans's simple use of things, which took place through the grace of the owner, as a special instance in which external things were used by a licit power.[29]

Ockham's conceptual methodology also contributed to the dissolution of the inherent connection between right and dominion or authoritative position that had been one of the prevailing concepts during the Franciscan controversy. His way of interpreting right as a licit power of agency worked towards the separation of right from the hierarchical connotations of authority or dominion. One characteristic of the writers who became involved with the Franciscan case after Ockham was that they could no longer easily employ the traditional language in which 'right' and 'dominion' were treated as equivalents. To be more precise, the theorists in question were driven to make a choice: was the individual right a matter of authoritative or superior status, or was it a matter of legitimate agency? A good example of this state of discussion is Richard Fitzalph's work, *De pauperie salvatoris*.[30]

RICHARD FITZRALPH

Written in about 1356, Richard Fitzralph's (c. 1300–1360) *De pauperie salvatoris* was one of the final statements in the debate over Franciscan poverty. Although Fitzralph deliberately set out to criticize the Franciscans, his discussion of the case was significantly diverged from the paradigm which prevailed in the earlier debate: Fitzralph's approach to rights was not

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the earlier literature of the poverty dispute or from respectable canonistic sources..." Tierney 1997, 118. Annabel Brett instead emphasizes Ockham's originality that she locates into his philosophy of agency: "*Ius* in Ockham is integrated into a quite different philosophy of agency, one which does not use the dichotomy between nature and spirit and one which therefore need not assimilate *ius* to liberty or to dominium in the strong sense."

[29] As Ockham explains his definition of *ius utendi*: "'Qua quis sine culpa sua', etc., etiam ponitur ad differentiam gratiae, qua saepe alicui conceditur potestas licita utendi re aliqua, qua tamen ad libitum concedentis absque omni culpa sua et causa licite privari potest solummodo quia concedens concessam revocat potestatem. Sic invitati pauperes a divite habent licitam potestatem utendi cibis et potibus positis ante se, quos tamen invitans ad placitum suum poterit amovere, et si amoverit, non poterunt invitati propter hoc invitantem in iudicio convenire, nec aliquam actionem habent contra ipsum; et talis potestas saepe vocatur 'gratia' in iure." *Opus nonaginta dierum*, c. 2, 304.

[30] For Fitzralph's role in the Franciscan case, see Walsh 1981, 349–451.

determined by an interest toward the usage of material things, but rather, he approached right from the perspective of the hierarchical metaphysics of essence. Fitzralph's major point lay in the claim that the perfect way of human life, which Fitzralph took to mean life in God's charity, by necessity entailed divine dominion over the rest of creation. In Fitzralph's view, God had originally shared his dominion with Adam, but the fall of Adam had spoiled just human nature and dispossessed mankind of the divine dominion. Yet, the incarnation of Christ had renewed human nature and the original dominion (*dominium originale*), which has ever since been necessarily possessed by all of Christ's true followers.[31] In light of Fitzralph's interpretation of the history of salvation in terms of dominion, the Franciscan way of life which insisted on the renouncement of all dominion appeared to be suspicious as a religious ideal. To Fitzralph's way of thinking, the renouncement of *dominium* was impossible if one wanted to live in God's charity.[32]

Fitzralph's *De pauperie salvatoris* makes an attempt to restore the association of right to authority in the debate over apostolic poverty. While explaining the key notion of his theory, the concept of *dominium originale,* Fitzralph explicitly states that the connection between right and 'power' is problematic, and that right should be associated with the term 'authority' instead:

> Authority or right falls only to a rational creature; power or faculty belongs to irrationals of their first institution; since, in accordance with the words of Genesis given above, 'That they might be to you as food, and to all the animals', the animals of the earth [...] have in their natural way a congenital and irreprehensible faculty. In addition, right or authority seems only to concern that which is not against reason, but this does not seem to be true of power.[33]

Fitzralph's point was to argue for a view in which right is seen as inherently connected to the rational and just nature of human beings. When right is treated as a form of authority, this captures the difference that is there between man's rights and animals' powers. It is only a rational creature who is capable of having "an authority or right to do what animals only have

[31] Richard Fitzralph, *De pauperie salvatoris*, lib. II, 335, 344, 348–356.

[32] For Fitzralph's doctrine of dominion, see e.g., Betts 1969, 160–175, and Brett 1997, 68–71.

[33] Richard Fitzralph, *De pauperie salvatoris*, lib. II, 338: "Auctoritas seu *ius* soli racionali convenit creature; potestas sive facultas irracionabilibus competit ex sua institucione primaria; quoniam iuxta supra posita verba de Genese, Ut sint vobis in escam, et cunctis animantibus, animalia terre [...] suo naturali modo habent congenitum irreprehensibilem facultatem: preter hoc quod *ius* sive auctoritas solum esse videtur respectu illius quod non obviat racione; non ita de potestate videtur …"

a power to do".[34] In Fitzralph's view, the rational human beings in their original righteous nature are the superior beings whose similitude with God makes them capable of having right or authority. The position of the animal is to be at the other end of the hierachical relation; under human dominion.

JEAN GERSON

Fitzralph's conclusions concerning 'right' were taken up and refuted by the French theologian and conciliarist Jean Gerson (1363–1429). Gerson was a theorist who did not have any connection to the debate over Franciscan poverty and whose discussion addressed rights on a more general or conceptual level. Nevertheless, Gerson made use of earlier terminology and placed himself among those who thought that the term 'right' could be used to signify legitimate or licit active potency. Gerson also paid heed to Fitzralph's arguments and ended up coming to the conclusion that animals and other creatures equipped with natural faculties could, in fact, be understood to possess rights. Through this conclusion, Gerson broadened the scope of the applicability of the term 'right' and emphasized his divergence from the metaphysics of essence that was underlying Fitzralph's language of rights.[35]

Gerson's language of rights is the source of the terminology that Conrad Summenhart used while he was developing his theoretical views on rights in *Opus septipartitum*. This express indebtedness in regard to the previous language does not, however, devaluate Summenhart's own contribution to the discourse of medieval rights. Gerson's terminology defined the starting point for Summenhart's own account. He systematized Gerson's views, explained conclusions which had remained implicit in Gerson, and occasionally ended up with conclusions which were not shared by Gerson himself.[36]

There was a conscious continuity in Gerson's thinking on rights throughout his literary career. In his early major work *De vita spirituali animae* (1402) Gerson sets forth a definition of 'right' which is very similar to the one introduced in his later work *De potestate ecclesiastica*, which was written during the conciliarist heyday of 1416–1417. Summenhart takes both

[34] Brett 1997, 70.

[35] For different views concerning the origin of Gerson's language of rights, cf. Brett 1997, 82–87, and Tierney 1989, 624–625. For the historical context of Gerson's writings, see Pascoe 1973; Posthumus Meyjes 1999.

[36] For different interpretations concerning the relationship between Gerson's and Summenhart's theories, see Tuck 1979, 27–28; Brett 1997, 35–36, 86.

of these definitions as the starting point of his inquiry and combines them in his review on Gerson's terminology:

> right is proximate power or faculty falling to someone according to the dictate of primary justice. And again, right is proximate power or faculty falling to someone according to the dictate of right reason.[37]

Gerson does not see any problems in characterizing rights as powers. The attribute 'proximate' is present in Gerson's definition to differentiate right from a remote. As proximate power, right is an active potency or power to immediate action; there is nothing that should be added to this potency. The principal characterization in this definition is the clause that speaks of the origin of right, stating that right falls to the individual subject "according to the dictate of right reason (or primary justice)". It is in explaining what this characterization stands for that Gerson – as well as Summenhart in his commentary – explicates his most original contribution to the medieval language of rights.

In his commentary on the definition of right in *De vita spirituali animae*, Gerson explains the role of the dictate of right reason in the formation of right. He suggests that in this context it is possible to speak of right reason in two different but related ways. Gerson says that "right reason and its dictate is firstly, originally and essentially in God".[38] The origin of all right reason can be found in God's reason and will. In this sense 'right reason' was equivalent to the 'primary justice' which expression Gerson came to use in referring to the origin of right in his later work *De potestate ecclesiastica*. In continuing his analysis, Gerson says that "right reason belongs consequently and participatively only to rational creatures".[39] As rational creatures, human beings participate in right reason which is primarly in God's thought.

Gerson's explanation of 'the dictate of right reason' and its relation to right did not stop to these two (somewhat traditional) characterizations. If right is an active power which belongs to one according to the dictate of divine right reason, does this mean that all created active powers are rights? This was the conclusion which Gerson ended up with:

> Therefore we say that every positive entity has as much of right thus generally defined as it has of being, and consequently of goodness. In this

[37] Summenhart, *Opus septipartitum*, q. 1, sig. A6 r: "Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen prime iusticie. Et iterum. Ius est potestas vel facultas propinqua conveniens alicui secundum dictamen recte rationis." Jean Gerson, *De potestate ecclesiastica*, consideratio 13, 250; *De vita spirituali animae*, lectio 3, 26.

[38] Jean Gerson, *De vita spirituali animae*, lectio 3, 26: "Recta ratio & dictamen suum, est primo originaliter & essentialiter in Deo ..."

[39] *Ibid.*: "Recta ratio consequenter & participative solum convenit rationalibus creaturis."

> way the sky has a right to raining, the sun to shining, the fire to warming, the swallow to building its nest, and even every creature whatsoever [has a right] in all things that it can do well by natural faculty.[40]

'Right' can be predicated of every creature which Gerson here treats from the point of view of their natural faculties. Whenever there is a god-given natural faculty, there is a right. Gerson was careful to emphasize that he is here speaking of right in a general sense of the term, and further, that right is understood in a narrower sense by political theorists. Nevertheless, according to Gerson, this general view was justified because the "no proximate power or faculty falls to someone without the dictate of divine right reason". The origin of any faculty can be traced back to divine law.[41]

CONRAD SUMMENHART

Right as power

In *Opus septipartitum*, Conrad Summenhart repeated Gerson's conclusions concerning the general natural rights of all creatures.[42] In addition, he further explicated Gerson's reasoning by applying a similar principle to various human powers. While Gerson had shied away from applying the general 'right' in the political or juridical discourse, Summenhart did not share these reservations. Summenhart advanced the idea of natural rights into a form which was current within the juridically-

[40] *Ibid.*: "Dicamus igitur, quod omne ens positivum quantum habet de entitate & ex consequenti de bonitate, tantumdem habet de Jure sic generaliter definito. In hunc modum coelum jus habet ad influendum, sol ad illuminandum, ignis ad calefaciendum, hirundo ad nidificandum, immo & quaelibet creatura in omni eo quod bene agere naturali potest facultate..."

[41] Op. cit., lectio 3, 27: "Propterea non absurde concedi posset nihil alicui competere nisi Jure divino, quemadmodum nulla est facultas aut potestas propinqua conveniens alicui absque dictamine recto divinae rationis …"

[42] This is most explicitly illustrated in a paragraph that concerns the general right to exist, as well as other rights that are based on this fundamental right. *Opus septipartitum*, q. 4, sig. C4 r: " ... ius repellendi corruptorem sue existentie convenit unicuique rei ratione naturalis doni, scilicet ratione existentie, eoipso enim quod deus alicui rei communicavit hoc donum scilicet existentiam habet talis res ius resistendi eis que ei illud donum auferre vellent. Similiter in eodem dono fundatur animalibus ius accipiendi alimenta quibus conservetur existentia, hoc modo lupus habet ius et dominium invadendi alia animalia, et aves habent ius colligendi grana vel semina et consimilia quibus sustentantur, hoc modo habent ius nidificandi in arboribus nostis, quia deus eis dedit potentiam generandi pullos et eos educandi, igitur etiam dedit eis ius in mediis quibus hoc commode facerent, et illud dominium fundatur in dono naturali eis communicato per deum."

tuned discussions of rights, and also used the same idea in his argumentation for individual autonomy or self-determination. It is here that we may find Summenhart's own contribution to the medieval language of rights.[43]

Summenhart's approach to the issue was twofold. On the one hand, he thought that man had a *prima facie* right to actualize his God-given potencies and faculties. On the other hand, he recognized the point that a power to act against the dictates of right reason is not a right. We may find both these characterizations present in a chapter in which Summenhart – now in his turn – sets himself to explain the elementary connection between 'right' and the dictate of primary justice or right reason. Summenhart writes:

> The fourth clause viz. 'according to the dictate of primary justice' is put forward to exclude proximate power that belongs to someone by which he can proximately act toward a thing or in a thing which does not, however, belong to him according to the dictate of right reason, as the robber has power by which he can proximately kill a man but in this form it does not belong to him according to the dictate of right reason. And I said 'in this form' because the power by which he can do that belongs to him according to the dictate of right reason, though not in order to that object and with these circumstances.[44]

Summenhart's remarks concerning the case of the hypothetical robber specify his Gersonian approach. On the one hand, it is all too plain that the robber does not have a right to kill his victim. On the other hand, the robber's ability to kill is based on his natural faculties and powers, which have their origin in the ultimate (i.e., God's) dictate of reason and justice. This complicates the analysis of the situation, leading Summenhart to state that the robber's power to kill a man does not 'in this form' belong to him, according to the dictate of primary justice. Thus, Summenhart's point is that the robber has a *prima facie* right to actualize his natural potential, but does not have the right to actualize such a potential in actions that deliberatively and unjustly cause the death of an innocent man.

[43] For other interpretations concerning Summenhart's language of rights, see Brett 1997, 34, 42–43; Tierney 1997, 248–249; Tuck 1979, 27–28; Seelmann 1979, 80–84.

[44] Summenhart, *Opus septipartitum*, tract. 1, q. 1, sig. A7 r: "Quarta vero clausula scilicet secundum dictamen prime iusticie, ponitur ad excludendum potestatem propinquam convenientem alicui qua de propinquo potest aliquid agere in aliquam rem, vel in aliqua re, non tamen convenit ei secundum dictamen recte rationis agere, ut latro habet potestatem qua de propinquo potest occidere hominem, sed illa ut talis non convenit ei secundum dictamen recte rationis. Et dixi ut talis, quia potestas illa que id potest quamvis ei conveniat secundum dictamen recte rationis non tamen in ordine ad illud obiectum et cum talibus circumstantiis."

In the above quotation, Summenhart suggests that the dictate of right reason also excludes illicit powers from the domain of rights. As is apparent from the context, this holds true when we are speaking of natural rights (or 'right' in the general sense). The important point to be noted is that in this approach the eliminative legal function is given a secondary role in the formation of a natural right; the law is not needed to justify man's natural powers which carry the status of a *prima facie* right because of their God-given origin. In other words, what Summenhart is suggesting is a liberty-based approach to rights. This is in agreement with his conception of the natural right of liberty. Hence, Summenhart writes:

> ... *libertas* is a species of right, and a free person has this right with respect to himself, namely [the right] of acting as he likes. Whence, that right is defined in *Institutes, de iure personarum*, §1, as one's natural faculty to do what one wants, unless it be prohibited by force or law.[45]

Here, Summenhart is interpreting the Roman law definition of liberty – originally introduced by the lawyer Florentinus – from the viewpoint of his Gersonian conception of natural rights. The outcome is an interpretation in which *libertas* (as a natural faculty) is understood to be a simple natural right, which was something of a novelty in juridically oriented literature.[46]

Summenhart's treatment of *libertas* can be regarded as a twofold theoretical success. First, Gerson's idea of the general rights of all beings is embedded in a concept of liberty which enters the political scene as a far-reaching moral principle. Secondly, the specification of Florentinus's definition of *libertas* provides the natural right of liberty a solid foothold in distinctively juridical discussions. In other words, the principle of *libertas* becomes formulated in juridical language, which makes it usable in the kind of moral analysis of economic contracts that forms the bulk of Summenhart's work in *Opus septipartitum*.[47]

[45] Op. cit., tract. 1, q. 1, A8 v: "Similiter libertas est quedam species iuris et illud ius habet liber in seipsem scilicet agendi quod libet. Unde diffinitur ius in institutis de iure personarum, §1. Est naturalis facultas eius quod cuique facere libet nisi quod vi aut iure prohibetur." See *Inst*. 1.3.1.

[46] According to an opinion commonly held by medieval lawyers, *libertas* consisted both of a factual element (natural faculty with factual restrictions) and of a legal element (a licence with legal restrictions). The two aspects of *libertas* were described by the first glossator, Irnerius, (c. 1050 – c. 1130) in the following way: 'Duplex est hec naturalis facultas: nam et posse mihi largitur quasi de facto et licenciam dat pro modo iuris, dupliciter ergo excipitur: in eo enim quod facti est facto, idest vi resistitur ei: in eo enim quod iuris est non videtur tacite permissum quod vetitum est nominatim." Quoted in Weigand 1967, 67. For glossators' interpretations of *libertas*, see Weigand 1967, 64–78.

[47] The connection between Gerson's 'general right' and Summenhart's *libertas* has been ignored by his modern commentators. See Brett 1997, 42–43; Tierney 1997, 247–248; Seelman 1979, 80–81; Tuck 1979, 26–28.

Summenhart's effort in conceptualizing the principle of *libertas* in the preliminary section of *Opus septipartitum* creates some expectations regarding the application of this principle. Summenhart's moral casuistry does not, however, meet these expectations without reservation. He does not make much use of the priciple of *libertas* in *Opus septipartitum*. There is, however, one special instance in the fourth Tract, the case of *redditus in persona* in question 74, in which Summenhart puts the principle of *libertas* into action. This is a systematically important passage.[48]

The *redditus* or *census* (also known as *rentes*) was a genuine medieval contract in which the buyer purchased an usufruct to the seller's real property. In return for a single payment, the buyer received an annual income (*redditus*) for the rest of his life or even for the lives of his heirs to come. Although the sale of *redditus* might formally be categorized as a sale, in practice it was both a loan and investment. For the buyer, it was a way to invest money profitably because the total sum of the annual income was expected to exceed the amount of the loan. For the seller it was a way to borrow money, although in the typical case the seller was to pay back more than the original capital. It was the use of *redditus* in financing both public and private enterprises that made the contract morally suspicious in the eyes of the Church. This was because loaning money at interest, i.e., usury, was a sin expressly prohibited by the canon law. Although usury was occasioned by definition in the contract of loan (*mutuum*), the fact that the sale of *redditus* seemed in practice to count as a loan at interest put the contract under moral suspicion, especially the variant of the contract called *redditus in persona*. Here the income was not fixed to the profit of any real property. Instead, the seller was personally obliged to provide *redditus* to the buyer.[49]

The moral and legal suspicions regarding the licity of the sale of *redditus* were significantly abolished in early fifteenth century, when the Council of Constance, followed by the Papacy, took their stands in favour of the contract. Three papal bulls were released, which declared that the contract of *census* or *redditus* was fully licit under the specified conditions. The papal blessing, however, only concerned *redditus in re*, and did not cover *redditus in persona*.[50] The question of the licity of the sale of *redditus in persona* retained its status as a morally controversial question, and as such it entered into Summenhart's discussion at the end of the century.

In *Opus septipartitum*, Summenhart dedicates an entire tract to questions related to the sale of *redditus* or *census*. In question 74, he launches a

[48] Summenhart, *Opus septipartitum*, q. 74, sig. B2 r: "Utrum liceat alicui homini singulari et etiam communitati hominum, in se vel sua persona constituere alteri redditum alicuius rei utilis."

[49] Munro 2003, 518–524; Noonan 1957, 154–164.

[50] Munro 2003, 524.

specific argumentation intended to defend the licity of the sale of *redditus in persona*. Summenhart's defence for *redditus in persona* has been valued as historically significant in that it lent a strong impetus to the gradual demise of the usury ban in the European economy, especially within the German region.[51] Philosophically, the interesting point in Summenhart's account is that he approaches *redditus in persona* as a question concerning the individual's autonomy or the right of self-determination. For Summenhart, the sale of *redditus in persona* was ultimately a matter of *libertas*.

In order to defend the licity of *redditus in persona* by appealing to the principle of *libertas*, Summenhart tries to demonstrate that contemporary legal thought does not recognize any law that would prohibit a free person from obliging himself under the contract of *redditus in persona*. He aims to show that the natural right of liberty provides the justification for even more extensive actions than the case of *redditus in persona* supposed it could. The principal point is that a free man's liberty in contemporary society was extensive enough to justify the conclusion that free men are their own masters (*dominus*). Consequently, the free man could licitly sell himself (to slavery), which in the juridical context was the action that most openly demonstrated the right of *dominus*. If the free man had the right to sell himself into slavery, which was the ultimate form of treating one's person as a thing, he could licitly oblige himself with *redditus in persona*.[52]

In Summenhart's view there is no such a law – divine, natural or human – which will pose a challenge to man's self-mastery by prohibiting a man from selling himself into bondage. Summenhart is content to say that it is not God's will to restrict man's natural abilities in this matter. He refers to the opinion of John Duns Scotus, according to which "someone can sell himself into slavery even though there would not be any specific divine approval to do that".[53] Furthermore, Summenhart points out that such a sale is not against the requirements of natural justice, as long as this transaction takes place voluntarily. This was because, as Summenhart notes in quoting Aristotle, "willingly there is no injustice".[54] As far as the will of the human legislator was concerned, Summenhart refers to the corpus of Roman law that included statements concerning the possibility of purchasing a free man. His discussion expressly recognizes that these Roman regulations posed a relevant challenge to his own view, because they explicitly declared that an adult free man could not be the object of valid purchase (Dig. 18.1.34;

[51] See Noonan 1957, 233–235.

[52] For detailed exposition of Summenhart's argumentation, see Varkemaa 1999.

[53] Summenhart, *Opus septipartitum*, q. 74, sig. B4 r: "Et idem dicit dis. 15, q. 1, quod aliquis potest se in servum vendere, licet de hoc non inveniatur specialis approbatio divina, hec ille."

[54] Op. cit., sig. B4 v: "... probatur igitur hoc primo sic, quia si peccaret, maxime contra venditum, sed hoc non, quia volenti non sit iniuria."

45.1.83; 45.1.118.). Summenhart's way to save his case is to emphasize that the regulations concerning the purchase of a free man in *Digesta* declared that the sale of a free man is merely invalid as a contract and would not give rise to civil obligations and actions. Although these regulations clearly inhibited a free man from selling himself, they were not direct prohibitions, and consequently, did not affect his self-mastery.[55]

Although the case of *redditus in persona* remained the unique instance in *Opus septiparitum*, in which Summenhart appealed to the priciple of *libertas* in moral reasoning, it was indeed significant enough to succeed in making a fresh approach to theological ethics in the late medieval moral milieu. Summenhart's reasoning suggested, in particular, that when we are evaluating morally controversial questions we may start our inquiry from the position that man has the right to act as he pleases, so long as he does not act against the dictates of right reason. This was a liberty-based approach to morality, and one that also recognized the limits of man's liberty, and took them seriously.

Right as relation

Shortly after beginning his inquiry into Gerson's terminology, Summenhart introduced the specification according to which right is to be classified as a relation.[56] In accordance with this classification, Summenhart's discussion turned on an analysis in which he characterized the Gersonian conception of right – as an active potency established by the law – using the terminology typical of medieval discussions concerning relations. The significance of his conceptual bedrock lies not so much in scientific categorizing – locating right in its proper Aristotelian category – but rather in the way Summenhart managed to elucidate the Gersonian conception of right with further precision.

In his analysis of right as relation, Summenhart reviews the Gersonian concept of right from a viewpoint that is distinctively formal of its nature. He puts his view of right as relation in a nutshell as follows:

> ... right is relation, namely disposition (*habitudo*), the foundation of which is laid in that who is said to have the right, and which is

[55] *Ibid*.: "… secundo quia si sic, maxime quia esset prohibitum iure positivo, sed hoc non, quia talia iura que hoc videntur prohibere, solum videntur disponere super invaliditate contractus, non autem super prohibitione contractus unde disponunt quod ex illo contractu non oriatur obligatio civilis que pariat actionem, unde emptor non est obligatur venditori civiliter nec etiam venditor emptori saltem scienti, sed non prohibent venditori venditionem."

[56] Op. cit., q. 1, sig. A6 r.

> determined to the thing toward which or in which one has the right as to the remote terminus, and to the action one can exercise toward the thing or concerning it as to the proximate terminus.[57]

This formulation counts as a formal definition of right, which realizes the general principle that a relation is defined by the foundation and terminus.[58] The foundation of the relation means the reason on which the relation is based. The terminus of the relation – as distinguished from the subject of the relation – is the object toward which the subject is related.[59]

Summenhart's commentary on Gerson's definition of right foremost addressed the characterization "proximate power or faculty" which Summenhart interpreted as meaning that right is an active potency.[60] The idea of an active potency is thought of in terms of the two termini of the relation. As a relation (or disposition), right is the potency to carry out a specific action (as the proximate terminus), and that action takes place in regard to the specific object (as the remote terminus). The following quotation explains Summenhart's views:

> For every right and dominion is a disposition (*habitudo*), of the one in which it is, toward the thing or in the thing in regard to which it is had, and this disposition is terminated at this thing solely through a certain act or action which the one who has the right or dominion is to exercise in that thing or to that thing. For example, the right or dominion that father has toward his son, is a right toward the son insofar as the father can exercise corrective acts toward the son and directive acts in regard to the same. And the right that one has in his house is a right insofar as he can exercise these acts in the house, namely, to come and go and place his things. Whence, everyone has as much of right or dominion in regard to a thing as much actions it is licit for him to exercise in regard to the thing.[61]

[57] *Ibid*.: "... ius secundo modo est relatio scilicet habitudo fundata in illo qui dicitur habere ius, et terminata in rem in quam vel in que habet ius tanquam ad terminum remotum, et ad actionem quam habet exercere in talem rem vel circa eam tamquam ad terminum propinquum."

[58] Op. cit., q. 1, sig. A8 r: "... quia quando diffinitum est relatio, tunc magistraliter describitur si per fundamentum et terminum describitur."

[59] For the medieval terminology of relations, see e.g., Brower 2001.

[60] Summenhart, *Opus septipartitum*, q. 1, sig. A8 r.

[61] *Ibid*.: "Nam omne ius atque dominium, est habitudo illius in quo est ad rem illam in quam vel in qua habetur, et hec habitudo non terminatur ad illam rem, nisi secundum aliquem actum vel actionem quam habens ius vel dominium habet exercere in illam vel in illa re. Exemplum, ius vel dominium quod habet pater in filium, est ius in filium secundum quod pater potest exercere actum correctionis in filium et actum directionis circa eundem. Et ius quod habet quis in domo sua, est ius secundum quod talis potest exercere illos actus in domo, scilicet ingredi egredi, et res suas inferre. Unde tantum quisque habet iuris vel

Summenhart's designations of the action as the proximate terminus and the object as the remote terminus follow from the logical priority of the action. Although a right is to be had in a thing or to a thing, it is the action itself that defines the right in the first place.[62]

The concept of founding the relation comes to the fore when Summenhart's discussion returns to the issue of 'the dictate of primary justice or right reason' and its role in the formation of a right. When Summenhart reinterprets this characterization from the perspective of the idea of relation, he comes to emphasize its positive function in the formation of a right:

> That clause is set down to touch the foundation of this relation which is called dominion or right. Namely, such a relation is founded on something, on grounds of which the law wills that such a relation should belong to him [...] For example, this sentence, 'man who fathers another, giving him being, has the right and dominion of exercising corrective and directive action toward the one who is born', is a natural law according to which the right and dominion toward son falls to the father. And this law points out the fact that he has fathered the son as the foundation of the dominion given to the father, and so fathering or fatherhood is the foundation of this dominion.[63]

In Summenhart's view, the law (or the dictate of right reason) has a twofold positive function as regards the formation of the right. First, the law defines the foundation of the right, and second, it concedes the right to the very subject upon which the foundation is predicated.

Right as dominion

A striking feature of Summenhart's language of rights was the equivalence of right and dominion. Unlike Gerson, who did not use 'right'

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dominii in aliquam rem, quantum actionis licet sibi exercere circa rem." According to Tierney, Summenhart is here saying: "A person had as much right or dominion over a thing as he had freedom of action concerning it." See, Tierney 1997, 247. To my view, there is no such an emphasis on freedom of action present in this place.

[62] Cf. Tierney 1997, 247–248.

[63] Summenhart, *Opus septipartitum*, q. 1, sig. A8 r: "Et hec clausula ponitur ad tangendum fundamentum illius relationis que dicitur dominium vel ius. Nam talis relatio fundatur super aliquo, ratione cuius lex voluit quod deberet ei convenire talis relatio. [...] Exemplum, hec oratio, homo qui alium genuit, dando sibi esse, habeat ius et dominium exercendi in genitum actionem correctionis et directionis, est lex naturalis secundum quam patri convenit ius et dominium in filium. Hec autem lex pro fundamento dominii collati patri, ponit hoc quod est eum genuisse filium, et sic genuisse vel paternitas est fundamentum illius dominii."

and 'dominion' equivalently, Summenhart spoke of right and dominion as equivalents in an explicit and even emphatic manner. In many of the quotations presented above, he equated the terms with each other recurrently, speaking of "the right or dominion that father has toward son" or of the "relation which is called dominion or right". It is distinctive of Summenhart that he constructed the equivalence of right and dominion by specifying the concept of dominion to make it parallel with the notion of right as an active potency established by the law. The outcome was a concept in which dominion is comprehended as a relation that is defined simply in terms of action. As we may recall from another of the quotations above, Summenhart stated that 'everyone has as much of right or dominion in regard to a thing as much actions it is licit for him to exercise in regard to the thing.'[64]

Summenhart's idea of dominion as a relation of action was a special one, but his view was not without its parallels in medieval thought.[65] It is not too difficult to find a medieval author who would – in a certain context – associate dominion with agency in a way that comes close to Summenhart's view. As one example, we may single out Thomas Aquinas who, in a chapter from his unfinished work *Compendium theologiae*, used the term dominion to determine the relation between a mover and the thing that is moved. Aquinas stated that "in order to move a thing, the mover needs to have dominion over that thing".[66] Another example can be found in John Buridan's commentary on Aristotelian ethics. When Buridan is describing the inner dynamics of human will, he introduces the comment that an "agent is said to dominate the patient".[67] There is thus a relation of dominion between the agent and the patient. A similar idea can be found in John Wycliff's *De dominio divino*. In Chapter One, Wycliff begins his inquiry into the concept of dominion by introducing a philosophical view of dominium, according to which "every physical agent is said have dominium over the patient".[68]

What these three examples have in common is that in each of them dominion is treated, not as a term belonging to the language of rights, but as

[64] Op. cit., tract. 1, q. 1, sig. A8 r: "... quisque habet iuris vel dominii in aliquam rem, quantum actionis licet sibi exercere circa rem."

[65] For Summenhart's departure from the traditional medieval conception of dominion, see Brett 1997, 40.

[66] Thomas Aquinas, *Compendium theologiae*, pars 1, caput 17, 18: "Oportet omne movens, ad hoc quod moveat, dominium super rem quae movetur, habere ..."

[67] John Buridan, *Questiones super X libros Aristotelis ad Nichomachum*, liber X, fol. 257 v: "...et agens dicitur dominari super passum ..."

[68] John Wycliff, *De dominio divino*, capit. 1, 2: "Dicitur enim apud philosophos omne agens vel faciens suum passum subici, de tanto pacienti huiusmodi dominari. Sic enim secundum naturales omne agens phisicum se habet in dominio ad suum passum."

a term that is embodying a way of speaking that is characteristic of natural philosophy or physics. John Wycliff even explicitly remarked that the kind of use of the term dominion is typical among the philosophers, and thus made it known that '*dominium*' is used differently by theologians and other moral theorists who operate in the framework of the normative language of rights. Summenhart was fairly well acquainted with natural philosophy, and it seems that his interpretation of dominion was influenced by the 'philosophical' usage of the term. In a way, Summenhart's interpretation of dominion made the term an extension of Gerson's language. Summenhart's term dominion – like Gerson's right – could be used to characterize phenomena discussed in natural philosophy, such as animal activity and physical motion in natural phenomenas, from the normative point of view. A prominent example of Summenhart's approach is his description of the right and dominion possessed by heavenly bodies:

> For heavenly bodies have the right of exercising various actions with respect to those underneath them (*inferiori*), concerning motion, light and influence, this right of theirs is called dominion that belongs to them on grounds of natural gifts which are given by God. [69]

This example concerning the heavenly bodies is emblematic of Summenhart's interpretation of dominion. The phrasing of the case is striking; Summenhart makes use of an association in which dominion is seen as a relation of the superior to the inferior; the similar phrasing would fit perfectly in with the hierarchical scheme, that describes the king's dominion over his subjects or the rational being's dominion over inferior creatures. The priciple fact that Summenhart is speaking here of the dominion possessed by celestial bodies, however, breaks down all associations with essential or political superiority. It is clear that in this case superiority is simply spatial, without any connection to the metaphysics of essence to any degree. The relation of dominion is defined simply in terms of the action that celestial bodies are to exercise over those underneath them. Dominion is a relation between the one who acts and the other who is acted upon.[70]

[69] Summenhart, *Opus septipartitum*, tract. 1, q. 6, sig. C6 r: "Corpora enim celestia habent ius varias actiones exercendi in hec inferiora, motu, lumine, et influentia, quod eorum ius dicitur dominium conveniens eis ratione naturalium donorum, eis a deo communicatorum..."

[70] Tierney has found a confusion in Summenhart's language. According to him, Summenhart made a sharp distinction between the right possessed by irrational creatures and the right inhering in humans: "Only in humans did *ius* designate a liberty, a freedom of action." Yet, "Summenhart's application of the same terms, *ius* and *dominium*, to both irrational and rational creatures perpetuated a confusion concerning the proper meaning of these words ..." Cf. Tierney 1997, 248–249. To my view, there is no such a confusion present in Summenhart's language. This is because he did not make a sharp distinction between the

As far as the applicability of Summenhart's terminology is concerned, the relevant question is this: Is the equivalent treatment of 'right' and '*dominium*' a plausible conceptual arrangement, when dealing with the juridically defined *iura in re* that provides the framework for the subject matter of *Opus septipartitum*? Summenhart is explicitly aware that the context does not support the equivalent use of right and dominion without some reservations. The terminology that was in use in contemporary jurisprudence is a particular obstacle. Summenhart recognizes that in the language of civil jurisprudence dominion is a narrower term than right; although dominion is a right, not every right is counted as dominion. According to the juridical way of speaking, the holder of the right to use a thing (*usus*) or the usufruct (*usufructus*) does not have dominion, neither *dominium utile* or *dominium directum*.[71] In a similar way, Summenhart points out that the equivalent use of 'right' and 'dominion' is out of its place when one is describing social or political relations. According to him, the inferior can be said to have a right regarding the superior, because the superior has certain obligations toward the inferior. Yet, it is inappropriate to claim that the inferior has dominion over the superior.[72]

Despite the contextual literary evidence that suggested a different interpretation, Summenhart sought to defend the equivalent use of 'right' and 'dominion' in the very context of *Opus septipartitum*. In order to justify his point, he introduces a conceptual distinction between the general and the strict sense of 'dominion'. He admits that the equivalence of right and dominion does not hold true if 'dominion' is understood in the strict or appropriated sense, because "appropriately taken *dominium* connotes, in addition to the sense of *ius*, also supremacy, therefore that *dominus* is a relation of superiority".[73] Alongside this remark, Summenhart makes the

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rights possessed by rational and irrational creatures. Summenhart's concept of *ius* (and *dominium*), as active potency established by the law, does not designate or connotate a liberty or a freedom of action.

[71] Summenhart, *Opus septipartitum*, tract. 1, q. 1, sig. A6 v: "Dominium etiam loquendo de civili dominio, esset minus commune quam ius, etiam de civili iure loquendo, quia civiliter loquendo aliquis habet ius in re alique ut usum in utendo re tali vel usufructum, i.e. ius utendi et fruendi re alique, qui tamen non habet dominium illius rei, nec directum nec utile, ut patebit in q. xii."

[72] *Ibid*.: "Nam inferior habet ius in superiorem quia superior tenetur inferiori in multis. Et filius habet ius in patrem, quia pater in multis tenetur saltem naturaliter filio. Et uxor habet ius in virum. Et tamen proprie non concederemus inferiorem habere dominium in superiorem, aut filium in patrem, aut uxorem in virum."

[73] *Ibid*.: "Attamen cum dixi, ius et dominium esse idem intelligendum est si dominium non capiatur valde stricte et appropriate. Nam appropriate capiendo dominium, connotat ultra rationem iuris etiam superioritatem, eo quod dominus est relativum superpositionis ..." On this point, Summenhart was quoting Antoninus Florentinus's *Summa theologia* (part III, c. 3, sig. f4 r), that was written in 1450s.

suggestion that we may use 'dominion' in a broad sense of the term that does not carry the hierarchical connotation, and is therefore equivalent with 'right'.

> But that strictly we do not take this. I shall prove that it [i.e., dominion] could be taken that broadly as changeable with right, for whoever has a right in a thing can be called *dominus* of the thing, because of this that right could be called dominion [...] For whoever has *ius in re*, if that thing is snatched or taken away from him against his will, the taker is said to commit a theft, and if this is true, then the one who seizes takes another man's thing against the will of *dominus*, the consequence follows from the definition of theft. As a consequence the one who has a right in the thing could in a way be called *dominus* of that thing.[74]

The major premise of Summenhart's proof is composed of an appeal to intuition. He is suggesting that when a person possesses a juridical right in a thing, this means by necessity that the thing is located under his actions in a relation that is exclusive of its nature. Therefore, any intruder who violates his right by taking the thing out of the range of his actions is understood to commit a theft. If this holds true, then the conclusion that Summenhart is seeking follows directly from the standard medieval definition of theft. For Summenhart, this demonstrates the fact that we are inclined to analyse economic relations by accepting 'dominion' in the broad sense of the term. Summenhart's proof may not be very successful, or convince others who think differently.[75] In an indirect way, he does succeed in identifying property relations as an area of discussion which – in contrast to the context of social or political relations – does not make use of the hierarchical connotation of dominion. To his way of thinking, property relations are defined simply in terms of the actions that men are able to exercise in regard to their things. This view of property did not come across from the property related juridical terminology that was influenced or burdened by feudalist presuppositions.[76]

[74] Summenhart, *Opus septiparitum*, tract. 1, q. 1, sig. A6 v: "Sed ita stricte hic non accipiemus. Quod autem possit ita large accipi ut convertitur cum iure, probo, quia quicunquam habet ius in aliqua re, potest dici dominus illius rei, igitur illud ius poterit dici dominium [...] quia quicunque habet ius in re, si ei surriperetur vel subtraheretur res illa eo invito surripiens diceretur furtum commisisse, et si sic, ergo surripiens contrectavit rem alienam invito domino, tenet consequentia per diffinitionem furti. Et per consequens ille qui habuit ius in ea re, poterat aliquo modo dici dominium illius rei."

[75] See Tierney 1997, 244–245.

[76] In an interesting way, Summenhart's terminology bears close resemblance to the terminology introduced by the famous Italian jurist Bartolus of Sassoferrato (1314–1357) at the middle of the fourteenth century. In speaking of property titles, Bartolus had recognized the distinction between the strict and general senses of the term dominion, and

CONCLUSION

Summenhart's theory of rights managed to bring an end to a particular continuity of thought that was centered around a view in which right was understood to signify power to licit action. The basic idioms of this way of thinking about rights were pronounced during the fourteenth century in the "controversy over the Franciscan poverty" that was probing the ideal of perfect human living. Such eminent members of their profession as the Dominican Hervaeus Natalis and his Franciscan opponent William Ockham summed up their interpretations in the elementary idea of right as licit power. Although their views were connected to the Franciscan case, which concerned using material things for daily needs, the actual description of right as licit power of acting was broad enough to outlive its original context. After the discussion of Franciscan poverty had long since withered away, the ensuing language remained in use by later theorists, whose interest towards rights was of a more general or conceptual nature. Jean Gerson and Conrad Summenhart were among those theorists.

Summenhart's theory appears to be a commentary on the basic terminology of Jean Gerson's language of rights. Yet, Summenhart did not confine himself to describing Gerson's basic ideas, but rather Gerson's terminology marked the point of departure for Summenhart's own conceptual workings. Summenhart employed Gerson's terminology in two distinct ways. Firstly, he concretely explained conclusions that in Gerson had remained only implicit. A prominent example is Summenhart's account of the natural right of liberty (*libertas*), according to which man has a natural right to do whatever he is able to do, unless this action is prohibited by law. In the form of *libertas*, Gerson's idea of the general God-given rights of every creature came into discussion as they concerned moral action in economic life. In the course of his argumentation, Summenhart assimilated *libertas* with the self-mastery or dominion that in the economic context of discussion took the form of (a moderate) self-ownership.

Secondly, Summenhart's extension of Gerson's terminology was demonstrated in the specifications he made concerning the Gersonian concept of right as an active potency established by the law. These specifications came through in two characterizations, through which Summenhart reviewed the Gersonian notion of right. On the one hand,

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suggested that in the general sense dominion can be associated with every *ius in re*. Bartolus's views – that were probably summarizing a contemporary concensus – became very influential, and it is probable that Summenhart was acquainted with Bartolus's terminology. Summenhart does not, however, refer to Bartolus in this context, and it is not clear whether his view is dependent on contemporary juridical language. For Bartolus, see Coing 1953.

Summenhart classified right as relation, while on the other, he equated right with dominion. These classifications took place in the analysis through which Summenhart approached the Gersonian idea of right from new perspectives. Summenhart's description of right as relation ignored the normative or material characteristics of right, and instead reviewed right from a viewpoint that was strictly formal. The principle point was that, as a relation, right could not be predicated solely from the right-holder. This served to broaden the object of analysis. The adequate conception of right presupposed an additional knowledge of the foundation on which the right is based, and also of the termini towards which the right is determined. It is distinctive of Summenhart's view that he took action as the primary determinant of right: "Everyone has as much rights or dominion in regard to a thing as much actions it is licit for him to exercise in regard to the thing."

The equivalence between right and dominion expressed another viewpoint concerning right that was alien to the way Gerson defined right. In a way, this equivalence answered the question: How does right appear in the relation between the subject and the object? It is distinctive of Summenhart's view of dominion that he took action to mean a kind of dominion. To have a right or dominion was to be the agent who dominated the patient by his actions. The patient was under the action of *dominus*, and he, she or it could not do anything but consent to the action.

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Chapter 6

MORAL SELF-OWNERSHIP AND *IUS POSSESSIONIS* IN SCHOLASTICS

Rudolf Schüßler (University of Bayreuth, Germany)

In recent years various attempts have been made to trace the origins of modern subjective rights back to scholastic sources. Medieval law, the dispute about Franciscan poverty, scholastic nominalism, and medieval conciliarism have been thoroughly scrutinised in this context.[1] The contribution of early modern casuistry to the emergence of modern ideas of subjective rights, however, has not received much attention. This is unfortunate, because casuistry has something to offer to the history of subjective rights. Rights were not only postulated in connection with legal claims in public courts, but also in the court of conscience (*forum conscientiae*). An important strand of Catholic casuistry assumed that in the absence of firmly recognisable moral restrictions an individual has a liberty right (*ius libertatis*) or possessive right (*ius possessionis*) to morally unrestricted agency. The notion of possession relates this set of ideas to the rise of modern liberalism. We should, therefore, include casuistical doctrines in our accounts of the early history of subjective rights and liberalism.[2] The rise of possessive rights in the court of conscience will then appear as a

[1] See Brett 1997; Coleman 1988; Mäkinen 2001; Tierney 1997; Tuck 1979.

[2] I will mainly refer to casuistry instead of more generally to moral theology because the doctrine we will discuss was designed to be applied by casuists, although it was a creation of theologians who often did not teach casuistry themselves. (It should be noted that different chairs of theology, casuistry and moral philosophy sometimes existed at early modern universities or colleges).

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 149-172.

striking example of the gradual appearance of subjective notions of rights in the scholastic tradition. An unambiguous statement of a universal moral *ius possessionis* was only made at the beginning of the seventeenth century – before Hobbes and Locke, but late in the scholastic tradition. It can be shown, however, how this right evolved step by step from medieval origins. Neither did it embrace all aspects of modern subjective rights all at once nor gain universal validity suddenly and through a single revolutionary event.

By elucidating these issues, the present paper will follow a trail which was marked some time ago by Edoardo Ruffini Avondo's article "Il possesso nella teologia morale post-tridentina".[3] Ruffini Avondo, however, investigated the role of the concept of possession in Catholic casuistry without establishing parallels with modern liberalism. Moreover, he focused on developments after the Council of Trent up to the nineteenth century, whereas the present inquiry is mainly concerned with developments from the thirteenth to the seventeenth centuries. I have also tried to reduce overlap with Ruffini Avondo by highlighting aspects of possession in the court of conscience which do not appear in his account (e.g., Soto's contribution, the Molinist connection). Because of this focus, cross connections with debates about Franciscan poverty, nominalism or conciliarism will be neglected. Such ties may well have existed, but they cannot be investigated here.

The present inquiry will start with some conceptual groundwork on the idea of moral self-ownership – in contrast to political (sec. 1). The medieval rule "in equal crimes or cases the position of the possessor is stronger" (the *possidentis* principle) will then be introduced (sec. 2). By the sixteenth century this rule had found a wide range of application from marriage to the theory of just wars and the justification of slavery. The next section (3) will show how the *possidentis* principle was innovatively applied to vows (i.e., promises to God) by the eminent Spanish theologian Domingo de Soto. Soto cleared the ground for the principle's career as a general rule of moral decision-making under uncertainty in scholastic probabilism, a doctrine invented by Bartolomé de Medina in 1577 (sec. 4). Probabilism's principle of possession was soon used to advance a *ius possessionis* or *ius libertatis* of free agency within the boundaries of doubt-free moral laws (sec. 5). The last section (6) summarises the paper and points out how scholastic natural law theories could become compatible with new individualistic trends of thought by opening up for quite radical innovations in the domain of moral uncertainty while modifying their traditional framework much more conservatively under conditions of certainty.

[3] Ruffini Avondo 1929.

SCHOLASTIC MORAL THEOLOGY AND MORAL SELF-OWNERSHIP: SOME PRELIMINARY ISSUES

Following C. B. Macpherson's *The political theory of possessive individualism*, historical inquiries into the ideas of self-ownership and possessive individualism have often centered on Hobbes, Harrington, Locke or other acknowledged ancestors of modern liberalism. Macpherson characterizes possessive individualism as a bundle of three assumptions: First, man is an owner of himself (self-ownership, meaning that everybody is free to market his abilities and productive faculties); second, freedom is a function of property ownership, and third, human societies consist of free and equal individuals, which owe each other nothing that is not grounded in contractual relationships.[4] It seems hard to believe that related concepts could have played an important role in early modern scholastic moral theology. Early modern scholasticism was impregnated with Thomism, and the Thomistic blend of Aristotelian and Christian virtue ethics appears hostile to proto-liberalist ideas. On the other hand, early modern moral theology was massively influenced by legal thinking. Legal concepts and principles had, of course, already played an important role in medieval theology, but their influence increased in early modern times. Thriving on this legalism, the language of possession and rights spread into the court of conscience.

Macpherson's category of possessive individualism is not suited to tracing such developments. His category mainly pertains to external actions in market societies, whereas the scholastic developments mentioned dealt with the inner workings of conscience. I thus introduce the concept of *moral* self-ownership to signify an inner space of freedom and rights. Moral self-ownership, in my definition, has three aspects: (a) a negative moral liberty of the self, (b) justified by claims of possession, (c) which are based on principles of property law. Negative moral liberty arises where human beings are free from moral restrictions and thus far regarded as free to act as they like.[5] This idea is not only a central assumption of what is commonly called "modern moral philosophy" but is also closely related to Macpherson's third assumption. Moreover, moral self-ownership is related to modern liberalism. This is underlined by the fact that the negative moral liberty in question is expressed in the language of possession.

[4] See Macpherson 1985. For the purposes of the present paper it is not necessary to subscribe to Macpherson's views concerning early modern liberalism. Therefore, they need not be discussed here either.

[5] On negative freedom, see Skinner 1984.

Before I show how moral self-ownership became a central idea in a major current of casuistry at the end of the sixteenth century, a word of warning may be appropriate. One should not assume that early modern scholastics developed an ideology of pure moral self-ownership. Since their ethical teachings usually were compromises between rule and virtue ethics derived from a blend of various medieval doctrines, all moves towards moral self-ownership were hedged by orthodox theological safeguards. No liberty was granted without exceptions in cases where conflicts with religious dogma, church authority or common utility arose. This orthodoxy was probably not merely simulated but honestly sought, even by the 'laxest' (most morally generous) casuists. Moreover, even lax casuists assumed that morality meant more than moral precepts and obligations. But such additional moral reasons, which were often associated with the virtues, were mainly embodied by counsels (*consilia*) and not by precepts (*praecepta*). Counselling that did not lead to precepts could be overruled without sin in the final action-guiding considerations of a moral actor. Under these preconditions, the idea of moral self-ownership became surprisingly forceful in the writings of some Catholic casuists. And despite the casuists' efforts to avoid the misuse of their doctrines, a germ was created that threatened to spread beyond the confines of casuistry. Since this germ will concern us more than the intentions of its creators, the safeguards of casuistical morality need not be analysed here.

MELIOR EST CONDITIO POSSIDENTIS: FROM THE MIDDLE AGES TO THE SIXTEENTH CENTURY

Moral self-ownership in early modern moral theology emerged from an old legal rule whose origins reach back to "time immemorial" as Joseph Ternus has put it.[6] More specifically, the *regula juris* no. 65 of canon law can be identified as the root of the developments in question:[7] "In equal crimes or cases the position of the possessor is stronger."

I shall, as stated, also refer to this rule or related principles under the generic notion of the "*possidentis* principle". Rule 65 says that when the nature of a case of disputed property ownership does not already create a legal presumption in favour of one of the sides (*pari causa*), a good may be retained by its present possessor. The position of the possessor is therefore 'stronger' (*potior*) than the position of a non-possessing claimant. However, in order to enjoy the benefits of a stronger or better position, a possessor has

[6] See Ternus 1930, 46.

[7] *Corpus iuris canonici*, reg. iur. 65 VI: "In pari delicto vel causa potior est conditio possidentis."

to be in good faith (*bona fides*).[8] A person with *bona fides* has to believe that the possessed good is rightfully hers or, at least, she cannot have uncontroversial reasons that someone else has a valid claim to it.

Because of the *bona fides* requirement, applications of rule 65 demarcated a continuously disputed frontier between medieval law and morality. The relationship between law and morality has never been unproblematic. Lawyers usually strive for autonomous systems of law, whereas moralists try to subordinate law to morality. In the middle ages canon law and considerations of the safety of consciences served as vehicles for imposing moral restrictions on civil law. Civil lawyers fought back and the strength of their position in medieval societies can be gleaned from the fact that they often succeeded. Civil lawyers assumed that *bona fides* was only required during the time in which legal action could be taken. Some canon lawyers and theologians, however, argued that nobody could own something with a good conscience knowing that the thing was unrightfully appropriated. This could, for instance, be the case if a person first heard of some fraud when legal action could no longer be taken. With the argument that civil laws should not put the salvation of people at risk, theologians pleaded for an indefinite temporal extension of the *bona fides* requirement. Civil lawyers rejected this proposal as impractical and medieval legal practice generally followed their advice.[9]

Rule 65 was situated at a junction between human law and morality, but in contrast to other legal rules and principles it apparently was not used to deal with pure doubts of conscience. Such doubts were commonly solved with the so-called *regula magistralis* which demanded that "In doubt the safer side should be chosen" (*in dubiis tutior pars est eligenda*).[10] The *regula magistralis* first appeared in early thirteenth century canon law and soon became the major principle for dealing with moral uncertainty when both sides of a decision problem were equally uncertain. Its domain of application is not easy to determine. The latin *dubitare* is almost as vague as the modern notion of doubt, which derives from it, but, as a technical term in rules of law or conscience, *dubium* regularly assumed a specific meaning. It signified an equal uncertainty based on a more or less even balance of reasons

[8] See e.g., Johannes Andreae, *Commentaria*, tit. De reg. jur. VI, reg. 65, fol. 36.

[9] To my knowledge the best treatments of the limitation of legal claims in medieval canon law are Reich 1880 and Cuyas 1962. Like Cuyas I follow Reich.

[10] The *regula magistralis* has been better known under the name of the *tutiorist principle* since the late seventeenth century. But note that *tutiorism* in its modern sense usually applies in all kinds of uncertainty, whereas the medieval *regula magistralis* was designed as a precept (*praeceptum*) for proper doubts, i.e., for situations in which no option has a higher probability than others. In other situations it was only a non-binding counsel (*consilium*).

concerning the two sides of a dialectical question.[11] This kind of doubt called for a suspension of assent by the reasoning person.

The notion of doubt and the *regula magistralis* are of special interest here because the *possidentis* principle became the main alternative to the *regula magistralis* in the sixteenth century. I could not find a single properly medieval case, however, in which the *possidentis* principle was used to supersede or curtail the *regula magistralis* (with the possible exception of marriage problems).[12] Conflicts were avoided by carefully distinguishing between judgement in the public court of law and the court of conscience.[13] Only the *regula magistralis* applied in purely moral matters. One might presume that a different treatment of the *regula magistralis* and rule 65 was already called for because only the former applied in situations of doubt. But the *possidentis* principle is also closely tied to such situations because *bona fides* is to be presumed in doubts about the honesty of a possessor. The late medieval canonist Nicolaus de Tudeschis (also called Panormitanus) claimed for example that "Good faith is to be presumed in doubt".[14]

Similar assertions can be found in earlier canonists, but they did not lead to a general application of the *possidentis* principle in doubts of conscience. This attitude began to change only after new moral problems had appeared in the early modern era. The early sixteenth century saw a considerable expansion of the *possidentis* principle's range of application, with the notion of doubt often being conspicuously present. One of the most interesting examples of this trend is the conquest of America. Spanish theologians and jurists claimed that the *possidentis* principle allowed Spain to retain its American possessions although everybody was well aware that the mode of their acquisition was morally doubtful to say the least. Juan de Guevara, a professor in Salamanca wrote about the wavering decision-maker on the throne of Spain:

> This was the case of Charles V who began to doubt his right to own the New World. But if a doubt remains in the examination of a case and

[11] Guillaume d'Auxerre, *Summa aurea*, lib. II, tract. XXX, cap. 3, fol. 105, col. 3, wrote in the early thirteenth century: "Dubium enim tale est quod habet equales rationes ad hoc quod sit et quod non sit." This notion of doubt is closely related to Aristotle's characterization of doubt in *Topics*, 145 b 17.

[12] The disagreement between Hadrian VI and Soto concerning matters of marriage which we will discuss below seems to rest on older foundations. I was not able to trace it back to debates in medieval law.

[13] Panormitanus emphasizes this distinction in his analysis of the application of the *regula magistralis*. See Tudeschis, *Super quinto decretalium*, tit. de homicidio, cap. ad audientiam, n. 2, fol. 100.

[14] Tudeschis, *Tertio super secundo decretalium*, tit. *De prescriptionibus, cap. sanctorum*, n. 3, fol. 23: "Bona fides in dubio presumitur." The next point is: "Mala fides ex quibus coniecturis probetur."

> equal reasons fight for each side, a prince who took possession in good faith may not be attacked by another prince and may retain the whole possessed thing.[15]

Guevara's argument can only be understood against the background of the sophisticated academic debate about "the Indies question" in early modern Spain.[16] Many well educated contemporaries of the *conquista* were aware that its cruel and lawless conduct rendered it prima facie legally and morally wrong. A majority of experts also believed that the American Indians had a right to self-government and property. Therefore, the apologists of Spanish claims to the New World and its gold had to look for suitably subtle arguments to explain how the King of Spain could retain his new possessions in America and make use of their golden fruits without sinning mortally. The main apology was that the Spanish crown had initially lacked the intention to conquer the Indian territories by war when it sponsored settlement in America. Instead, the Spaniards declared that they had intended to settle in uninhabitated quarters of the New World, wishing to trade with the Indians to their mutual benefit. Nevertheless, fighting had somehow broken out in a way that left it unclear who was responsible for the hostilities. For these reasons, Guevara claimed that the Spaniards had begun settlement in America in good faith. Because of the uncertain responsibility for the outbreak of hostilities, he also assumed that the legitimacy of the Spanish possession of America was doubtful instead of being obviously morally wrong. Under these premises, the *possidentis* principle could be employed to justify Spanish rule in America including the appropriation (as *usus fructus*) of its precious metals. Not all Spanish intellectuals accepted this justification. Bartolomé de Las Casas, the prime defender of the Indian case, debunked the application of the *possidentis* principle to a thing like America by neat legal reasoning.[17] He showed that the Spaniards could not believe in their own *bona fides*, however unaware the Spanish crown may have been of the realities of the *conquista* at the beginning. The *conquistadores*, at least, must have known that their conduct destroyed the presumption of *bona fides*. This argument seems sound to modern readers, but it did not convince too many Spanish lawyers in Spain's era of gold.

The *possidentis* principle also played a major apologetic role for early modern slave trade. The African slave trade increased massively in numbers

[15] Guevara in Baciero 1984, 448: "Tal fue el caso de Carlos V que empezó a dudar de su derecho a la posesión de las Indias. Pero si examinando el asunto, la duda persiste y militan iguales razones por una y otra parte, el príncipe que empezó poseyendo con buena fe, no puede ser atacado por el otro y puede retener íntegramente la cosa poseída."

[16] See Gillner 1997; Ramos 1984.

[17] See Las Casas 1997, 85.

from the fifteenth century onward. Many aspects of the trade were regarded as morally problematic by Christian moralists and theologians.[18] Quite often, for example, Europeans bought slaves who were captured by Africans. The African princes or their customers declared that their human merchandize had been lawfully enslaved, e.g., as prisoners of just wars.[19] But these declarations obviously appeared dubious. Could a Christian slave trader and his customers disregard such doubts with a good conscience? In the background of this question loomed the medieval principle "In doubt the safer side should be chosen". Not buying possibly illegitimate slaves clearly minimized the risk of sinning. The *possidentis* principle, however, was used to put these worries to rest. A purchaser could with a good conscience retain and re-sell a bought person even in situations of doubt about legitimate enslavement because a *bona fide* possessor could retain and use the possessed good (i.e., the slave).[20] Since slaves were important goods of early modern capitalism, the *possidentis* principle was an instrument which facilitated the transformation of medieval societies into market societies.[21] We should keep this in mind when we now take a closer look at theoretical developments which prepared the way for a generalized moral application of the *possidentis* principle at the end of the sixteenth century.

DOMINGO DE SOTO AND THE *POSSIDENTIS* PRINCIPLE

The rise of the *possidentis* principle to a general moral decision rule was initiated by the great Salamancan theologian Domingo de Soto, whose role has been recognized by historians of thought. Albert Schmitt claimed that Soto was the first to extend the idea of remaining in possession to matters of personal freedom or freedom of choice.[22]

[18] Eisenberg 2003 has recently shown how the discourse of subjective rights was associated with Brazilian debates about voluntary slavery in the sixteenth century. (I thank Janet Coleman for this information). Eisenberg concentrates on the problem of selling oneself into slavery in cases of no extreme necessity. He touches upon the *possidentis* principle only in passing.

[19] This was an acceptable way to make slaves according to scholastic law, because it was in the interest of prisoners of war to survive as slaves instead of being killed. On early modern slavery and Spain, see Hanke 1959.

[20] See, e.g., Pagden 1982, 33, who quotes a letter of Francisco de Vitoria in which a fellow Dominican's unease concerning slave-owning is resolved by the *possidentis* principle.

[21] In a similar way it could be shown how the *possidentis* principle was used by scholastic counsellors of conscience to take the bite out of usury restrictions, but lack of space does not permit this here.

[22] See Schmitt 1904, 41.

Soto developed his position by challenging Adrian of Utrecht who had proposed a rigorist application of the traditional rules of moral decision-making under uncertainty in the late fifteenth century. Adrian was more than a normal scholastic. Since he was tutor of Charles V, thereafter his regent, and finally became Pope Hadrian VI, his opinions obviously counted more than the ideas of an ordinary university professor. Generations of Spanish theologians argued against young Adrian's almost pacifist views on military obedience. Adrian, who was brought up in the austere spirit of the Dutch *devotio moderna*, also had quite rigorous opinions about the validity of doubtful marriages. In both fields he used the principle "In doubt the safer side is to be chosen" in a new and unusually restrictive manner.[23]

Francisco de Vitoria and others announced their disagreement with Adrian, but Soto presumably was the first to respond to Adrian's arguments in detail. Soto attacked Adrian's position on military obedience and marital matters with the *possidentis* principle. Soto emphasized that a king was possessor of his soldiers and thus could expect obedience in situations of doubt. He likened the role of the king in this context to the role of a marital partner who could claim sexual intercourse even when the legitimacy of a marriage was in doubt. In both cases, Soto's use of the *possidentis* principle followed a distinctive pattern. Firstly, it gave the king and one marital partner a claim right which could be exercised in doubt. This claim right *is* the possessed thing in these cases. Secondly, in both cases other persons exist whose freedom of choice is restricted or whose claims are denied.

The same pattern can be found in Soto's trail-blazing use of the *possidentis* principle in matters of doubtful vows. Should the vow of a very young boy to become a monk be regarded as binding?[24] Soto gave the benefit of doubt to the boy. If the boy had not yet reached the normal majority it had to be established beyond reasonable doubt by the side which favoured the vow that the boy was capable of rational long-term decision-making. Soto argued on the basis of the *possidentis* principle that unless convincing proofs were presented the boy should retain his liberty and remain in possession of

[23] For an analysis of this new mode of application, see Schüssler 2000 on Adrian and military obedience.

[24] Soto, *De iustitia et iure*, lib. VII, q. 3, a. 2, 500: "quando ante legitimum tempus pubertatis quis emisit votum [...] non sufficit quaecumque opinio, hinc habuisse usum rationis, quando vovit: sed requiritur rem esse adeo certam & compertam, ut nulla aut tenuissima apud viros prudentes reliqua fiat dubitatio contrariae opinionis. [...] dum res est dubia, potius esse in favorem voti iudicium ferendum, nempe obligare. Crediderim namque prorsus contrarium: nam cum iure eiusmodi puer praesumatur non habuisse usum rationis, non est in contrarium adigendus nisi luculenter id ratio convicerit. Melior siquidem est possidentis conditio & homine manere liberum, censetur manere in sua possessione."

himself: "The lot of the owner is better and that a person should remain free, which means in his own possession."[25]

It is not entirely clear what Soto wants to say here. According to one possible interpretation, being free from a vow is tantamount to being free from a bond like servitude. On these premises, liberty would mean the absence of rights of other people (e.g., superiors in a religious order) concerning a person's actions. Therefore, a parallel to Soto's use of the *possidentis* principle in cases of war and marriage would exist. However, references of other scholastics to Soto's treatment of doubtful vows indicate that it was considered a novelty.[26] This can be explained by pointing out that the close nexus between the validity of a vow and the validity of promises and contracts makes Soto's use of the *possidentis* principle a suitable springboard to its generalized application in all moral matters.[27]

A second interpretation assumes that Soto had already applied the *possidentis* principle as a general moral rule in order to defend human liberty against all doubtful moral claims. Albert Schmitt comes close to this second understanding by assuming that Soto favoured an individual's possession of liberty against God as claimant.[28] Schmitt's interpretation is corroborated by the fact that a vow is a promise given to God, but I hesitate to regard this fact as decisive. Soto's remarks about the difficulty of determining the intellectual maturity of a teenager point towards a practical and quite untranscendental context. Soto may have been concerned only with the consequences of teenage vows for teenagers and religious communities. At least he did not yet present an unambigous case of the *possidentis* principle's application as a general moral decision rule. For such cases we will have to wait until the end of the sixteenth century.

In any case, Soto took the generalization of the *possidentis* principle one step further. He also contributed to the rise of possession as a moral category in other ways. This is documented by his innovative analysis of honour and reputation (*honor et fama*).[29] Other scholastics, of whom Soto especially mentions Thomas de Vio, had questioned whether somebody could be a full

[25] *Ibid*.: "Melior siquidem est possidentis conditio & homine manere liberum, censetur manere in sua possessione." I shall use the established translation "lot of the owner" for *conditio possidentis* in the following. I have not used it for rule 65 because this rule has 'stronger' (*potior*) instead of 'better' (*melior*), and I did not want to speak of a stronger lot of the owner.

[26] See Gabriel Vazquez' reference to Soto in his *Disputationum in primam secundae*, tom. I, q. 19, disp. 65, c. 2.

[27] See Tomás Sanchez' use of the *possidentis* principle cited in the next section.

[28] See Schmitt 1904, 41: "Ja, Dominicus Soto ist der erste, der das Prinzip der Possessio auch auf die menschliche Freiheit Gott gegenüber anwendet."

[29] See Soto, *De iustitia et iure*, lib. IV, q. 2, a. 3, 211. For the importance of reputation in scholastic moral thought, see Coleman 2003.

owner of his "good name" or reputation. They assumed that the use of one's "good name" could legitimately be restricted because it belonged to the "order of life" (*ordo vitae*) – presupposing that nobody but God is the owner of human lives. Soto replied that "A person has rightful rule (*dominium*) over his honour and reputation: in fact, so that he can use them like money, although they should be esteemed higher than goods with a price."[30]

This means that honour and reputation had more than just monetary value. Soto assumed three classes of worldly goods: life, honour and reputation, and temporal goods.[31] Although honour and reputation are not in the same category as temporal goods or money, Soto thought that we may use them according to the same principles. Therefore, it is not unjust in itself to use honour and reputation as one likes, but their use may be restricted by considerations of charity. This, of course, is also to be assumed for the possession of temporal goods. Thus, honour and reputation became possessions and could be managed according to rules of possession.

PROBABILISM AND THE *POSSIDENTIS* PRINCIPLE

In 1577 Bartolomé de Medina, a Dominican professor in Salamanca, claimed: "If an opinion is probable it may be followed, even if the opposite opinion is more probable."[32] According to the scholastic notion of probability, a proposition is probable if it is supported by enough reasons for a reasonable observer to regard it as true. Such support can come from the opinions of experts. Medina discusses cases in which the opinions of experts are divided and rational belief remains underdetermined. This is the case if a majority of experts vote for a proposition, for instance, while a sufficiently large minority of experts exists so that a person's assent to the negation of the proposition cannot be regarded as irrational. Two contradictory propositions can thus both be probable, although one may also be more probable than the other according to the number and weight of expert opinion. In such cases (and some others) a decision-maker remains free to

[30] Op. cit., 213: "Homo dominium obtinet honoris sui & famae: nempe ut possit illis veluti pecuniis uti, licet pretio sint maiori aestimanda".

[31] *Ibid*.: "Triplex est nostrorum bonorum genus: primum est vita, postremum temporalia bona, medium honor & fama. [...] Opinio ergo nostrae contraria, collocat honorem & famam in ordine vitae, nos autem in ordine bonorum exteriorum. Et ratio nostra prima est superiori contraria. Homo vere ac legitime est suorum bonorum omnium dominus, ut citra cuiuspiam iniuriam, quae proprie sit contra iustitiam, possit illa dispendere ac negligere, illisque uti."

[32] Medina, *Scholastica commentaria*, q. 19, a. 6, 464: "Si est opinio probabilis, licitum est eam sequi, licet opposita probabilior sit."

choose either side of a question as a premise for action according to Medina. This permission created a new doctrine of moral decision-making, which was first called *doctrina probabilitatis* and later simply probabilism. Probabilism flourished from 1577 until the end of the seventeenth century, when the decline of the scholastic tradition as a whole began. It is surprising how rapidly probabilism became a widespread and respected doctrine. By 1600 it was well-entrenched in Spanish moral theology, among the scholars of the Jesuit Collegio Romano in Rome, and began to influence Catholic theologians everywhere.

The present paper is, however, not the place to deal with the intricacies and ramifications of probabilism or to provide a detailed account of its evolution.[33] I will concentrate on the role of the *possidentis* principle in a liberty-centered version of probabilism (soon to be outlined) which began to emerge shortly after Medina had published his claim. Probabilism was quickly associated with the question of the *possidentis* principle's range of application. Medina himself used the *possidentis* principle against dubious claims to obedience if a duty to obey would have led to significant losses (*detrimentum*) by an actor. In an example he concentrates on material losses, thus not advancing far beyond the traditional application of the *possidentis* principle.[34] The famous Jesuit theologian Francisco Suárez went further. He relied on an extended but still not fully general use of the *possidentis* principle in *De bonitate et malitia humanorum actuum* where a detailed justification of probabilism can be found. In his treatment of the doubting conscience (*conscientia dubia*), Suárez carefully distinguished between different kinds of moral doubt in order to avoid confusion. He pleaded for an application of the *possidentis* principle only in the domain of doubts about the existence or general validity of a law (*an lex sit lata*) or in doubts about facts of the kind "whether this thing is mine". In cases of doubts about a law's existence or validity Suárez argued: "And thus the general rule is that it does not oblige, which can be justified by the principle that in doubts the lot of the owner is better and that a person retains his freedom."[35]

He immediately added a second decision rule which, of course, is compatible with the *possidentis* principle: the principle "a dubious law does not bind" (*lex dubia non obligat*). Probabilism, however, is first discussed in the next section of "De bonitate". There, Suárez relied on a distinction between opinions about rights (or law) and things (*interdum opiniones*

[33] For a fuller treatment of probabilism see Deman 1936; Kantola 1994; Schüßler 2003; Stone 2004.

[34] See Ruffini Avondo 1929, 68. Besides Medina, Ruffini Avondo discusses only Navarrus and Suárez as early proponents of an extended application of the *possidentis* principle.

[35] Suárez, *De bonitate*, disp. XII, sec. 5, n. 7: "Et tunc generalis regula est non obligare: ratio peti potest ex illo principio, quod in dubiis melior est conditio possidentis; homo autem continet libertatem suam."

versantur circa ius ipsum ... interdum circa res ipsas).[36] He claimed that one can with a good conscience prefer a less probable and less safe opinion in matters of right, but not generally in matters of fact. The argument for probabilism invokes the *lex dubia* principle, whereas the *possidentis* principle is not explicitly mentioned.[37] Nevertheless, Suárez established a parallel between the previous analysis of an uncertainly given law and probabilism by carrying over the *lex dubia* principle. This means that the *possidentis* principle should also suffice to justify probabilism.

After Suárez, the assumption that uncertain laws or moral obligations have insufficient force to bind agents became the foundation of a new and fertile branch of probabilism. In cases in which the opinion not to be obliged remained at least probable, it was assumed that a decision-maker remained free to choose according to other criteria of choice. Forms of probabilism which defend moral freedom in this way will be called "liberty-centered" here. An extension of the *possidentis* principle's domain of application probably occured as early as 1581/82 when the passages quoted from Suárez' commentary on Aquinas's *Summa* were written as a basis for lectures.[38] Suárez and his followers apparently could rely on the authority of the highly renowned canon lawyer Martin de Azpilcueta (alias Dr. Navarrus): "In doubts, above all (*maxime*) in matters of justice, the lot of the owner is better."[39]

The 'maxime' in this sentence seems to indicate that the application of the *possidentis* principle extends beyond the domain of justice (i.e., beyond rival claims to goods and their distribution) to *all* doubtful matters, although the principle remains best suited to solving problems of justice. Azpilcueta and Suárez, however, probably only meant that the *possidentis* principle could be applied to *some* other domains of morality. In his *De censuris in communi*, for example, Suárez says that possession should cover other virtues, but he explicitly refers only to Soto's case of vows.[40]

[36] I do not regard it as relevant that Suárez speaks of rights and not of law here. He explicitly remarks that he intends to write about precepts or prohibitions, which shows that he intends to cover opinions about laws as well.

[37] Suárez, *De bonitate*, disp. XII, sec. 6, especially after n. 8.

[38] On Suárez' lectures, see Deman 1936, 473.

[39] Navarrus, *De ablatorum restitutione*, tom. II, lib. III, c. 4: "in dubiis, maxime in materia iustitiae, melior est conditio possidentis", cf. Ruffini Avondo 1929, 69. It should also be noted that the formula "in dubiis melior est conditio possidentis" is used instead of rule 65 of canon law. This became common practice among probabilists.

[40] Suárez, *De censuris*, disp. XL, sec. 5, n. 14. Ruffini Avondo (1929, 69) fails to distinguish between a fully general application of the *possidentis* principle and Navarrus' and Suárez' selective extension.

Gabriel Vazquez, a fellow Jesuit and adversary of Suárez, vigorously opposed any generalized application of the *possidentis* principle.[41] Like Suárez he employed the distinction between doubts of law and doubts of fact (*dubium iuris*, *dubium facti*) reporting that some recent authors allow choosing the less safe side in doubt about the validity of laws. The *possidentis* principle is identified as premise of this new trend, only to be immediately attacked by Vazquez, who argued against Soto's use of the *possidentis* principle in matters of vows. According to Vazquez, the *possidentis* principle is valid only in matters of justice. He weakened his case, however, by pointing out that should the *possidentis* principle be extended to vows it would automatically be valid in all kinds of moral doubt. Many casuists who were not willing to accept a limitation of the principle to matters of justice did follow Vazquez' conclusion and accepted a fully universal application.

Thus, Vazquez' attack did not prevent a further radicalization of liberty-centered probabilism. It is not clear how many theologians were involved in this process, but the Jesuits Tomás Sanchez and Juan de Salas certainly played significant roles. Sanchez was a full-time casuist who taught in Granada. Despite not being at a centre of the scholastic academic world, he had great influence on the evolution of probabilism through his *De matrimonio*, which became a standard work on marriage and sexual morality in the seventeenth century. Salas (like Suárez and Vazquez) taught at the Collegio Romano, the centre of Jesuit theology and science. One of his younger colleagues there was Vincenzo Filliucci, a notoriously 'lax' probabilist, who relied on the same set of premises as Sanchez and Salas.[42] The new trends in probabilism, therefore, were not restricted to the periphery of Jesuit theology.

Salas and Sanchez radicalized liberty-centred probabilism by explicitly founding it on the assumption that the general freedom to pursue different courses of action is a possessed good of which human beings are deprived by means of precepts. Doubtful moral obligations do not have enough force to justify this deprivation. At best, they establish a contentious case of

[41] See Vazquez, *Disputationum in primam secundae*, q. 19, art. 6, disp. 65, c. 2. Other early opponents of an extended application of the *possidentis* principle beside Vazquez were the casuists Azor, Comitoli, Rebello and Sayer. Ruffini Avondo (1929, 70) does not mention the central role played by Vazquez' criticism.

[42] On Filliucci's professorship at the Collegio Romano from 1600 to 1604 and 1607 to 1613, see Villoslada's (1954, 221) appendix. Filliucci's probabilism and its closeness to Sanchez and Salas can be gleaned from his *Moralium Quaestionum*, tract. XXI, cap. 4 and especially n. 159: "pares rationes probentes obligationem & libertatem, ius possessionis libertatis praeponderabit". About Leonard Lessius, another important early probabilist, it may suffice here to say that his probabilism (documented in *De beatitudine, de actibus humanis*, q. 19, art. 6, dub. 7–10) was mitigated like that of Suárez'.

ownership to be dealt with in the court of conscience. The *possidentis* principle is then applied to resolve this case in favour of an actor's liberty of choice. Tomás Sanchez established this line of reasoning in his *De matrimonio*:

> Furthermore, if after sufficient inspection it remains doubtful whether he promised marriage, he is not bound, and it is the same if he doubts whether he has made a vow. This follows because in doubt the position of the possessor is better, not only in matters of justice but everywhere else. [...] In such doubt, however, the will (*voluntas*) possesses its freedom, [...] therefore in such doubts one should judge in favor of freedom.[43]

In his *Opus morale* he adds that "The will is justly said to possess its freedom, and whoever wants to impose an obligation that restricts freedom has to bear the burden of proof".[44] Sanchez' position became a point of departure for later casuists who emphasized human liberty in doubts about the validity of moral laws. Hermann Busenbaum, for instance, whose *Medulla theologiae moralis* was a best-seller in the market for conscience literature in the seventeenth century, reproduced Sanchez almost verbatim.[45]

Juan de Salas justified liberty-centered probabilism with a long and detailed analysis of its foundations and ramifications in his commentary (treatises 3 and 8) on Aquinas's *Summa theologiae*. Salas suggests three opinions concerning the claim that one may licitly follow a less probable opinion against a safer and more probable one.[46] The first opinion denies this claim outright, the second calls for a distinction between matters of law and matters of fact, and the third accepts probabilism even without such a distinction. Salas embraced the third opinion, citing several reasons for his choice. His third reason contains a far reaching claim: "In doubts the lot of

[43] Sanchez, *De matrimonio,* tom I., lib. I, disp. 9, n. 11: "Ceterum dicendum est, si sufficienti adhibita diligentia adhuc manet dubius, utrum matrimonium promiserit, minime teneri: & idem est si dubitat de voto a se emisso. Probatur, quia in dubio melior est possidentis conditio, non tantum in materia iustitiae, sed in quacumque alia. [...] Sed in hoc dubio voluntas possidet suam libertatem, [...] ergo in hoc dubio pro libertate iudicandum est."

[44] Sanchez, *Opus morale*, lib. I, c. 10, q. 1, n. 11: "voluntas dicitur possidere vere suam libertatem, & volenti obligationem imponere privantem libertate, incumbit eius probandae onus." See also Sanchez, *Consilia*, lib. VII, c. 1, dub. 55, n. 5, 209: "Caeterum, ut respondeam, supponendum est primo, quod hoc distat inter arbitrium boni viri & liberam voluntatem, quod dum aliquid relinquitur liberae voluntati alicujus, ille ad nil tenetur, nec indiget causa, & stabitur declarationi suae, sive iustae, sive iniustae, sive dignae sive indignae." The *Opus Morale* and the *Consilia* were edited and possibly re-worked after Sanchez' death. For details see Bajen Espanol 1976.

[45] See Busenbaum, *Medulla*, lib. I, tract. I, c. 1, dub. 3.

[46] See Salas, *Disputationes in primam secundae*, tract. VIII, sec. 6, n. 61.

the owner of some external thing is better and thus the lot of the owner of his own freedom and the right to bring about what may be useful for him."[47]

In sum, Sanchez and Salas went further than Suárez in several respects. Above all they regarded the freedom of action as property, which was protected by the *possidentis* principle. Suárez, of course, valued freedom highly, too. He inclined towards Scotist views concerning the freedom of the will and, at least in his early years, towards a radical conception of freedom in the debate about grace.[48] Nevertheless, it should not be dismissed lightly that Suárez did not speak of a right to retain one's possessions in his justification of probabilism. In substance and language he does not belong to the most radical probabilists. Suárez intended to use the *possidentis* principle mainly in doubt about a law's validity. Salas' three-fold distinction between positions, on the other hand, makes it clear that Salas pleaded for a fully general application of the *possidentis* principle in all doubtful matters of moral relevance.

Motives for a liberty-centered transformation of probabilism can be found in scholastic voluntarism and the Catholic dispute about grace.[49] Medieval voluntarists emphasized the will's role in decision-making, insisting on its independence and freedom in the final act of choice. Aquinas, in contrast, maintained that the free element in decision processes is not the will but free choice (*liberum arbitrium*), a joint venture of intellect and will. The formal freedom of the will, which Aquinas and the Thomists after him did not deny, cannot in their opinion be used to make decisions against the intellect. This is relevant to Medina's probabilism as a product of Spanish Dominican Thomism.[50] The Dominican Medina never elevated the freedom of the will to the extraordinary status it attained in Suárez and especially in Sanchez and Salas.[51] Sanchez, as we have seen, speaks of a freedom of the will (*voluntas*) as a possessed thing. Salas documents his voluntarism in his long treatise on the will (treatise 3) and by maintaining the very radical

[47] Op. cit., n. 66, probatur 3: "in dubiis melior est conditio possidentis rem aliquam externam ita etiam melior est conditio possidentis libertatem suam, & ius efficiendi, quod sibi utile fuerit."

[48] See Suárez, *Disputationes metaphysicae*, disp. XIX, sec. 5; Stegmüller 1933, 7.

[49] The influence of voluntarism on probabilism and casuistry is one of the most interesting philosophical issues in this field of study. Stone (2000) has shown how medieval voluntarism influenced fifteenth and early sixteenth century ideas about dealing with moral uncertainty. The following remarks on later influences of voluntarism add further emphasis to Stone's observation that not only canon law and moral theology but also late medieval philosophy had a decisive impact on the development of probabilism and casuistry.

[50] On medieval voluntarism see Auer 1938; Kent 1995. On the Spanish Thomist theory of action, see Lebacqz 1960, 26 and on Medina, see Davitt 1953, c. 11.

[51] The action theory of these three Jesuits shows markedly voluntaristic influences, which they openly acknowledge by quoting Duns Scotus and other important figures of medieval voluntarism. Ockham, however, is not quoted in this context.

position that the will can decide against the intellect even in epistemic matters by producing assent to a less probable position.[52]

The spread of voluntaristic traits in Jesuit thought was fuelled by the *De auxiliis* debate between Dominicans and Jesuits. The Jesuits emphasized the freedom of the will in their struggle against all doctrines which came close to predeterminism. The Dominicans, on the other hand, felt that the Jesuits moved too far into the direction of the Pelagian heresy, which minimized the role of God's grace in human moral action. Out of this dispute arose a violent conflict between these Catholic orders. It entered a 'hot' phase with the publication of Luis de Molina's *Liberi arbitrii concordia* in 1588 and was mitigated in 1613 when the compromise doctrine of 'congruism' replaced Molinism as the main Jesuit position. Stegmüller assumes that Suárez, who was one of the most important proponents of congruism, mitigated his attitude towards moral freedom soon after he learned about Molina's position.[53] Suárez liberty-centered probabilism may thus reflect an early stage of his thought. On the other hand, Molinism certainly contained enough praise of liberty to support to some extent the positions of Sanchez and Salas.[54] Sanchez' *De matrimonio* was finished about 1596 and appeared in 1602, whereas Salas' commentary on Aquinas was published in 1607/09, shortly after he taught as professor at the Collegio Romano.[55] Both wrote during the 'hot' phase of the fight between the Jesuits and the Dominicans concerning Molinism. This may help to explain the radicalization of their liberty-centered views. It also makes understandable that the positions of Sanchez and Salas did not appear overly problematic to many peers and superiors in the Jesuit order.

We may conclude that the *possidentis* principle reached the terminal point of its evolution from a medieval principle of property law to a general principle of moral non-obligation in cases of serious moral uncertainty in the works of Tomás Sanchez and Juan de Salas. Their positions show clear signs of moral self-ownership. Both theologians assumed that human beings can

[52] See Salas, *Disputationes in primam secundae*, tract. VIII, sec. 6, n. 61: "aliqui [...] putant neminem assentiri posse propositioni, cuius oppositam existimet esse aeque aut magis probabilem, ego vero puto esse possibilem: quia sicut possumus amare minus bonum etiam cognitum, ut tale, ita & assentiri propositioni minus probabili cognitae."

[53] See Stegmüller 1933.

[54] This leads to the question of Molina's attitude towards probabilism. Hitherto, I could find no indication that Molina tended towards a radical form of probabilism. Furthermore, Ruffini Avondo (1929) does not mention Molina in his survey of the post-tridentine career of the *possidentis* principle.

[55] On the finishing of Sanchez's *De matrimonio* and immediate discussions of the text's orthodoxy at the Collegio Romano, see Bajen Espanol 1976, 60. Salas taught at the Collegio Romano in 1604, see Villoslada 1954, appendix.

legitimately use their freedom of choice for arbitrary purposes as far as their freedom is protected by a principle of possession.

LATER DEVELOPMENTS AND MORAL SELF-OWNERSHIP AS *IUS LIBERTATIS*

In the seventeenth century, many casuists were probabilists and many probabilists accepted the view that the *possidentis* principle protects an individual's freedom of choice. The liberty-centered probabilism of Suárez, Sanchez and Salas became a mainstream casuistical doctrine. Some treatises on probabilism, like Juan Caramuel y Lobkowitz's *Dialexis de non-certitudine humanam libertatem in possessione et bona fide plene conservans*, bore witness to the *possidentis* principle in their titles. Caramuel, who earned himself the nickname "prince of laxists", embraced a radical form of probabilism which became prominent after the Thirty Years War. He was an unflinching supporter of liberty-centered justifications:

> But a person is in sure and legitimate possession of her freedom, of which she is deprived by precepts. Therefore, nobody can take away a sure and legitimate possession of freedom other than by a sure precept. Therefore, as long as a precept is merely probable (for so long it is uncertain) the freedom to act retains its original force.[56]

Caramuel's idea of moral self-ownership is even more radical than its predecessors' because he raises the level of certainty required for binding obligations. Caramuel and some other probabilists of the 1650s claimed that a law had to be regarded as insufficiently published if the legitimacy of non-compliance was not clearly improbable. In other words, the rightness of an action is to be presumed not only if its premises are probable but unless the opposite is proven beyond reasonable doubt. This, of course, added to already existing fears that probabilism would entail moral anarchy, giving additional momentum to the wave of violent criticisms of probabilism which arose in the second half of the seventeenth century and of which Blaise Pascals *Provincial Letters* are the best-known example.

From the seventeenth century onward, the language of probabilism also became explicitly connected with that of subjective rights. We have already seen that Juan de Salas asserted (in doubt) a *ius efficiendi, quod sibi utile*

[56] Caramuel, *Dialexis de Non-Certitudine* I, n. 294, 118: "At in suae libertatis certa & legitima possessione homo est: & ipsa per praeceptum privatur. Ergo homo non potest certa & legitima libertatis possessione privari, nisi ob praeceptum certum. Ergo quamdiu praeceptum est mere probabile, (tamdiu enim est incertum) manet in suo pristino vigore operandi libertas."

fuerit, i.e., a *ius* in a subjective sense.[57] From Vincenzo Filliucci in the early seventeenth century to Ignaz Schwarz, who wrote in the early eighteenth century, Jesuits spoke of a probabilistic *ius possessionis*:

> This rule that the position of the possessor is better is not only valid in matters of justice but also of conscience. The reason is that even there a person has a sure right of possession (*ius certum possessionis*) of her freedom.[58]

The enemies of probabilism were keen to attack such rights language. A subjective right to act as one wishes helped to bedevil the radical probabilist conception of human freedom. Scholastic critics of probabilism, like Daniele Concina, complained that the probabilists assumed a liberty right which gave way only to laws (*Lex tollit ius libertatis, inquiunt Probabilistae*).[59] According to Concina such a *ius libertatis* or *ius possessionis* negates God's dominion over man: "Therefore, the right of possession which the Probabilists ascribe to human freedom in controversial issues is wrong and completely imaginary: it violates God's supreme mastery (*dominium*)."[60]

Concina, I think, saw rightly that the probabilists emphasized the liberty of choice so much that in fact they postulated a natural right to moral self-ownership. In this they prepared – surely unwittingly – the modern departure from the traditional theological framework of morality. The surprising modern 'touch' of liberty-centered probabilism can also be gleaned from a statement of the English casuist Antonius Terillus: "The will has a natural mastery (*dominium*) of everything, if it is not forbidden by law."[61] This sounds sufficiently 'Hobbesian' to make us wonder whether Terillus read Hobbes or Hobbes knew about such assertions by casuists. We must leave this question to future inquiry. It is interesting, however, that probabilist claims of moral self-ownership could come quite close to the language of one of Macpherson's champions of possessive individualism.[62]

[57] Salas, *Disputationes in primam secundae*, tract. VIII, sec. 6, n. 66, probatur 3.

[58] Schwarz*, Institutiones iuris universalis*, tom. I, tit. I, instructio V, §4, resp. 2: "Ista regula, quod melior sit conditio possidentis non tantum valet in materia iustitiae, sed etiam conscientiae. Ratio est: Quia etiam in hac homo habet ius certum possessionis quoad suam libertatem." For Filliucci, see footnote 42.

[59] Concina, *Theologia christiana*, tom. I, lib. II, diss. II, cap. 7, §1, n. 1.

[60] Op. cit., n. 4: "Igitur ius possessionis, quod in rebus controversis libertati humanae adscribunt Probabilistae, falsum atque omnino chimaericum est: laedit supremum dominium divinum." This allegation insinuated that probabilism resulted in "practical atheism".

[61] Terillus, *Fundamentum*, q. 23, n. 46, 425, margin: "Voluntas habet naturale dominium in omnia, nisi lege prohibeatur."

[62] Of course, one should not equate Terillus's and Hobbes's concept of the will, but only note that both claim a right to everything which is not forbidden by law.

FINAL REMARKS

The present inquiry shows that central ideas of modern liberalism and modern moral philosophy have roots in early modern scholasticism. Scholastic probabilism conceived an idea of moral self-ownership even before Hobbes and Locke. A key concept which allowed probabilists to depart from the traditional ways of natural law teaching is uncertainty. The Thomistic connection between *lex* and *ius* and the good moral world order was not abandoned, a distinction being made between situations of moral certainty and moral uncertainty. Under conditions of certainty much remained as before, but in cases of serious moral uncertainty, the bond between rightful actions and the moral good was considerably loosened. Up to Bartolomé de Medina, traditional scholastic decision doctrine had insisted on choosing the action which had less potential for sin (i.e., the safer side) or that which was more likely morally right. These possibilities represent an unwavering orientation towards the morally right and good, but probabilism legitimized the choice of moral options which were less safe and less likely morally right. In liberty-centered probabilism this permission was combined with a second key idea: a *ius possessionis* of free choice. This led to a space of inner freedom as a sanctuary of free agency within the limits of doubt-free moral laws. In other words, a domain of negative freedom was created in which virtue could counsel but not bind.

It is, I think, not coincidental that probabilism's inner space of freedom was framed in legalistic terms and in the language of possession. Following the history of rule 65 of canon law we may recognize step by step how rules of possession assumed an increasingly central role in scholastic moral discourse. The main period for this development was the sixteenth century. This was, of course, also the period in which modern market societies began to emerge. Without falling prey to narrow Marxist theorizing we may assume that capitalism helped probabilism and vice versa. Slave traders and slave owners received support from the *possidentis* principle. Moreover, probabilism took the sting out of many restrictions on usury. On the other hand, the importance of the post-tridentine dispute about grace and freedom of the will for the evolution of probabilism shows that an exclusively economic story of the rise of modern self-ownership would be far from satisfactory.

Finally, it seems worthwhile to reconsider Hobbes and Locke in the light of probabilism. Hobbes's state of nature is above all a state of uncertainty. For him, uncertainty abrogates natural law and thus creates a moral (near) vacuum in the state of nature. Seen from this angle, Hobbes – like probabilism – used the domain of uncertainty to move beyond tradition. Locke, in contrast, defended the old doctrine that we disregard God's will if

we knowingly act against the most probable reasons. There is no inner sanctuary of moral self-ownership in Locke's thought. His self-ownership is an external affair which pertains to market transactions and contracts. With Locke, nascent liberalism distances itself from the anarchic potential of probabilism's inner freedom. The demise of the scholastic tradition has spared modern liberalism the question of whether it can follow Locke's retreat without subscribing to his theology. In a secularized philosophy we thus have to ask anew whether political and economic self-ownership can be assumed coherently without embracing moral self-ownership and its possibly anarchic consequences as well. I will not attempt to provide answers here, but these looming questions may come back to haunt liberalism.

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Chapter 7

DOMINION OF SELF AND NATURAL RIGHTS BEFORE LOCKE AND AFTER

Brian Tierney (Cornell University, USA)

The idea of natural rights or human rights, the idea that all humans, by virtue of their very humanity, have certain rights that ought to be acknowledged and protected, is of distinctively western origin. And a major problem of current world politics is to determine whether such rights can be assimilated into the traditional religious cultures of non-western societies. In these circumstances the task of understanding how an idea of natural rights could first grow into existence and then survive in the western world is of more than antiquarian interest. In this paper I want to consider the origin and development of one particular strand of related thought, the ideas of ownership or mastery of self as a ground of natural rights.

The idea of self-ownership is widely deployed in contemporary writing on human rights, and an obvious source for the idea is often found in the work of John Locke who famously declared that "every Man has a *Property* in his own *Person*". Much recent work, however, has been devoted to exploring the earlier origins of the concept of natural rights in the jurisprudence and philosophy of the middle ages and in the writings of the Spanish neo-scholastics. This work suggests that we might learn to see modern doctrines of rights, not as innovations of the seventeenth century or

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the age of Enlightenment, but as the final product of a developing tradition of thought from the twelfth and thirteenth centuries onward.[1]

The recent studies on premodern formulations of natural rights thinking have led to new insights but they have also given rise to some new problems, and often they involve issues of human autonomy and freedom that are related to our theme of self-dominion. Several recent authors have maintained that, even if some notion of natural rights existed in the medieval era, it was radically different in kind from the modern idea of human rights. The argument suggests, not only that contemporary 'rights talk' includes much that was undreamed of by medieval thinkers – that is self-evidently true – but also that the whole grounding of premodern rights was such that it could not have led on to a concept of human rights in the modern sense. In effect, it is argued, modern rights could not have emerged from a medieval setting.

The essential argument for this position asserts that modern rights are derived from an idea of individual autonomy, premodern ones from an ethic of natural law, and that the two approaches are incompatible with one another. The function of natural law, it is argued, is to limit our range of choices by its commands and prohibitions; but modern rights theories envisage a sphere of autonomy where an individual is free to act as he chooses, where he can exercise mastery or 'sovereignty' over his actions as H. L. A. Hart explained in an influential article. And such rights, it is maintained, cannot be derived from natural law because, within a natural law framework, the only rights that can exist are rights to obey the mandates of the law and to fulfill the duties it imposes.

The argument has been presented in various ways by modern scholars. Ernest Fortin wrote that medieval rights were "subservient to a natural law that circumscribed and relativised them" and that, accordingly, "natural rights in our sense of the term were largely alien to the medieval mind".[2] Maximiliane Kriechbaum maintained (unpersuasively I think) that the frequent medieval references to a right (*ius*) as a power (*potestas*) did not have any of the connotations of will and mastery that we find in modern rights discourse.[3] Richard Helmholz observed that medieval natural rights, grounded on natural law, did not exist to "to vindicate human choice [...] or to allow men and women to flourish as they chose".[4]

Some contemporary authors maintain that a modern conception of rights is not to be found even in the 'classical era' of Grotius, Pufendorf and

[1] For various approaches to premodern rights, see Villey 1975; Tuck 1979; Pennington 1993; Brett 1997; Tierney 2001 (1997); Finnis 1998; Cavallar 2002.
[2] Fortin 1996, 246, 248.
[3] Kriechbaum 1996. For criticism see Tierney 2000.
[4] Helmholz 2003, 304.

Locke. Knud Haakonssen for instance, argues that, still for Locke, "natural rights are powers to fulfill the fundamental duty of natural law", and that even later, through much of the eighteenth century, rights remained derivative, being mere means to the fulfillment of natural law duties.[5] L. W. Sumner took up the nineteenth-century distinction between rights as protected interests and as protected choices, and held that choice rights – rights freely to choose a course of action – are characteristic of modern rights theories but lacking in the natural law theories of the seventeenth century. "I know of no example in this era", Sumner wrote, "of a theory which modelled its natural rights on the choice conception; this seems to have been a distinctively modern innovation". Theories grounded on natural law, he held, were not related to the values of "autonomy, self-determination, and freedom that characterize modern ones".[6] On this argument, Locke's treatment of natural law and natural rights still belonged to the realm of premodern discourse.

A final viewpoint that we need to consider maintains that the breakthrough to a modern idea of natural rights did indeed occur in the seventeenth century and specifically in Locke's doctrine of self-ownership, but that this could only come about because, in the course of his work, Locke tacitly abandoned the idea of a divinely ordained natural law that he overtly proclaimed. In a particularly interesting treatment of this theme, Michael Zuckert presented a direct comparison between Aquinas's natural law teaching and Locke's doctrine of natural rights. He noted that some of Aquinas's teaching could readily be translated into a language of rights (though Aquinas himself did not do this). If one has a duty imposed by natural law then one must have a right to act in accordance with the duty; but, Zuckert argued, any rights derived from natural law could only be rights freely to obey the law's mandates. They would imply nothing about a "realm of liberty or of free choice". Locke's teaching on self-ownership presented a quite different concept, "the notion of human beings as right bearers by nature because they are self-owners". Moreover, according to Zuckert, by asserting that we own ourselves, Locke implicitly denied the traditional belief that we belong ultimately to God and are bound by God's laws, a view that he overtly asserted. In Zuckert's view, therefore, Locke's teaching "points to a break with the entire premodern tradition".[7]

Although the idea that medieval natural rights could only be rights to obey the mandates of natural law is often taken for granted in modern writings, I cannot recall any medieval text that makes this assertion. Instead,

[5] Haakonssen 1996, 55, 62.
[6] Sumner 1987, 109, 97.
[7] Zuckert 2002, 183, 185, 193; 1998, 276.

when we turn to the earlier sources, we encounter a long tradition of pre-Lockean discourse on natural rights that emphasised choice rights as well as the fulfillment of duties. Specifically, there were two ideas that were central to medieval discourse on natural law and natural rights that persisted and that were always conducive to an assertion of human autonomy and of the choice rights associated with it. These were the idea of a permissive natural law and the idea of self-dominion. I have written about the former concept elsewhere, so will mention it only briefly here.

Briefly then, the jurists of the twelfth century gave a new definition of the old term *ius naturale* (natural law or natural right) as meaning "What is permitted and approved but not commanded by any law". With this definition the jurists had begun to carve out, within the framework of natural law ethics, an area of human autonomy where the law did not command or forbid but left humans free to choose their own courses of action. From then onward, the idea of permissive natural law as a ground of natural rights had a continuous history down to the eighteenth century. It persisted even in the work of Kant.[8]

The other ground of human autonomy that we encounter in earlier writings is the idea of self-dominion – self-ownership or self-mastery – that will be our principal theme. The various modern views that we considered leave us with two problems. Did Locke's teaching on self-ownership introduce a modern conception of rights by breaking with the previous tradition? Or did such a break occur but only in the following century? In discussing these issues I can present only a few selected texts, a series of snapshots one might say rather than a complete narrative. And I am very aware that in treating some topics – Aquinas on free will and self-love, Vitoria on Indian rights, eighteenth-century secularization – I am only touching the surface of problems that would require more complex argumentation in a full-scale treatment of them. But this seems unavoidable in pursuing a limited theme through a variety of sources over a period of several centuries. I shall be concerned principally with pre-Lockean ideas, but will first consider briefly the views of Locke himself and conclude with a glance at some later developments of thought.

[8] Tierney 2001, 2002. It has sometimes been argued that such rights could refer only to trivial choices (e.g., Waldron 1981, 322; Haakonssen 2002, 38). But this is not the case. Such choices could include a right to marry (or not marry), to choose a profession or take up some avocation, to join or not join a variety of social or civic or professional groups, to choose how we spend our disposable income, to vote for this or that political party, to acquire property, to travel, to speak or be silent. These are the choices that shape our map of life.

LOCKE: SELF-OWNERSHIP AND SELF-MASTERY

The argument of Locke's *Two Treatises* turned on two concepts of ownership – the idea of divine ownership, maintaining that humans are "his Property whose Workmanship they are", and the idea of self-ownership, the idea that "every Man has a *Property* in his own *Person*".[9] Zuckert, we noted, held these ideas to be incompatible with one another; he saw in the second assertion "a stunning reversal" of the first one.[10] A principal argument for this position, which we shall eventually need to consider, maintains that Locke's concept of self-ownership involved a right to commit suicide and that this directly contradicted the idea that a man's life belongs ultimately to God.

In principle, however, the ideas of divine ownership and of self-ownership are not inherently contradictory. For centuries before Locke it had been taken for granted that different parties could have property rights in the same thing; in the language of the jurists one party could have *dominium directum*, ultimate ownership, another *dominium utile*. Locke himself gave a similar explanation of divine ownership and human ownership when he considered property in external things.

> In respect of God, the Maker of Heaven and Earth, who is sole Lord and Proprietor of the whole World Man's Propriety in the Creatures is nothing but that *Liberty to use them*, which God has permitted...[11]

This was standard medieval doctrine. Aquinas had expressed the same view in very similar language.[12]

The argument could apply as well to self-ownership as to the ownership of anything else. And in fact both ideas, self-ownership and divine ownership, were essential to different phases of Locke's argument. Self-ownership implies that we do not belong to anyone else, that no one is naturally the master of another. In Locke's work this led on to an argument that all legitimate government must be based on individual consent, on the consent of the individuals who first came together to form a political community. And the assertion that a person was owner or master of his own actions, especially of his labour, was the basis of Locke's argument justifying the acquisition of private property in a state of nature. Self-ownership also meant that individuals enjoyed a wide range of free choice in the conduct of their lives. By nature, Locke wrote, men enjoyed a "perfect

[9] John Locke, *Two Treatises* (hereafter *TT*), II. §6, §27.
[10] Zuckert 1998, 240.
[11] John Locke, *TT*, I. §39.
[12] Thomas Aquinas, *Summa theologiae* (hereafter *Sth*), 2a 2ae, q. 66, a. 1, 612.

Freedom to order their Actions as they think fit within the bounds of the Law of Nature" or "within the permissions of the *Law of Nature*".[13] In spite of the final caveats, Locke's argument left ample space for freely chosen activities, for "a moral freedom to pursue our own life plan".[14]

But Locke needed the idea of divine ownership too. God's law imposed duties on humans, including a duty of self-preservation.[15] And one consequence of this, for Locke, was that a man could not voluntarily enslave himself, "put himself under the Absolute, Arbitrary Power of another to take away his life when he pleases".[16] Locke seems here to be rejecting a consensus of earlier scholars who, following the doctrine of Roman law, held that self-enslavement was legally permissible. But the argument was important for Locke's political theory. His point was that, just as an individual could not enslave himself, so too a whole people could not put itself under a despotical government with an "Absolute, Arbitrary Power" to take away a man's life.[17]

Locke did envisage one circumstance in which slavery could be justified. An unjust aggressor forfeited his right to life. He fell under the despotic power of his captor who could licitly kill him or allow him to live on as a slave. It was in treating this topic that Locke very briefly introduced the idea of licit suicide. He wrote that, if the captive found the hardships of slavery unendurable he could, "by resisting the will of his master [...] draw on himself the death he desires".[18] It seems then that Locke was arguing after all that suicide was permissible and so, it can be argued, was signaling to a sufficiently alert reader that he had tacitly abandoned the tradition of Christian natural law that he overtly defended in order to present a skeptical, atheistic doctrine that provided a novel ground for a theory of natural rights. To evaluate this argument and put it in a meaningful historical context we shall need to consider some earlier formulations of the idea of self-ownership, and its implications for the issues Locke raised concerning natural law and choice rights, and self-preservation and suicide.

In discussing these earlier formulations we at once encounter a semantic problem. Authors writing in Latin very commonly used the word *dominium* to describe a human characteristic. They wrote, for instance, that a man had *dominium* over himself or over his actions or over his liberty. The primary meaning of *dominium*, to give a simple dictionary definition, was "property, right of ownership", but the word could also have the sense of mastery,

[13] John Locke, *TT*, II. §4, §128.
[14] Simmons 1992, 77. See also 53, 261, arguing against the view that Locke's freedom was only a freedom to obey the mandates of natural law.
[15] John Locke, *TT*, II. §6.
[16] Op. cit., II. §23.
[17] Op. cit., II. §172.
[18] Op. cit., II. §23.

rulership, governance. Medieval writers were quite capable of distinguishing between the two meanings and occasionally did so, but most of the time they used the word in phrases like *dominium sui* without further explanation. Sometimes one meaning was clearly intended, sometimes the other. I have the impression that often an author was not making a clear distinction in his own mind, for the two meanings do overlap.

The important point in the present context is that these same usages are also characteristic of Locke's work. His most famous phrase refers to a person's 'property' in himself, but Locke used various other expressions. He wrote that man was "Master of himself and his own Life", "Lord of his own Person and Possessions", free to "order as he lists his Person, Actions, Possessions", endowed with a "Liberty of acting according to his own Will".[19] Locke sometimes used the English word 'dominion' where a Latin text would have had *dominium* (and I have followed his usage in translating the Latin word.) In his treatise on education, for instance, Locke wrote, concerning small infants:

> Another thing wherein they show their love of Dominion is their desire to have things to be theirs; they would have *Propriety* and possession, pleasing themselves with the Power which that seems to give, and the Right they thereby have to dispose of them as they please.[20]

Here 'dominion' was equated with 'propriety', 'possession', 'power', 'right'. In the *Two Treatises* also, especially in the critique of Filmer in the *First Treatise*, Locke used the word 'dominion' to mean either ownership or rulership. In exploring the antecedents of Locke's arguments, therefore, we have to consider, not only the idea of self-ownership but also a cluster of related meanings, all used to express the idea that persons belong to themselves with a right to make free choices. In the following discussion I have translated *dominium* as 'ownership' or 'property' only in contexts where that seems the clearly intended meaning, specifically in arguments concerning self-enslavement or where the word is used in the same phrase to refer to a person and his external possessions with no differentiation of meaning.

THOMAS AQUINAS TO CONRAD SUMMENHART

I will begin with Aquinas because his work is often regarded as the paradigmatic account of medieval natural law teaching. Aquinas himself did

[19] Op. cit., II. §27, §172, §123, §57, §63.
[20] John Locke, *Some Thoughts*, § 105.

not develop a doctrine of natural rights, but he did present various arguments concerning human free choice that were assimilated into later rights theories. And Aquinas had his own conception of autonomy based on human rationality. A rational creature, he wrote, was not ordered to another as an end but rather, by virtue of human dignity, all were equal in liberty.[21] Martin Ronheimer has further maintained that Aquinas's understanding of natural law as ascertained by reason was itself an assertion of human autonomy.[22]

Like Locke, Aquinas held that humans, under God, had a natural dominion over external things and over their own acts and that the two forms of dominion were related.

> Nothing is loved by man more than the liberty of his own will. For it is by this that he is a man and owner (*dominus*) of other things, by this that he can use and enjoy them, by this also that he masters (*dominatur*) his own actions.[23]

Usually in Aquinas the phrase *dominium actuum* is best translated as mastery of one's actions but at one point he wrote that man dominates himself in the same way that he has dominion over external things.[24] In various other contexts Aquinas explained man's dominion of his acts as a faculty of free choice that distinguished humans from irrational creatures:

> Things that have reason move themselves to an end because they have dominion of their actions through free choice which is a faculty of the will and reason; those that lack reason tend to an end by natural inclination as being moved by another.[25]

In another context Aquinas referred to a man's "judgment of his own will" (*propriae voluntas arbitrium*) through which he was master of himself (*sui dominus*). Aquinas wrote also that only free actions performed by a man as *dominus* of his actions could properly be called human.[26] To argue that man was not master of his acts would destroy all moral philosophy and social life.[27] For Aquinas, human free choice included also the power to choose evil. Free will was never so subservient to passion, Aquinas wrote,

[21] Thomas Aquinas, *2 Sent*. 44.1.3, 255.

[22] Rhonheimer 2000, 5: "For St. Thomas natural law is not simply 'discovered' by the reason but rather 'constituted' by the reason."; op. cit., 534: "The natural law in its fundamental structure is an expression of personal autonomy."

[23] Thomas Aquinas, *De perfectione*, 560.

[24] Thomas Aquinas, *Sth* 1a 2ae, 1.96.2, 327.

[25] *Sth*, 1a 2ae, q. 1, a. 2, 355. See also 2a 2ae, q. 66, a. 1, 612; *Summa contra Gentiles* (hereafter *SCG*), 3.81, 86; 3.111, 97.

[26] Thomas Aquinas, *De perfectione,* 560; *Sth*, 1a 2ae, q. 1, a. 1, 354.

[27] Thomas Aquinas, *SCG*, 2.60.5, 43. Other texts relating to dominion of self and free choice include *Sth*, 1.82.1, 304; 1a 2ae, q. 6 a, 2, 365.

that a man was compelled to sin; otherwise he could not be held responsible for his actions.[28]

Aquinas's teaching on self-dominion was accompanied by a robust doctrine of licit self-love. For medieval writers love of self was not a defect of fallen nature but an exemplification of the virtue of charity. Everyone understood that the command to love our neighbours as ourselves required that we first love ourselves (after God). Hence, when Aquinas considered the sin of suicide, his primary argument was that it was a sin against charity, against the love that a man owed himself.[29]

In the writings of Aquinas, the emphasis on human freedom was complemented by various passages on the due limits to the power of governments. According to Aquinas, human law can judge only external acts, not inner volitions and intentions.[30] And we are obliged to superiors only in matters where we are subject to them, not in decisions depending on the interior choice of our own wills, such as choosing to marry or not marry "or anything else of this sort".[31] In such matters, Aquinas wrote, a man is so much a free person that he can act even against the command of the pope.[32] Moreover, human law does not prohibit all vices but only the more grievous ones, especially those that harm others such as murder, theft and rape.[33] And some wrongful practices, such as the rites of unbelievers, should be tolerated in Christian societies lest their repression lead to worse consequences.[34]

Aquinas thus presented a strong doctrine of self-dominion and of freedom of choice without, however, building up any correlative doctrine of natural rights. But this classic exposition of medieval natural law certainly included elements of thought that could be conducive to the development of later ideas of rights based on human autonomy. As a modern commentator has observed, Aquinas's teaching at times seems to cry out for a complementary doctrine of natural rights.[35]

Language similar to Aquinas's on self-dominion is found also in thirteenth-century Franciscan sources. John Peter Olivi provides a good example. In considering a complex case concerning a possibly usurious contract he wrote:

[28] Thomas Aquinas, 2 *Sent*. q. 25, a. 1, c. 4, 200.

[29] *Sth* 2a 2ae, q. 64, a. 5, 610. Aquinas gave as other arguments that suicide offended God and injured the *respublica*. For some other texts on love of self see op. cit., q. 26, a. 4–5; q. 44 a. 7, 585. For some texts from later scholastic authors, see Knebel 1991; Kempshall 1999.

[30] *Sth* 1a 2ae, q. 100, a. 9, 490.

[31] *Sth* 2a 2ae, q. 104, a. 5, 661.

[32] *4 Sent*. q. 38 a. 1, c. 4, 613.

[33] *Sth* 1a 2ae, q. 96, a. 2, 482.

[34] *Sth* 2a 2ae, q. 10, a. 11, 539. For further texts and discussion see Finnis 1998, 239–242.

[35] Simmons 1992, 96n.

Everyone is owner (*dominus*) of himself and of his own as regards any contract or exchange not prohibited by right or law.

But, arguing that the contrac twas indeed usurious, Olivi added: "No one is owner of himself or of his own as regards things contrary to God."[36] Here the same word *dominus* was applied both to the self and to the ownership of external things.

In the latter part of the thirteenth century, the most detailed treatment of a problem involving ownership of self came from a secular theologian of Paris, Henry of Ghent. Henry posed the question whether a criminal justly condemned to death could licitly escape, and so raised the issue of the right and duty of self-preservation. Here the principal interest of his argument is that it involved the idea of a person's right in himself understood specifically as a property right. Henry began by pointing out that different persons could have power over the same thing in different ways. One might have property, for instance, the other use, and each could exercise his own right provided that he did not harm the other. In the present case the judge had a right to use the criminal's body by capturing, holding and killing it; but the criminal had a power of using his body to preserve his own life. This power was, moreover, a right according to the law of nature. The final stage of the argument turned on the original distinction between use and ownership. The judge had only a right of use but the criminal had a property right in himself:

> Only the soul under God has power as regards property in the substance of the body.[37]

The conclusion of the argument was that in some circumstances the criminal's property right 'trumped' the judge's use right. The prisoner could not break free by force but if he were left in a cell unbound with the door unlocked, he could escape without injury to the judge and was obliged to do so in order to preserve his life. The idea of self-ownership "under God" with an associated right and duty of self-preservation may remind us of one phase of Locke's argument. In Henry's work the right did not always involve an ineluctable duty; the exercise or non-exercise of the right depended on the circumstances in which the prisoner found himself. Among the various later authors who discussed the case of the condemned criminal John Mair restated Henry of Ghent's argument with an explicit reference to his source. Mair concluded, however, that, although the prisoner could licitly flee to preserve his life, he was not bound to do so (*iudico quod non tenetur*). The

[36] Peter John Olivi, *Quodlibet* I, q. 17, 319, 321.

[37] Henry of Ghent, *Quodlibet* IX, q. 3, 309: "Potestatem autem quoad proprietatem in substantia corporis solo anima habet sub Deo et tenetur ius suum in hoc custodire absque iniuria alterius."

prisoner might choose to accept his just punishment. For Mair, the right of self-preservation could itself be a kind of choice right.[38]

Early in the fourteenth century, Marsilius of Padua gave several definitions of the word *dominium* including man's "dominion of his acts". He explained that without this self-dominion there could be no ownership of external things and added that this was so self-evident that he would pass it over without further comment.[39] Toward the end of the century, Jean Gerson presented an unusual argument that even irrational creatures possessed a kind of right in their actions since they acted in accordance with the right reason of God, but he distinguished this right from human *dominium*. Even after the Fall, Gerson wrote, man retained some natural *dominium*, including "dominion of his liberty".[40] To speak of dominion or ownership of our liberty seems an odd usage but it persisted even into the eighteenth century when Hutcheson wrote that "each man is the original proprietor of his own liberty".

The most detailed treatment of our theme at the end of the middle ages came from Conrad Summenhart in his treatise, *De contractibus*. Summenhart persistently equated the terms *ius* and *dominium*, right and ownership, and this had an important result when he came to consider dominion of self. The dominion of our actions, the power of free choice, that had usually been understood as a psychological attribute of humans was now treated as a right, a right to liberty.

Summenhart first defined *dominium* (following Gerson) as "an immediate power or faculty of taking some external thing [...] for one's licit use".[41] But then he commented that dominion did not always apply only to externals. One could say that the soul had dominion of itself or that the will had dominion of itself in moving from not acting to acting.[42] Then Summenhart moved on to consider self-dominion as freedom of choice, but he now identified this freedom as a right to liberty understood in a juridical sense.

> Similarly liberty is a species of right (*iuris*) and a free man has that right in himself, namely of doing what he pleases. Whence the right (of liberty) is defined in the Institutes (1.3.1) as a natural faculty to do what one pleases unless prohibited by force or law.[43]

[38] John Maior, *4 Sent*. q. 15, a. 22, fol. CXXIIr.
[39] Marsilius of Padua, *Defensor pacis* II, 12.16, 271; 13.9, 281.
[40] Jean Gerson, *De vita spirituali animae*, 146.
[41] Conrad Summenhart, *De contractibus*, tract. 1, q. 1, 1. On Summenhart see also Brett 1997, Varkemaa 1991.
[42] *De contractibus*, tract. 1, q. 1, 4.
[43] *Ibid*.

But then Summenhart added a final caveat:

> But he is not owner (*dominus*) of his members to cut them off or otherwise abuse them. On this see q. 74.

At quaestio 74 Summenhart presented a full-scale discussion of human liberty and dominion. He addressed the issue by raising an old problem of moral theology. Ever since the thirteenth century theologians had debated the question whether one could pay a fixed sum to acquire a right to a permanent revenue. Summenhart considered a particular variant of the problem – whether a man could "establish a revenue for another in himself or his person", that is to say, whether a man could enter into a contract by which he bound himself to life-long servitude to another.[44] Summenhart first noted that involuntary servitude could be incurred by a captive taken while waging an unjust war or by a criminal. But his real purpose was to argue that the human right of free choice extended even to the possibility of voluntary self-enslavement. In the usual scholastic fashion he gave a string of counter-arguments and then responded to them. One of the counter-arguments, taken from Roman law, raised explicitly the issue of self-ownership.

> No one is the owner (*dominus*) of his own members according to the *lex Aquileia*; still less then is he the owner of his person. Therefore no one can sell his own person, for anyone who sells something is the owner of that thing.[45]

This was the position that Summenhart set out to refute. In arguing that a man was indeed so much the *dominus* of himself that he could sell himself into servitude, he appealed to both civil law and theology. As for the civil law – if a man did not have a right over himself and his own body, the law would be meaningless that described a free man as *sui iuris*, belonging to himself or existing in his own right. Arguing from theology, Summenhart maintained that God gave power to man over himself and his own person at Ecclesiasticus 15.14 where we read, "God [...] left him in the hand of his own counsel". Summenhart next presented an argument from Duns Scotus. Our bodies do indeed belong to God but not every use or commitment of them requires a direct divine authorization. Rather, God had left to man a wide range of free choice.

> Although man by virtue of his creation is obliged to God in everything he can do, still God does not demand so much from man but rather leaves

[44] Op. cit., tract. 4, q. 74, 335.
[45] Op. cit., 337.

> him his liberty provided only that he keeps the commands of the Decalogue.[46]

Summenhart went on to consider the texts of Roman law that permitted voluntary servitude and concluded:

> It does not seem that a free man cannot oblige himself to serve another perpetually [...] for if he is free he has the faculty of doing whatever he pleases unless prohibited by force or law.[47]

Summenhart added an odd argument to prove his point. If a contract of permanent service was illicit, then the professors of his own university would have sinned when they agreed to teach permanently in the university in exchange for a fixed stipend.[48] Although Summenhart quoted Roman law, the kind of 'servitude' he had in mind was evidently not the real chattel slavery of the ancient world.

It may seem paradoxical that here and in various other writings (including Locke's) the limits to human freedom were explored by considering the possibility of voluntary servitude. But one could hardly look for a more explicit case for a wide range of choice rights than the argument presented by Summenhart. In his work, the freedom of choice inherent in man's dominion of himself was understood as a right to liberty, and the exercise of the right extended to all choices that were not explicitly prohibited by the Ten Commandments.

SUMMENHART TO LOCKE

The treatise of Summenhart was widely quoted by the Spanish neo-scholastics of the sixteenth century. (Vitoria called it a "noble book".) Their works provide another large body of argument concerning the implications of self-dominion, but again, being necessarily selective, I have chosen to discuss just two examples, Vitoria and Suárez. Vitoria is interesting in the history of the idea of self-ownership because he used the concept as a basic argument in his famous defence of the American Indians. But Vitoria also had much to say about another relevant topic, the possibility of exercising a right of choice where a natural duty was involved, specifically the duty of

[46] Op. cit., 337.
[47] Op. cit., 339.
[48] *Ibid*. One could say the same of Aquinas. He too accepted servitude as a part of the human condition but held that the power of a master was substantially limited by natural law. See Finnis, 1998, 184–185, for Aquinas's texts on slavery.

self-preservation. Suárez presented a major work of synthesis, a sort of harvest of a century's work by his many distinguished predecessors.

In his *Relectio de Indis*, Vitoria set out to answer the question, "By what right did the barbarians come under the rule of the Spaniards"? The first question to be discussed was whether the Indians had any rightful dominion – which Vitoria took to mean both ownership and jurisdiction – before the Spaniards arrived. Although Vitoria wrote that he would pass over here his earlier detailed treatment of *dominium*, some remarks in his commentary on Aquinas form a taken for granted background to his later argument. In the earlier work Vitoria wrote that, out of his generosity, God, the lord of all creation, had given "right and dominion" over all things to all men. Moreover, Vitoria maintained, all could know this from natural law; there was no people so barbarous that they did not know that man was the owner of other things.[49]

Given this background, it would seem evident that the Indians, and indeed all other peoples, did have a rightful dominion in accordance with natural law. Vitoria agreed that this must be true, "failing proof to the contrary".[50] He then presented three lines of argument, all of which he eventually refuted, that might be taken to prove that the Indians were incapable of holding dominion – that they were natural slaves, that they were foolish or witless, and that they were sinners or heretics. In refuting each of these assertions Vitoria appealed to the idea of self-dominion as a ground of his argument.

In considering the question of slavery, Vitoria was especially concerned with *dominium* as ownership of property. According to Roman law, he pointed out, a slave could have nothing of his own; whatever he acquired belonged to his master. And, according to Aristotle all barbarians were natural slaves. In response, Vitoria first distinguished between civil or legal slavery, which he treated as a form of penal servitude, and Aristotle's natural slavery. Then he gave a misleadingly benign interpretation of Aristotle based on the idea of each person's self-ownership:

> Aristotle certainly did not mean that persons of less intelligence naturally belong to others or that they have no ownership (*dominium*) of themselves or their own. Slavery of this sort is a civil and legal institution and no one is such a slave by nature.[51]

By nature, then, all persons own themselves and can own other things.

Vitoria introduced the idea of self-dominion again when he considered the argument that the Indians were irrational creatures and so incapable of

[49] Vitoria, *De justitia*, 71, 72.
[50] Vitoria, *De Indis*, *Obras*, 651.
[51] Op. cit., 665.

dominion. Summenhart, influenced by Gerson, had maintained that irrationals did have a kind of right and dominion; but Vitoria did not want to base a defense of Indian rights on such an insecure ground. Instead he insisted that Summenhart's argument was mistaken. Irrational animals did not have ownership of themselves (*dominium sui*), much less of other things. Then Vitoria quoted one of the standard texts of Aquinas asserting that only rational creatures had mastery of their acts and that it was by virtue of this self-dominion that they were able to own external things.[52] The argument finally asserted that the Indians were in fact rational beings and so capable of dominion.

> The truth is that they are not witless but have in their own way the use of reason. This is clear because they have some order in their affairs. They have cities, proper marriages, magistrates, rulers, laws [...] all of which require the use of reason.[53]

The issue of self-dominion arose again when Vitoria considered the objection that the Indians could not be true owners because they lived in a state of sin. Here Vitoria had to refute the views of Fitzralph and Wyclif who had held that all dominion was founded in divine grace and that, accordingly, a sinful ruler lost his right to rule, a sinful owner lost his right to own. Vitoria indicated that he was concerned primarily with the latter point and again appealed to the idea of a natural self-dominion inhering in all persons.

> If a man lost civil dominion by offending God, then for the same reason he would lose natural dominion. But the conclusion is proved false; a sinner does not lose his natural dominion over his own acts and his own body; a sinner has the right to defend his own life.[54]

In his earlier commentary on Aquinas, Vitoria put the point a little differently. If sin took away dominion then a sinner would not be the owner of his own body or his own acts and so would sin in using them. Vitoria added here that man was also owner (*dominus proprietarius*) of his spiritual gifts.[55]

The last sentence of the passage just quoted – "A sinner has the right to defend his life" – can introduce us to the second area of Vitoria's thought that is relevant to our theme of human autonomy and choice rights, the possible exercise of choice even when faced by a duty mandated by natural

[52] Op. cit., 662.
[53] Op. cit., 664.
[54] Op. cit., 654.
[55] Vitoria, *De justitia*, 107.

law, here the duty of self-preservation. The problem was that a right typically referred to conduct where a man was free to act as he chose. Could he therefore choose not to defend himself and so bring about his own death?

The fullest discussion of this question came in Vitoria's treatise, *De homicidio*, which was mainly concerned with suicide. Vitoria first presented the standard arguments showing that suicide was inherently sinful as being contrary to divine and natural law; but this was only the starting point of an extensive argument that inquired whether there were any circumstances in which a man might bring about his own death. In the case of self-defense it was generally conceded that the victim of an assault might licitly kill his attacker if this were the only way of preserving his own life. The further question was whether the victim could waive his right and choose to die. Vitoria concluded that this would be a permissible and even virtuous act. It would be a more perfect act, he held, to accept one's own death rather than send the aggressor, who was in the act of sinning, to immediate damnation. Vitoria acknowledged, however, that the whole issue was controversial and that others disagreed with him. He stated an opposing argument fairly:

> If a man could defend himself and did not do so, it would be contrary to the command not to kill himself.[56]

Vitoria replied that there were many cases in which a man could licitly preserve his own life but was not bound to do so. And yet Vitoria also wrote that God was the supreme lord of life and death. It is a similar problem to the one we encountered in Locke. If a man's life belongs to God can he ever choose to bring about his own death? Vitoria responded by explaining more explicitly than Locke the correlation between divine ownership of self and an individual's self-ownership.

> Although man is not the owner of his own body and his life as he is of other things, nevertheless he does have something of ownership and right in his life so that if someone harms his body he injures not only God, who is the supreme lord of life, but also the individual man himself. Therefore he can laudably set aside this right that he has in his own body, even though he has a right of defending himself, and so patiently suffer death.[57]

Vitoria went on to discuss various circumstances in which a man might choose to give up his own life, approving of the act in some cases but not in others. For instance, a man who had just enough bread to keep himself alive while others were starving had a right to keep the bread, but he could relinquish his right and give the bread to another to save the other's life.

[56] Vitoria, *De homicidio*, 1113.
[57] Op. cit., 1118.

Likewise a shipwrecked sailor could abandon the plank he clung to in order to save the life of another.[58] Vitoria's basic point was that a man could not licitly say, "I want to kill myself", but he could sometimes choose a course of action that would bring about his own death.[59]

If we turn now to Suárez we find that in his work the idea of dominion of self understood as an inner psychological liberty, freedom of choice, was associated with another idea of liberty as meaning freedom from external domination; then this extended conception of liberty became entwined with another concept that I mentioned earlier, the idea of a permissive natural law.

Suárez wanted to emphasize human free will in part to counter Protestant theories of predestination. He wrote that dominion of our acts does not merely mean that we can perform some action voluntarily but that we can choose between different courses of action, and choose to act or to forbear.[60] Human acts, Suárez emphasized, are not predetermined by fate or by the influence of heavenly bodies or by the appetites of the body or even by a subordination of will to intellect. If the will necessarily followed the judgments of reason there would be no really free actions. And without such freedom humans could not be held responsible for their sins.[61]

The argument then turned to the other understanding of liberty as freedom from subjection to another. Like Summenhart, Suárez treated the freedom of choice associated with dominion of self as a right and, again like Summenhart, he appealed to Roman law in making the argument. In its primary meaning, Suárez wrote, the word *libertas* referred to one who was *sui iuris*, that is, one who existed "in his own right", not subject to another. Then, Suárez continued, from this primary meaning the word was transferred to our internal freedom of will.[62] And this freedom inhering in humans could be described as a right. Suárez explained in another context that any secular person, one who had not taken a religious vow of obedience, had "a right to his liberty".[63]

Suárez added one more important point in considering human freedom and the rights associated with it. Aquinas has written that humans could not choose their end in life – happiness or felicity – but only the means to the end. Suárez added that this applied only to the final end; there were many

[58] Op. cit., 1122.
[59] Op.cit., 1128.
[60] Suárez, *De necessaria dependentia*, 1.1.2–4, 5–6.
[61] Suárez, *De voluntario*, 1.2.2–10, 162–165.
[62] Op. cit., 1.3.13, 171.
[63] Suárez, *De statu perfectionis*, 7.3.9, 535.

other particular ends in life and humans could choose freely between them. In effect, each individual could shape his own plan of life.[64]

The idea of self-dominion, understood as human free choice became associated with the earlier idea of a permissive natural law when Suárez considered the origin of private property. He repeated some of the standard arguments. God was the supreme lord of all, but humans enjoyed a subordinate dominion as creatures made in the image of God, masters of their own acts, endowed with a free and rational nature.[65] However, Suárez also had to deal with an old problem of the canonists – community of property pertained to natural law and natural law was immutable. The Spanish author gave the same answer as the twelfth-century jurists. Only the commands of natural law were immutable and the natural law relating to community of property was not preceptive but "permissive or negative or concessive".[66] Accordingly, the acquisition of private property was licit, not commanded or forbidden, a matter of human choice. In a later discussion Suárez wrote that many things could be done rightfully according to natural law that were not commanded by the law. (He mentioned the right to take a wife or to preserve one's liberty). The 'faculty' to do such things was a 'natural right' (*ius naturale*).[67] Such rights were not rights to fulfill duties imposed by natural law but rights to do or forbear, choice rights in modern language.

Although Suárez emphasized the right to liberty he also explained that this too was a kind of choice right. The issue arose when he discussed the origin of human government and the possibility of voluntary servitude. The initial problem in both cases was that by natural law all were free; the solution again turned on the idea of a permissive law. Although natural law did not give one person dominion over another, Suárez argued, it did not actually forbid a person to relinquish his liberty.[68] As regards human government, therefore, Suárez concluded, like Locke, that a political society exercising authority over its members could licitly be formed, but only by "the special will and common consent" of the individuals who came together to constitute it.[69] To explain this further Suárez again turned to the idea of self-dominion, using it this time as a metaphor. Just as a man was naturally free and not a slave, with dominion over his acts and power over himself and

[64] Suárez, *De causis*, 5.7, 713.
[65] Suárez, *De voluntario*, 1.2.11, 165; *De statu perfectionis*, 8.5.19, 567. See also 8.4.10, 560. There Suárez distinguished between man's natural and innate dominion over his "internal goods" and dominion of external things acquired by human division and will.
[66] Suárez, *De legibus*, 2.4.16, 137.
[67] Op. cit., 2.18.3, 163–164.
[68] Op. cit., 2.14.18, 141.
[69] Op. cit., 3.2.4, 181.

his limbs, so too a political body of men, established by their consent, had power and rule over itself and its members.[70]

Suárez held, again like Locke, that the institution of a government was a two-stage process. First a political society was formed, then the society instituted a ruling authority. Suárez discussed several kinds of regimes and suggested that some type of limited or mixed monarchy would probably be best; but his main point was that the kind of government to be instituted depended on the free choice of the community.[71] We are again in a realm of choice rights. The one kind of regime that Suárez excluded was an absolute, arbitrary despotism. Political rule, he explained, was not a dominion that imposed despotic servitude, but another kind of dominion, a dominion of jurisdiction, instituted for the good of the subjects. Individuals had a right of self-defence (the greatest of rights according to Suárez) against the attack of a tyrant and the whole community could remove such a tyrant from office.[72]

There remained the problem of liberty and slavery. Suárez wrote often and enthusiastically about human liberty. He called freedom natural to man and a great perfection of man. He wrote that freedom from subjection was grounded in the natural dignity of humans, made in the image of God, *sui iuris*, created subject to God alone.[73] And yet slavery existed and had to be accounted for. Suárez gave the usual explanation of involuntary servitude; it had its origin in the practice of sparing prisoners of war and it could be imposed by the state as a punishment for crime.[74] The problems arose when Suárez considered the problem of voluntary self-enslavement. At this point the sense of the word *dominium* shifted from meaning jurisdiction to meaning ownership, including ownership of self. Precisely because a man was owner (*dominus*) of his liberty, Suárez argued, he could sell or alienate it; he could give up his ownership of self and confer it on another. But Suárez also had to consider the issue that Locke would raise; a man's life did not belong wholly to himself but also to God. His response was to make a crucial distinction between selling one's life and selling one's services (rather as Locke distinguished between slavery and 'drudgery').

> Although a man is not properly the owner of his own life, nevertheless he has his own right of holding it and conserving it which [...] he cannot abdicate or separate from himself, for that is contrary to the right of the principal lord. Therefore, although he can sell himself into servitude he cannot sell his life nor the right that he has in it. He also has the right of

[70] Op. cit., 3.3.6, 183.
[71] Op. cit., 3.4.1, 184.
[72] Op. cit., 3.1.7, 178; *Defensio fidei*, 6.4.5, 6.4.15, 676, 680.
[73] Suárez, *Defensio fidei*, 3.1.2, 203.
[74] Suárez, *De statu perfectionis*, 2.12.17, 172.

> using his limbs and faculties in his actions, and that right he can alienate as is done in voluntary servitude.[75]

Suárez further explained:

> Because a man is not absolute owner of his own body for any use whatsoever, he cannot sell it to another in such a way that the other is permitted to kill him or mutilate him.[76]

Suárez also discussed the law of self-preservation and possible exceptions to it when he considered the possibility of suicide. He quoted Vitoria's argument that the victim of an assault would act virtuously if he accepted death rather than kill his attacker. But Suárez was dubious about this argument; he thought that, other things being equal, a man's primary duty was to preserve his own life. Suárez' main point, however, was to distinguish between relinquishing one's own life, which might sometimes be permitted, and committing a direct act of suicide, which was always forbidden.[77]

After Suárez, the idea of self-ownership recurred in various other seventeenth-century writings. Grotius wrote that

> By nature a man's life is his own [...] also his own are his body, limbs, reputation, honor and the acts of his will.[78]

The idea of self-ownership was also current among the English Levellers and it was expressed strikingly by Richard Overton:

> To every Individual in nature is given an individual property by nature, not to be invaded or usurped by any: for everyone as he is himselfe, so he has a selfe propriety, else he could not be himselfe.[79]

Similar language was used by the Presbyterian, Richard Baxter: "Every man is born with a propriety in his *own members*." Also by Matthew Hale, Chief Justice under Charles II: "So every man hath an unquestionable property in his own life and in his own self."[80]

[75] Op. cit., 8.4.2, 557.
[76] Op. cit., 9.4.11, 706,
[77] Suárez, *De charitate*, 713.
[78] Hugo Grotius, *De iure belli et pacis*, 2.17.2.
[79] Richard Overton, *An arrow,* 3.
[80] The texts of Baxter and Hale are given in Tuck 1979, 168, 164.

Evidently, when Locke presented his own teaching on self-ownership and self-mastery, he was building on a long established tradition. Like his various predecessors, Locke adapted the tradition in his own way and for his own purposes which, in Locke's case, were determined by the particular circumstances of England in the 1680s. But in two ways Locke seems to have rejected rather than adapted elements of the preceding tradition – in his refusal to accept voluntary servitude and in his condoning of suicide. The first point is easily disposed of. Locke's objection to self-enslavement was that it put a man "under the Absolute, Arbitrary Power of another, to take away his life when he pleases". But none of his predecessors who discussed the issue had envisaged such a condition; they treated slavery as simply a contract of life-long service in which master and slave had mutual rights and duties. Vitoria and Suárez both noted that a master did not have the right to kill his slave. Most of Locke's predecessors would have agreed that a man could not sell himself into the kind of slavery that Locke envisaged.

The case of suicide is more complicated. Immediately after stating that a man, "not having power over his own life", could not voluntarily hand himself over to the arbitrary power of another, Locke wrote that an unjust aggressor, held in penal slavery, could bring about his own death rather than endure the hardships of his condition.[81] So Locke seems after all to have approved of suicide. The matter is important because, as we saw, it has been interpreted as a sign that Locke really intended to subvert the whole premodern tradition of thought on natural rights and natural law.

I think, though, that Locke's argument can be explained without recourse to such an unlikely hypothesis. Locke was not writing in a vacuum of thought about suicide. Vitoria envisaged various circumstances in which a man might bring about his own death and, since his time, a very elaborate casuistry, both Catholic and Protestant, had grown up concerning the licitness of 'self-murder'. All the casuists agreed that, in principle, suicide was forbidden because one's life belonged to God. But they displayed considerable ingenuity in envisaging an array of exceptional circumstances in which a man might licitly bring about his own death. Some held, for instance, that a person accused of a capital crime could licitly incur death by making a confession – even a false confession – in order to avoid excruciating torture.[82]

An immediate source for Locke's argument can perhaps be found in a passage of Pufendorf, in a work that Locke knew and admired. Zuckert quoted some words from this text to refute the argument that, in Locke's

[81] John Locke, *TT*, II, §23.
[82] See Knebel 1991; Minois 1995.

view, the captive acted licitly because he did not directly commit suicide but brought about his own death indirectly. And Pufendorf did indeed write:

> [W]hether a person falls by his own hand or in any way whatsoever forces others to put him to death seems not to have any bearing on the case.

But, if we read on, Pufendorf's next words were:

> *He who did not owe it to die here and now* is not excused if he has used the hand of another to bring about death [emphasis added].[83]

Pufendorf's exception envisioned the precise situation that Locke discussed. Locke's unjust aggressor had forfeited his life; he did "owe it to die here and now." Pufendorf went on to consider a variety of circumstances in which suicide might be permitted or excused, including the case of

> persons [...] who, when they see death at the hands of a truculent foe hanging over their heads have preferred to hasten their fate in order to avoid torture.

Locke did not offer any defense of the brief remark that has evoked so much modern comment but, if he had chosen to defend it, he could have found good authority for his position in orthodox Christian sources.

LOCKE TO NOZICK

In moving rapidly from Locke to contemporary political theory I am passing over much familiar natural law teaching of the Enlightenment philosophers. I want only to make the point, as others have done, that the *philosophes* retained more than they acknowledged of the scholastic culture that they overtly despised. So far I have argued that Locke inherited a strong tradition of natural law thinking that was associated with ownership of self and with a wide range of freedom of choice. It remains to consider whether there is any meaningful relationship between this tradition and more modern conceptions of human rights.

Knud Haakonssen is inclined to see a disjunction. He holds that a true conception of natural rights could emerge only when the old theistically grounded natural law doctrine was set aside and rights came to be based on

[83] Samuel Pufendorf, *Elementorum...libri duo*, 293–294.

human autonomy understood as a capacity for self-legislation. The argument seems to be leading to a Kantian "invention of autonomy" as a necessary ground of modern rights. But the argument assumes, mistakenly, that the only rights in earlier natural law teaching were rights to obey the mandates of the law; and we have seen that medieval thinkers had their own doctrine of autonomy based on human rationality and of the choice rights associated with it. Against that background we might see the secular rights theories of the eighteenth century as an adaptation of an old tradition rather than as an abandonment of it.

There are two evident reasons why a doctrine that had grown up in a medieval religious culture could persist into the eighteenth century. One is that the possibility of grounding natural rights on a purely rational basis was always inherent in the medieval formulations themselves, in the persistent teaching that an understanding of natural law and natural rights could be arrived at by right reason alone without any divine revelation. In such arguments God was not always seen as a necessary hypothesis. When Grotius presented his "impious hypothesis" – "Even if we should grant that there is no God..." – he was echoing a substantial tradition of late medieval thought.[84]

A second reason why earlier ideas of natural rights could persist into the age of Enlightenment is that, as a mass of modern scholarship has shown, the eighteenth century was not only an age of skepticism and secularism but also one of very considerable religious vitality.[85] We now even have a Protestant Enlightenment and a Catholic Enlightenment. And, especially in America, rationalism and religious radicalism went hand in hand, each reinforcing the other. When Jefferson wrote of nature and nature's God, probably most of those who read his words really did believe in the divine origin of the natural rights that they claimed. One might add that this perhaps quaint notion has not become extinct. A substantial part of the current writing on the grounding of human rights is based on religious beliefs.

In the age of Enlightenment, the French National Assembly proclaimed the "natural and inalienable rights of man" with only the vaguest reference to a Supreme Being; but the rights proclaimed were the thoroughly traditional ones of "liberty, property, security, and resistance to oppression". By the end of the eighteenth century purely secular doctrines of natural rights existed, and if one were writing a history of moral philosophy this would seem a most significant change; but, if one is interested primarily in the origin and development of the idea of natural rights, it is equally significant that the old rights persisted in a new secular garb. If a doctrine of rights had not grown

[84] St. Leger 1962. See also Rhonheimer, above, n. 22.
[85] This work is discussed in two recent review articles, Sheehan 2003 and Van Kley 2003.

up in an earlier, more religiously oriented culture, there would, so to speak, have been nothing there to secularize. And we need not suppose with Blumenberg that secularization implies illegitimacy. It was rather that the old idea of natural rights seemed too valuable to discard, even in a different world of thought.

After the excesses of the French revolution the concept of natural rights did fall out of favour with Western intellectuals. Various new movements of thought – utilitarianism, Marxism, legal positivism, anthropological relativism – all tended to discredit the idea of rights common to all humanity. Then, in the years after World War II, there came a sudden proliferation of new rights claims, now designated as human rights, along with an abundance of new theories to justify these rights. Although there is much that is new in this modern 'rights talk', some older notions have persisted. Fortin complained that medieval rights, unlike modern ones, were limited by natural law. But, even though the language of natural law has only a few doughty defenders these days, Maritain for instance in an earlier generation and Finnis more recently, nevertheless modern rights are still seen as necessarily limited – by law or by the rights of others or by the rules of whatever moral system they are embedded in. Even the most extreme libertarians, when they uphold the doctrine of self-ownership, will typically argue that their teaching permits any conduct except acts that harm others. But that is no slight qualification. It already requires adherence to several of the Ten Commandments. Libertarians will indeed argue, paradoxically it may seem, for a right to do wrong; but they seem to mean only that government should not use coercive force to prohibit purely private acts, even those that society considers immoral. It is not a particularly radical idea. One could make a pretty good case on Thomistic grounds against civil laws forbidding private consensual behaviour.

Much of the modern work on the grounding of rights is still concerned with our theme of self-ownership.[86] Here again we find some quite novel questions discussed – for instance, the donation or sale of body organs; but a considerable body of writing is still focused on the perennial problems of human freedom and social justice. Probably the most widely read and influential treatment of ownership of self in modern political theory was presented in Robert Nozick's *Anarchy, State, and Utopia*. Arguing against government-imposed taxation, Nozick maintained that, through such measures, other people appropriate a part of one's labour and that this "makes them a part owner of you; it gives them a property right in you". In an earlier argument, Nozick found a ground for individual rights in the capacity of a person endowed with "rationality, free will, and moral agency"

[86] See Kymlicka 2002, esp. 107–127, with extensive bibliography.

to formulate a long-term plan of life for himself.[87] Here the argument seems basically concerned with self-determination or what I have called self-mastery.

This approach is not uncommon. Among libertarian writers and some others who accept the idea of self-ownership we encounter the same ambiguity that we find in earlier treatments of dominion of self, an ambivalence in deciding whether to emphasize a specific property right in the self or rather the idea of self-mastery or freedom of choice. Palmer, for instance, borrowed the word *dominium* from Vitoria and defined it in one context as self-mastery and in another as "an ability to 'own' our actions".[88] Rothbard saw self-ownership as the "fundamental axiom" of libertarian theory but he defined it as the "mind's command over (the) body and its actions". Boaz also regarded self-ownership as fundamental but, in defining the individual self, he emphasized the power of free choice and approvingly quoted Thomas Aquinas on the individual person as master of his acts. Rasmussen emphasized self-direction rather than self-ownership and he too quoted Aquinas. Lomasky wrote of a 'sovereignty' over one's own life.[89]

In the economic sphere, the idea of self-ownership is usually deployed to defend free-enterprise capitalism. But there is a whole group of left-wing writers, among them Steiner, Cohen, and Vallentyne, who take self-ownership as a premise but derive from it arguments to justify a socialist or egalitarian society.[90] The most impressive of these works is that of Van Parijs. In arguing for a guaranteed annual income for all as providing the greatest freedom of choice, he introduces the Rawlsian principle that the opportunities of the most favoured group in society should not diminish those of the least favoured group; but, unlike Rawls, he grounds his whole argument on the principle that, in a free society, the structure must be such that "each person owns herself (self-ownership)".[91]

There are also many criticisms of the idea of self-ownership in the current literature. Some reject the idea altogether, arguing, like Kant, that the concept is incoherent – one cannot be both owner and owned – or, like MacPherson, that the idea necessarily leads to an unjust society. Some accept the Lockean idea of self-ownership as a ground of autonomy but reject the specific doctrine of property that Locke presented. Others find new ways to use the old idea. Crosby, for instance, deployed the idea of self-ownership to introduce a work on phenomenological psychology.[92]

[87] Nozick 1974, 172, 49.
[88] Palmer 1998, 349; Palmer 2001, 69.
[89] Rothbard 1982, 31, 59; Boaz 1997, 95; Rasmussen 2001, 127n; Lomasky 1987, 114.
[90] Steiner 1994; Cohen 1986; Vallentyne 1997.
[91] Van Parijs 1995, 80.
[92] Crosby 1996.

Old problems persist and new ones arise. There is still disagreement about whether a right to freedom implies a right to enslave oneself. Nozick affirms such a right; Rothbard denies it.[93] Modern feminists usually emphasize a woman's ownership of her own body but Carol Pateman discerns a "patriarchal construction" in the idea of ownership of one's person.[94] One could go on and on. The point is that the ideas of self-ownership and self-mastery that we have pursued from the thirteenth century onward are still very much alive in contemporary political discourse.

CONCLUSION

We began by considering some differing views about the origin of a distinctively modern theory of human rights, rights grounded on individual autonomy and freedom of choice. But a glance at the current literature on political theory suggests that perhaps the question has been badly posed. There is no one modern theory of autonomy or of rights. As Susan Brisson pointed out, we now have a "vast and diverse philosophical literature" on the meaning of autonomy. (Mercifully, she went on to discuss only six versions of the idea.)[95] As for the ground of human rights we now have an endless variety of theories – religious and secular, Kantian and Aristotelian, deontic and consquentialist, communitarian and libertarian.

I have been arguing for a degree of continuity in the development of the idea of human rights by tracing one strand of thought, the idea of self-ownership or self-mastery, through a long premodern history stretching back to medieval times. Evidently the whole modern cornucopia of rights and rights theories could not have emerged from the middle ages or indeed from the age of Enlightenment. Still, one purpose of historical study is to make our present-day world more intelligible. My purpose, therefore, is not to argue that a 'modern' idea of human rights emerged at some defined point in the past but rather that the very existence of our modern culture of rights is not intelligible unless we pay some attention to the early history of the idea.

If, for instance, we ask why there was such a sudden burgeoning of concern for human rights in mid-twentieth century, there is a simple, necessary, but not sufficient explanation. The modern preoccupation with human rights arose as a response to the atrocities of the Nazis in World War II. The evil of the Holocaust inhered not only in the scale of the massacre that was perpetrated but in the fact that the victims were stripped of all human dignity, so far as that could be achieved, before being murdered. A

[93] Nozick 1974, 331; Rothbard 1982, 40.
[94] Pateman 1988, 14.
[95] Brisson 1998, 323.

doctrine of human rights does indeed seem a fitting response to such a horror. One might almost say that if the idea had not existed it would have been necessary to invent it. And yet we cannot be sure that some Newton or Einstein of morality would have emerged to create a novel language of rights if it had not already been available. There were other ways of expressing moral outrage. In reality, though, a language of rights was "historically available" as Ignatieff put it and, because it seemed so appropriate to the need of the time, it was taken up and elaborated with a new enthusiasm. One result was a vigorous revival of the old idea of ownership of self.

If we asked further why a language of natural rights was available in 1945, at a time when the idea had been viewed with disfavour by most jurists and political philosophers for more than a century before then, we might turn to the eighteenth century and the American Declaration of Independence. A founding document of the American republic could never be entirely forgotten or discredited. But the language of the Declaration itself is not self-explanatory. Given the facts of geography and economic life, it was perhaps inevitable, certainly probable, that at some point the American colonists would have sought to break with the mother country. But it was not inevitable that they would have expressed their protest in a language of rights. The point again is that such a language was historically available to them and that it seemed well suited to define their grievances. To explain why this was so would take us back to Locke and Grotius and then to the medieval traditions that they inherited. Each part of the later tradition becomes fully intelligible only when it is seen in the context of the whole.

When one looks at that whole tradition there may be a temptation to understand it in terms of some timeworn metaphor like that of the great oak tree that grows from a tiny acorn. But this would be entirely misleading. It suggests that the growth and present flourishing of a doctrine of human rights was something inevitable, programmed so to speak into the cultural genes of the West. But what we actually find when we look at the history of the doctrine is a series of unforeseen contingent circumstances in which the ideas of self-dominion and natural rights were deployed for different purposes and used to defend a variety of causes. These ideas were also defended by writers whose works reflect a variety of philosophic and religious commitments; this was true of the medieval authors we considered and it is still very much the case today. But the fact that modern thinkers ground their arguments for human rights on a variety of competing philosophies does not mean that the doctrine itself lacks strength and force. Christianity itself has coexisted with half a dozen philosophical systems in the course of the centuries. The survival of an idea of natural or human rights in so many different historical contexts is rather a testimony to its enduring value and its flexibility. Once the ideas had been articulated that

persons belong to themselves and that individuals have rights, they proved too appealing to be given up.

Amy Gutmann has observed that we should not deplore the multiple modern groundings of human rights but welcome them; a doctrine that can be defended in terms of different foundational arguments is more likely to win widespread acceptance and lead on, if not to a uniform set of rights, at least to an "overlapping consensus".[96] This seems important when we consider the point mentioned at the outset of this paper, the possible extension of an idea of human rights to non-Western societies. If this is to come about, if talk of rights is to be more than a Western veneer covering very different realities, it will be because Asian and African peoples find grounds for upholding some basic human rights in their own religious and cultural traditions and assimilate them in their own ways into their own societies. An overlapping consensus is all that we can hope for, and all that we ought to hope for.

[96] Gutmann 2001, xix.

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Towards Modern Rights Theories

Chapter 8

NATURAL LAW AND PRACTICAL REASONING IN LATE MEDIEVAL SCHOLASTICISM

Shifts Toward Early Modernity

Holly Hamilton-Bleakley (University of Cambridge, U.K.)

In this chapter, I should like to suggest that during the late thirteenth century, specifically between Aquinas and Scotus, there were some important developments in moral philosophy in which certain concepts were articulated which could be classified as more 'modern', and that these developments can be seen clearly in changing scholastic attitudes to the Aristotelian claim that there cannot be prudence (*phronesis*, also translated in this chapter as 'practical wisdom') without moral virtue.

The first thing to be done here, of course, is to try to come to an understanding of what is 'modern' about modern ethics. However, the more one tries to understand what is distinctively 'modern', the more one becomes conscious of trying to impose a kind of artificial homogeneity upon a time period which consists of very different thinkers and ideas. The following description of modern ethics, then, is an attempt merely to identify certain prominent strands in a very complex pattern.

One way to start thinking about how modern ethics should be characterised has been given to us in recent years by scholars working on virtue ethics. These scholars tend to identify the distinctiveness of modern ethics by contrasting it with ancient ethics.[1] Modern ethics, they claim, is an

[1] The literature on virtue ethics, and the criticism which it makes of modern ethics, is enormous. For an introduction to virtue ethics see for instance Crisp 1996; Darwall 2003; Crisp and Slote 1997.

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 207-224.

ethics concerned with right action, or conduct. It asks: "What am I to do?" Ancient ethics, on the other hand, is an ethics concerned with the agent's character. Thus, an ethics of character asks: "How shall I live?" or "What sort of person shall I be?"[2]

The contrast between an ethic concerned with character and one concerned with conduct encompasses many dimensions which further distinguish modern ethics from ancient ethics. One is the charge that modern ethics is 'impartial' in that it asserts that morality reigns supreme over the agent's desires.[3] The moral law must be followed, irrespective of what the agent may want to do, may find pleasure in doing, or may understand as in her interest.

This impartiality of morality is linked closely with the issue of motivating the agent to obey the moral law. If the moral law is seen as fundamentally distinct from what the agent may *want* to do, or what the agent considers as good *for her*, then the motivation which the agent has to obey the moral law becomes a matter of concern. Instead of being motivated by one's desires to act rightly, one may have to be motivated to obey a moral law through the idea that one is obligated to obey it as a rational agent. Because one's desires may not be in line with what morality requires, one responds to the notion of obligation with one's *will*. Thus, in this story told by virtue theorists which contrasts modern philosophy with ancient philosophy, the will is a central feature of modern ethics which connects with other characteristics of modernity such as impartiality, obligation, right action, and its corollary, rule-following.

How, then, are these characteristics seen as a move away from an ethics of virtue, which is posited by most virtue theorists as an *Aristotelian* ethics of virtue? There are many aspects to answering this question, and unfortunately I cannot do justice to it here. I can, however, point to one way in which the notions of motivation, obligation and will differ from Aristotelian ethics theory, which focuses on Aristotle's conception of the practically wise man.

Aristotle's practically wise man has no need for a notion of obligation, because there is no dichotomy between his desires and his conduct. A major part of this harmony no doubt comes from Aristotelian teleology, which ensures that there is continuity between the agent's interests and virtuous activity. Man's *telos* is rational activity, but this is synonymous with the agent's happiness and well-being.[4] However, there is more to be said concerning this harmony of the practically wise man's desires than referring

[2] See for instance Darwall 2003, 1 and McDowell 2003, 121.

[3] On the impartiality or 'demandingness' of modern ethics, see Crisp 1996, 9–14 and Cottingham 1996, 57–58 and 70–76.

[4] Aristotle, *Nicomachean Ethics* I.7.

solely to teleology. It is that the practically wise man has been habituated so that his desires correspond with actions which will lead him toward his *telos* of rational activity.[5] This harmony between action and desire means that there was a previous harmony between his desire and his practical intellect, issuing dictates as to how he should act.[6]

This harmony of reason and desire is the defining feature of the Aristotelian virtuous agent, but the work of Aristotelian scholars has shown us that there is more complexity to Aristotle's virtuous agent than having appetites which follow his reason. Indeed, the interaction between his reason and his desires means that the practically wise man has what I will call an 'epistemological advantage'[7] over his non-virtuous fellow men when it comes to knowing how to act.

For Aristotle, the influence of the appetites upon the intellect is just as critical to virtuous activity as the influence of the intellect over the appetites, for the vicious appetites cloud the mind and blind one to the merits of virtue, whereas virtuous appetites enable the agent to understand what virtuous activity is in every particular situation in which the agent find himself.[8] Thus, the operation of the practical intellect in Aristotle means that knowledge of how to act reflects both the agent's affective side and his rational side.[9] This, then, is one reason why obligation is not an issue for

[5] On the importance of habituation for the alignment of one's desires with what is truly rational activity, and therefore what is truly pleasant, see op. cit., Book II.1–3.

[6] It is important to note that this harmony between the practically wise man's desire and his practical intellect is part of the larger notion of Aristotle's theory of action, which asserts that the operation of practical intellect is inextricably linked with desire. In this way, in order to have right choice, which is one defining characteristic of the practically wise man, the agent must have both 'true' reason and 'correct' desire. See op. cit., VI.2.

[7] See for instance op. cit., VI.5, where Aristotle argues that practical wisdom requires that the agent's understanding of the "first principle of what is to be done" is not "distorted by what is pleasant or painful". In this way, one's passions are an integral part of the operation of one's practical intellect, and will be either an enabling, or a debilitating, influence upon the practical reason. Thus, the virtuous agent has an 'epistemological advantage' in knowing how to act, and the vicious agent has an epistemological *dis*advantage. The inspiration for the term 'epistemological advantage' and the way that I use it throughout the chapter comes from an outstanding article by Schneewind (1997, 180), where he argues that one difference between virtue ethics and "act-centred" (in other words, deontological/modern) ethics hinges on the relationship between one's character and knowing how to act in a particular situation. While in virtue ethics the agent must be virtuous in order to know how to act, in act-centred ethics "the rules or principles [for action] can be known and applied by someone who has no desire or concern for acting on them. Such a person could mimic that actions of someone who had, behaving correctly without valuing such behaviour for itself. There is thus no counterpart in an act-centred theory for the epistemological privilege of the virtuous agent in a virtue-centred view.

[8] See *Nicomachean Ethics* VI.12.

[9] Op. cit., VI.2.

Aristotle's practically wise man, because his dictate of practical reason already includes the influence of his morally habituated appetites. The fact that his appetites follow the dictates of his reason is a consequence of how these dictates were formulated, which was through the perspective given to him by his affective side. This is why training the appetites of the youth through habituation is so vitally important; for there is no way they will develop practical wisdom without first having a properly habituated affective side.[10] Indeed, this is why Aristotle says in Book VI of the *Nichomachean Ethics* that one cannot have prudence without also having moral virtue, for the moral virtues affect the operation of the practical intellect.[11]

As I stated in the introduction, this chapter will suggest that a shift in medieval ethics toward something more modern occurs in late thirteenth century and early fourteenth century interpretations of this Aristotelian claim that there cannot be prudence (practical wisdom) without moral virtue. I have just argued that the notion of impartiality and its connected concepts of obligation, motivation and the will are characterised by some scholars as central features of modern ethics. I have also tried to show that an Aristotelian ethics of virtue does not address questions of impartiality or obligation, because it gives an account not only of how a virtuous character will follow the practical intellect, but also a corresponding account of how a virtuous character *influences* the operation of the intellect. Thus, the agent *wanting* to act virtuously is bound up with an epistemological theory of how he *knows* what is virtuous.

Yet, surely the reasons as to why Aristotle is not concerned with obligation point towards reasons as to why modern ethics *is* concerned with it. Indeed, I suggest that the notions of motivation and obligation feature in modern ethics not only because modern thinkers may have a differing account of how the role that the appetites and the will[12] play in relation to reason, but also because they have a differing account of how the practical intellect comes to know how to act.

There is not room for me here to discuss various modern philosophies and their views on how the practical intellect operates. What I will suggest, however, is that an ethical theory which sees a tension between the agent and her desires on the one hand and what morality requires on the other is an ethical theory which sees it as possible to acquire knowledge of how to act without necessarily being morally habituated. That is, the very struggle

[10] See for instance op. cit., I.3 and X.9, 1179b–1180a.

[11] Op. cit., VI.12.

[12] It is perhaps imprecise to say that modern thinkers had a different idea from Aristotle concerning the role which the *will* plays in relation to reason, since the concept of the will itself , as we see it manifested from Augustine onwards, is not present in Aristotle's ethical theory. This is not a subject that can be treated in any depth here; see however Kahn 1988 for an assertion that the concept of the will develops after Aristotelian ethical theory.

between the appetites and the reason – or, depending on the theory – between the will and reason, is a move away from the 'epistemological advantage' which Aristotle's practically wise man has. This struggle implies that moral knowledge is speculative knowledge, or, even a kind of scientific knowledge, because it is a knowledge which one can have irrespective of one's character. So, I suggest that if such notions as impartiality and obligation are features of modern ethics, then a notion of the practical intellect as scientific or speculative must also be a feature of modern ethics.

I use the term 'scientific' here in what I think is an Aristotelian use of the term. As any reader of the *Nichomachean Ethics* knows, Aristotle very frequently contrasts the speculative intellect with the practical intellect. The speculative intellect does not need a rightly habituated affective side to function properly and this is why the intellectual virtue of practical wisdom (*phronesis*), which *does* need the affective side to be rightly habituated,[13] is differentiated from the other intellectual virtues – wisdom (*sophia*), understanding (*nous*), science (*episteme*), and art (*techne*) – for it cannot be achieved in the same way.[14]

Thus, to return to the claim that late thirteenth and early fourteenth century ethics incorporated a shift toward something more modern, I propose that this period sees a shift in the theory of the operation of the practical intellect, from an account where the intellect is integrated with the agent's desires with Aquinas, to an account which is more speculative with Scotus. As I mentioned earlier, this shift in the operation of the practical intellect is reflected, among other places, in the way in which the scholastics of this

[13] See for instance *Nicomachean Ethics* VI.2: " ... rational choice involves not only intellect and thought, but a state of character; for acting well and its contrary require thought and character."

[14] There are many distinctions which Aristotle draws between the intellectual virtues which cannot be discussed here. What is important for my purposes here is to assert that practical wisdom is different from the other intellectual virtues in that it depends upon the agent's moral virtue, whereas the other intellectual virtues do not. See op. cit., VI.5, where Aristotle draws various distinctions between practical wisdom and the other intellectual virtues. Practical wisdom is distinguished from the other intellectual virtues in that it has to do with "what is to be done", and this kind of knowledge is influenced by one's passions, because it is influenced by pleasure and pain: " ... it is not every supposition that is ruined and distorted by what is pleasant and painful – not, for example, the supposition that a triangle does or does not have two right angles – but rather those about what is done." However, even if one were to contend that some of the other intellectual virtues were dependent in some way upon the agent's moral virtue, that would not change the central contention here, which is that there is a difference for Aristotle between 'moral' knowledge, or knowledge of how to act, and speculative, or scientific knowledge, in that the latter does not incorporate the influence of the agent's affective side, which I have argued is a fundamental aspect of the practical intellect.

period interpreted Aristotle's claim that there cannot be prudence (practical wisdom) without moral virtue.

One way of interpreting the question of how medieval scholastics understood the Aristotelian assertion that there cannot be prudence without moral virtue revolves around medieval notions of the voluntarism of the will. Because voluntarism posits the will as free, medieval voluntarists could not accept the Aristotelian connection between prudence and moral virtue, because the will is free to accept or reject the dictate of prudence. Thus, because moral virtue is generated through the will choosing the dictates of prudence, there can be prudence without moral virtue if the will refuses to choose its dictates.

It is not surprising that medieval voluntarism should enter into an explanation of how scholastics saw the connection between prudence and moral virtue. After all, Scotus himself, when stating his opinion on this connection, first refers to the freedom of the will in relation to the dictate of prudence by arguing that "the intellect can have a dictate that is right in an unqualified sense without the will having to choose in conformity with that dictate".[15] Thus, because the right act of dictating is what forms prudence in the agent, and the right act of choosing is what forms moral virtue, it must therefore be possible for the agent to possess the virtue of prudence "in the intellect without any moral habit in the will".[16]

Scotus' voluntarism, like that of his late thirteenth century predecessors, is of course in many ways a reaction to Aquinas's notion of the will as a rational appetite. I need not go into any great detail here concerning a subject so well-trodden as medieval voluntarism, but it is important to note that high profile scholastics such as John Pecham, Henry of Ghent and William de la Mare (just to name a few), as well as high profile events such as the condemnation of 1277, were to a significant extent concerned to correct the Thomist conception of the will and the consequences which it had for the Christian notion of sin.

For Aquinas, the will, as a rational appetite, has an object proper to it, which is the good.[17] It naturally tends toward this object. This is true of the will's most general inclinations; however, it is also true for Aquinas that the will, in virtue of its nature as a power, is always moved toward that object which is present to it as a particular good by the reason: "That which is apprehended as having the meaning and force of being good and fitting sets the will in motion after the manner of an object."[18]

[15] John Duns Scotus, *Ordinatio* III, suppl. d. 36, a. 2, 401.
[16] Op. cit., 401.
[17] See Thomas Aquinas, *Sth* 1a 2ae, q. 10, a. 1–2.
[18] Op. cit., 1a 2ae, q. 9, a. 2, in corp.

Aquinas, however, was anxious to stress that necessity was not a part of his theory of human choice and action,[19] particularly in his late work, *De Malo* in 1270.[20] There is not room to discuss his justifications here; what we shall have to content ourselves with is the knowledge that many scholastics, particularly those in the Franciscan order, saw Aquinas as positing a theory of choice which did not go far enough in recognising man's freedom.

For instance, Henry of Ghent directed question 16 of his first *Quodlibet* against Aquinas, characterising the Thomist position as one where the act of the will is a certain inclination which follows the form of the intellect. According to Henry, Aquinas held that when there is a firm judgement of the intellect, then "it is necessary that the will follow, through the appetite, that which is judged to be better through the counsel of reason, and it is inclined to that".[21]

Henry's argument against this position is one which displays a voluntarism inspired by Augustine. For Henry, to say that the will is necessarily moved by a firm judgement of reason is to take away the role which Augustine gave it as the source of evil. Referring to *De Civitate Dei,* Book XII.6, where Augustine had posited that it is only through the will that one wants to do evil, Henry asserts that here Augustine proved that "in no way" is the will necessarily moved by a "firm" judgement of reason.[22] Thus, in order to preserve the Christian notion of sin as defined by Augustine, Henry rejected what he interpreted as Aquinas's doctrine of the will as a rational appetite.

The Condemnation of 1277 also reflects these concerns with the notions of freedom and necessity concerning the relationship between the reason and the will. In essence, most of the propositions relating to ethics which were condemned had to do with the idea that the nature of the will is not such that it will be necessarily inclined toward a particular dictate of reason and thus act with a kind of necessity in conforming to these dictates. For instance, the following propositions were condemned: Proposition 163, which stated "That the will necessarily pursues what is firmly held by reason and that it cannot abstain from that which reason dictates";[23] also proposition 169,

[19] See for instance op. cit., 1a, q. 82, a. 2; 1a 2ae, q. 10, a. 1–2.
[20] See Thomas Aquinas, *Quaestiones disputatae de malo*, q. 6.
[21] Henry of Ghent, *Quodlibet* I, q. 16, 99, lines 17–20.
[22] Op. cit., q. 16, 101, lines 58–62.
[23] A list of the propositions is found in *Propositiones Condamnees par Etienne Tempier, eveque de Paris, 1277*, 187ff.; the numbering of the propositions is from this edition. A translations of the propositions, which I use here, is in *Philosophy in the Middle Ages*, eds. Hyman and Walsh 1967, 542–549.

which stated "That as long as passion and particular science are present in an act, the will cannot go against them".[24]

Now, implicit in both of these propositions, through their assertions of the freedom of the will to act in accordance with a dictate of reason, is the notion that prudence, on its own, does not make the will righteous. In other words, sin in the will can exist with a dictate of prudence. Scotus's assertion twenty-five years later that one can have prudence without moral virtue looks like just another way of stating the Augustinian-inspired doctrine behind the condemnation of 1277, which was anxious to assert the will as the source of sin, and therefore assert its ability to reject intentionally a dictate of prudence.

That late thirteenth century voluntarist conceptions of the will and free choice were in many ways a reaction to Aquinas's notion of the will as a rational appetite cannot be denied. However, I would like to suggest that medieval interpretations of the connection between prudence and moral virtue cannot be fully appreciated by focusing solely on questions of the will and how it reacts to the intellect. This is seen most clearly by going back to Aquinas, and looking at *his* interpretation of the connection between prudence and moral virtue.

Aquinas, of course, adopts the Aristotelian position that one cannot have prudence without moral virtue, but his argument for this position does not stem in any direct way from his notion of the will as a rational appetite. In other words, he does not invoke the argument that there must be moral virtue with prudence because the will out of its nature chooses the dictate of prudence, therefore ensuring that prudence and moral virtue always go together. Instead, his argument revolves around the Aristotelian concept of the 'epistemological advantage' had by the practically wise man.[25] In this way, the connection between prudence and moral virtue for Aquinas is about how the practical intellect operates in formulating dictates of prudence, not about how the will reacts to those dictates. Thus, when we look at how medieval interpretations of the connection between prudence and moral virtue evolved after Aquinas, we need to be aware that theories of the practical intellect are changing with this evolution, just as much as theories of the will.

Why, then, does Aquinas assert that one cannot have prudence without moral virtue? Essentially, Aquinas believes that the dictate of prudence is not formulated independently of the agent's affective side. Both man's will and his passions can affect the operation of the practical intellect. For instance, in his *De Veritate*, in giving an explanation of the cause of sin, Aquinas asserted that sin was in both the reason and the will. Specifically, he

[24] *Propositiones*, 188.
[25] See for instance *Sth* 1a 2ae, q. 58, a. 5 and 2a 2ae, q. 47, a. 13, and discussion below.

held that the reason there was sin in the will was because of a pre-existing defect in the intellect. This defect in the intellect came from the passions, in that the passions affected the operation of the intellect such that it apprehended a particular object to be good which, in truth, was not. The will accepted this apprehended good, and thus there was sin in the will.[26]

But does this mean, then, that Aquinas saw no other role for the will in sinning than simply willing something bad which was presented to it as good? No, for in question 2 of his *De Malo*, Aquinas gave an account of the role of the will in sin which asserted that the will itself could be part of the process by which the intellect apprehended some particular bad thing to be something good. Something which is not good can appear good in two ways, he argued. In one way, it is because of a vice in the intellect, whereby the intellect "has a false opinion concerning some action". However: "sometimes there is not a defect out of the part of the intellect but more out of the part of the will; for as the man is, so will the end appear to him", as is said in Book III of the *Ethics*: "by experience indeed we know that something good or bad can be seen as otherwise to us concerning those things which we love and those things which we hate. And thus when someone has an inordinate affection for something, the judgement of the intellect is impeded in a particular act of choosing out of inordinate affection. And thus, vice is principally not in the cognition, but in the affection."[27]

Thus, here Aquinas imputes to the will a responsibility for the agent's general disposition. It is part of the affective part of the soul which, together with the passions, can influence the agent's outlook on things such that what is good will appear to him to be bad.

This interdependence which Aquinas asserts between the intellect, the will and the passions goes some way toward explaining the dependence which the agent has upon his moral virtue in formulating the dictate of prudence. In discussing specifically the connection between moral virtue and prudence, Aquinas sets forth a theory of action where the agent must incorporate an understanding of both universal principles and particular principles in order to act in accordance with prudence.[28] However, understanding universal principles – such as those pertaining to natural law – is simply not enough for the agent to "reason rightly about particular cases".[29]

[26] Thomas Aquinas, *Quaestiones disputate de veritate*, q. 24, a. 9, 700, ll. 92–126.
[27] *De malo*, q. 2, a. 3, 37, ll. 156–173.
[28] *Sth* 1a 2ae, q. 58, a. 5.
[29] *Ibid.*

Prudence, for Aquinas, is concerned with reasoning about particulars, because it is the particular in which actions take place. It is moral virtue which ensures that the agent has a right understanding of particular principles. One may understand certain universal principles about action, but these principles can become corrupted "in the particular by some passion" in that when the agent is overcome by passion, the particular object which he desires appears to him as something good, although it is against his "universal judgement of reason".[30] Thus, although the agent still "has himself rightly" toward a universal principle without moral virtue, he cannot see how, or even if, this principle applies in a particular situation.

Because an understanding of universal principles does not pertain to particulars, Aquinas sees it as having little value for virtuous action. This 'universal judgement' is a practical 'science' which can exist with moral vice.[31] The function of judging rightly about particular actions, however, is not the function of practical science, but the function of prudence. Unlike practical science, prudence cannot exist with moral vice and in this way prudence is "incompatible with sin".[32] Here is a clear alignment of Aquinas with Aristotle on the importance of a rightly habituated affective side for right judgement concerning particular action. Although there are important differences between Aquinas and Aristotle on their respective notions of universal principles for action which cannot be discussed here,[33] it is still valid to assume that Aquinas follows Aristotle in holding that the *application* of universal principles in particular situations is dependent upon the agent's moral virtue. In this way, Aquinas adopts Aristotle's concept of the 'epistemological advantage' which the virtuous agent has in deliberating on how to act, and therefore asserts that there cannot be prudence without moral virtue.

Thus, I suggest that Aquinas's explanation as to why there cannot be prudence without moral virtue is primarily an explanation of the operation of the intellect, rather than the will. Yet, as we have seen, much of the criticism of Aquinas in the late thirteenth century, as well as part of Scotus's explanation as to how there can be prudence without moral virtue is concerned to assert a certain concept of the will that is free in the face of a particular dictate of reason. However, although modern scholarship seems to

[30] *Ibid.*

[31] Thomas Aquinas, *Quaestio disputata de virtutibus in communi*, a. 6, as cited in Bourke 1983, 359. This understanding of universal principles, of course, corresponds to Aquinas's notion of natural law, an understanding of which he also argues can exist with the agent's sinfulness (see *Sth* 1a 2ae, q. 94, a. 6).

[32] *Sth* 2a 2ae, q. 47, a. 13.

[33] See Jaffa 1952, 174–186, who gives a discussion concerning the differences between Aquinas's first principles of practical reason and Aristotle's "principles of practical action".

have focused more on the attention which Aquinas's theory of the will received by his critics rather than on the attention paid to his theory of the practical intellect,[34] it also seems clear that Aquinas's critics recognised that a rejection of his account of the will also meant a rejection of his account of the intellect.

Take, for instance, the Franciscan William de la Mare. Writing his *Correctorium* of Aquinas between 1278 and 1279, William explicitly attacked Aquinas's idea of sin which he had put forward in *De Veritate*: that sin in the will is caused by a pre-existing error in the intellect, which is caused either by itself or by some passion, where what is bad is not perceived as bad by the intellect. William asserts that this way of thinking about sin amounts to the error of Pelagius, which he describes as the idea that the will does not need the gift of the Holy Spirit in order to act rightly, it only needs the law and true doctrine.[35] Thus, in order to preserve the Christian ideas of sin and grace – that is, the idea that sin is a deliberate, knowing turning away from God, and the idea that man needs grace in order to enable him to act rightly – William has to reject the idea that our knowledge of how to act in particular situations is influenced by our passions. In other words, by rejecting the idea that sin is caused by the will which chooses a dictate from a blinded intellect, he is implicitly rejecting Aquinas's ideas which are essentially related to this: that man's passions and the character of his will affect the way man deliberates concerning how to act and that therefore the virtuous man has the epistemological advantage in gaining this knowledge.

We can see, therefore, that Aquinas's critics, in order to maintain the freedom of the will, had to also maintain an alternative notion of prudence. This notion of prudence looks to be something along the lines of what Aquinas had in mind with his idea of practical science, which as we saw, he thought to be something very different from prudence, because it could exist with moral vice and with sin. For Aquinas, there is no epistemological advantage had by the practically wise man when it comes to knowing universal principles of action: we can know these universal principles without being virtuous. Aquinas's critics, however, such as William and the authors of the condemned propositions of 1277, seem to want to apply this same characteristic to particular principles of action and make prudence more like moral science – that is, we can cognise the particular dictate of

[34] The literature on reactions to Aquinas's notion of the will is vast; in general, it seems fairly safe to say that most of the literature on voluntarism takes it for granted that voluntarism is in many ways a reaction to a Thomist conception of the will.

[35] For William's *Correctorium* against Aquinas, see Giles of Rome, *Correctorium corruptorii Thomae* 1927. For William's citation of Aquinas's notion of sin, and his criticism of this notion, see pp. 331–332.

prudence without being virtuous. After all, the model these critics want to put forward is that of a will that needs more than prudence to enable it to act rightly[36] and the corollary to this model is that we can know how to act without being disposed to act that way. The Aristotelian epistemological advantage of the virtuous agent has been lost.

I have been suggesting that the voluntarist theories of the will which we see in the late thirteenth century have to also incorporate what could be termed a more 'scientific' model of the practical intellect, where it operates independently from the influence of the agent's affective side. No doubt there are some exceptions to this assertions; indeed, we are about to look at one of them by returning to our examination of the position of Henry of Ghent. However, I think that the suggestion becomes compelling when Scotus is considered, for this pairing of a voluntarist notion of the will with a scientific notion of the practical intellect is manifested explicitly in his commentary on the connection between prudence and moral virtue. It is here that he shows his awareness of the fact that this connection cannot just be about the question of prudence being chosen by the will; it also has to be about the question of how the will plays a role in the formulation of prudence. Indeed, Scotus's treatment of this connection is framed within the context of his criticism of Henry of Ghent on this very issue of how the will could be said to influence the intellect. I shall look briefly at Henry's position, and then at Scotus's response.

As I have just noted, Henry of Ghent seems to mark an exception to my suggestion that voluntarist theories of the will must be paired with a 'scientific' notion of the operation of the practical intellect, with 'scientific' meaning that the practical intellect operates independently of the influence of the passions and the will, such that it's dictates do not reflect the agent's desires, inclinations, or even character. In this model, it is possible for the practical intellect to know what to do, but for the will, or the passions, to be opposed to the proposed action. There is no epistemological advantage of the virtuous agent in this model. Henry of Ghent, however, holds a voluntarist conception of the will, as we have seen, but he *also* argues that the will can influence the operation of the intellect, which would seemingly put him in favour of the idea of the epistemological advantage of the virtuous agent.

Interestingly, Henry holds both these positions because they are both from Augustine. As we have seen, Augustine held that the source of evil is the will, and Henry interpreted this as meaning that the will must be free to reject a dictate of reason. But Augustine also argued that a bad will could influence the operation of the intellect, such that the agent is blinded and

[36] See, for instance, proposition 166: "That if reason is rectified, the will is also rectified. This is erroneous [...] because according to this, grace would not be necessary for the rectitude of the will but only science, which is the error of Pelagius." *Propositiones*, 188.

unable to judge properly the relative significance of earthly and heavenly things.[37] Thus, with these two positions – first, that the will is the cause of sin because it can act against a dictate of reason, and second, that the will is the cause of sin because it blinds the intellect such that it cannot 'see' the right way to act – we have two different ways in which Augustine held that the will could be responsible for sin. Henry of Ghent held both these positions, but not only did he *hold* them, he also tried to *reconcile* them. And it was out of his efforts to reconcile them that Scotus's disconnection between prudence and moral virtue was born.

The catalyst for Henry attempting to reconcile these two ways in which the will could be the source of sin was his involvement in the examination of various suspect propositions by Giles of Rome, just a few weeks after the Condemnation of 1277.[38] The examination led to the condemnation of fifty-one of Giles's propositions, but it also led to the *concession* of a proposition drawn from Giles's commentary on the *Sentences*, written around 1274. The approved proposition, which was clearly associated with Aquinas's definition of sin which he had given in the *De Veritate*, stated: "There is never malice in the will unless there is error or at least some ignorance in the intellect."[39]

As Dumont points out, scholastics who were confronted with the concession of this proposition and with the condemned propositions of 1277 which we have seen concerning the freedom of the will in relation to a dictate of right reason, stated that there was a real contradiction between them. Clearly, what was at issue here was the source of moral wrong-doing. Was it in the will which rejects a dictate of reason, or in an erring intellect?

Henry devoted several questions of his *Quodlibets*, particularly question 10 in Book X, in the year 1286–1287, to resolving the contradictions between these two propositions. His complex solutions will not concern us here. Rather, what is important about Henry's treatment of these issues as it concerns our analysis of Scotus is Henry's interpretation of Giles of Rome's proposition. As Dumont explains, Henry interpreted Giles's proposition "to mean that error in the will and intellect occurs *at the same time*".[40]

[37] See for instance Augustine's commentaries on the 13th and the 68th Psalm, where he suggests a 'blinding' or 'obscuring' of the eye – that is, of the intellect – due to wrong affections. Augustine, *Ennarationes in Psalmos I–L*, Psalm XIII.2, ll. 10–11, and *Ennarationes in Psalmos LI–C*, Psalm LXVIII, sermo II.8, ll. 0–10.

[38] My understanding of Henry's involvement in the examination of Giles of Rome, and some of Henry's philosophical positions which arise out of that involvement, owes a great deal to an excellent article by Dumont 1992.

[39] Giles of Rome, *Aegidii Romani apologia*, 59.

[40] Dumont, 582, my italics. The account which I give here of Henry of Ghent's attempts to reconcile Giles of Rome's proposition with the condemned propositions which we have examined earlier is a summary of the account found in Dumont.

Essentially, according to Henry, the malicious will – which rejects the dictate of reason – causes the effect of error in the intellect. However, the effect is simultaneous with its cause, so whenever there is a malicious will, there is also an erroneous intellect. Dumont shows that Henry resorted to a complicated argument as to how an effect can be simultaneous with it's cause,[41] but the result of this argument was to assert the "causal and natural priority" of the will over the intellect, while maintaining that in temporal terms, there is never a malicious will without an erroneous intellect.[42]

Thus, by asserting that Giles's proposition meant that error in the intellect existed at the same time as malice in the will, Henry constructed a defence of his assertion that these two propositions were both true: 1) that the will is the source of sin because it can act against a particular dictate of reason and 2) that there is no error in the will unless there is error in the intellect.

In Scotus's discussion on the connection between prudence and moral virtue, Scotus cites Henry's argument concerning the simultaneity of the erroneous intellect and the erroneous will. According to Scotus, Henry's notion of simultaneity plays out as such: " ... error in the will is prior by nature to that of the intellect, so that if one considers the intellect only insofar as it is prior by nature to the will, the intellect is correct, but the will, by freely choosing to err, blinds the intellect, and this blindness occurs at the same time as the will errs, even though by nature it is posterior [because it is caused by the will]."[43]

Thus, in Henry's scenario, according to Scotus, the intellect gives a correct dictate, but the will acts against it, thus blinding and making an erroneous intellect at the same moment the will itself is erroneous.

Scotus rejects this position concerning the relationship between the intellect and the will. Instead, Scotus's position implies that the influence of the will upon the intellect which Henry posits cannot hold, since, if the will did have influence over the intellect, there would never be a point where the intellect could formulate a correct dictate that the malicious will could then reject: "If the first choice of the will did not blind the intellect, then neither did any other, for the first could be just as evil as any other, and if no act blinded it, then no matter what the actual evil in the will might be, it would never blind the intellect, and thus one could become evil to any degree whatsoever without there being any error in the intellect."[44]

Thus, there is no simultaneity here: an evil will can exist with rectitude in the intellect. And this position, which focuses *not* on the independence of the *will* from the intellect, but on the independence of the *intellect* from the will,

[41] See Dumont's explanation of this argument, in Dumont 1992, 581–590.
[42] Henry of Ghent, *Quodlibet* X, q. 10, 270, lines 29–44.
[43] Scotus, *Ordinatio* III, suppl. d. 36, a. 2, 397.
[44] Op. cit., 397.

is an essential assertion of the will as the source of error in moral wrongdoing.

In stating his own opinion on the connection between prudence and moral virtue, Scotus first maintains, as we have seen, the freedom of the will in relation to the dictate of right reason. However, after asserting this first position, Scotus then immediately states: "But if this is so, then one can ask: How does evil blind the intellect, as the authorities claim?"[45] Here we have Scotus's awareness of the interconnection – and indeed, even *contradiction* – between the assertion of the freedom of the will on the one hand, and the assertion of the influence of the will on the intellect on the other. To say that there can be prudence without moral virtue not only implies the freedom of the will to reject a dictate of right reason; it also implies the independence of the intellect from the influence of the will in it's formulation of the dictates of right reason. And indeed, this is what Scotus asserts. The will can 'blind' the intellect in two ways – privatively and positively – but neither of these ways affects the actual operation of the intellect. The will can turn "the intellect away from the consideration of what is right" (privatively), or it can command the intellect to consider ways of reaching a bad end (positively), and to this extent "it is the evil will that blinds".[46] However, it does not blind the intellect "by making the intellect err regarding some proposition, but by forcing it to perform an act and develop a habit of considering some means for attaining a bad end".[47]

Scotus's argument that a bad will does not affect the intellect is based around his very straightforward idea of how the intellect works. First principles are known to us through their terms – whether they are theoretical or practical. The method of syllogistic reasoning is also self-evident. Thus, once a deduction from self-evident principles takes place, the intellect must also assent to the conclusion. There is no way that the will can interfere with this process, according to Scotus.[48]

These arguments concerning the independence of the intellect build up to one of the crucial, final separations which Scotus makes between prudence and moral virtue. Scotus argues that, although Aristotle had asserted that prudence must be conformed to a right appetite, prudence is "naturally prior" to moral virtue and "what is naturally prior does not seem to derive anything of its essential being from what is posterior".[49] In this way, prudence must not require moral virtue, since it is prior to moral virtue and as such 'defines'

[45] Op. cit., 401.
[46] Op. cit., 401–403.
[47] Op. cit., 403.
[48] See op. cit., 399; Scotus explains here that "a bad choice cannot blind the intellect so that it errs in its judgement about what can be done".
[49] Op. cit. 409.

it.[50] However, referring to his notion of praxis as directive knowledge, in which he maintains that directive knowledge must be prior to action,[51] Scotus asserts that we can say that prudence is conformed to a right appetite in the sense that directive knowledge is "such that so far as it itself is concerned, *right practice must be conformed with it*".[52] Thus, the way in which prudence is conformed to a right appetite still allows prudence its independence from the influence of the will. Indeed, its "conformity" to a right appetite consists only in its being the sort of dictate that a right appetite *would* choose as a right appetite.

I have argued that Scotus represents a shift toward a more 'scientific' or 'speculative' ethics and thus a shift toward modern ethics, as he denies any influence of the will upon the operation of the intellect. As he argues that an evil will cannot adversely affect the intellect,[53] he is, by this argument, also rejecting the Aristotelian epistemological advantage had by the virtuous agent. Thus, deciding how to act is a matter only for the intellect, not for the agent's faculties as a whole.

In connecting a scientific idea of ethics with modernity, it is perhaps important to note that in seventeenth-century philosophy we see a particular concern to articulate a 'science' of ethics, from Hobbes to Locke to Spinoza to Pufendorf, just to name a few. No doubt much of the attention on a science of ethics came from a concern to carve out a realm for man's nature and rational powers, which could be considered distinct from theology. In this way, the attempt at a science of ethics was an attempt to protect reason from religion.

But can it also be seen as an attempt to protect reason from the influence of vice? The emphasis on basing one's actions upon self-evident truths and conclusions deduced from those principles was a way of arguing that we are all capable of rational behaviour, and indeed, that we have to be if society is going to survive. In this way, it seems that the idea of a science of ethics is closely connected to the idea that appealing to man's reason seems to be a more sure way of securing peace than appealing to his virtue. And if that is the case, then I would suggest that early modern theories of rights sit very happily with a shift toward science and away from virtue.

[50] *Ibid*.
[51] For the assertion that directive knowledge must be prior to the activity of the will, see Scotus, *Ordinatio*, prol., p. 5, q. 2, 158–162.
[52] *Ordinatio* III, suppl. d. 36, a. 2, 409–411, my italics.
[53] Op. cit., 401.

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Chapter 9

LIBERTY AND NATURAL RIGHTS IN PUFENDORF'S NATURAL LAW THEORY

Kari Saastamoinen (University of Helsinki, Finland)

Samuel Pufendorf's (1632–1694) main works on natural law, *De jure naturae et gentium* (1672) and its abridged student version *De officio hominis et civis* (1673), were among the most influential contributions to moral and political thought in early modern Europe.[1] Written in the aftermath of the Thirty Years' War, they presented a theory of a universal moral law which was formally independent of revealed religion, a detailed account of

[1] The standard scholarly editions of these two works are Pufendorf 1997 and Pufendorf 1998. English translations in this article are, with slight alterations, from Pufendorf 1927, Pufendorf 1934, Pufendorf 1991, and Pufendorf 1994 (an English translation of *De Officio* from 1691 is available in Pufendorf 2003). In 1684 Pufendorf published an enlarged version of *De jure* with numerous additions to the original text. These were included in subsequent editions and are usefully identified in Pufendorf 1998. Other significant works by Pufendorf dealing with natural law are *Elementorum jurisprudentiae universalis* (1660, Pufendorf 1999; an English translation in Pufendorf 1931), the small tract *De statu hominum naturali* published in the collection *Dissertationes academicae selectiores* (1675, Pufendorf 1990), and the collection of polemical writings, *Eris Scandica* (1686, Pufendorf 2002a). Pufendorf's major works on the topic of religion have little to say about the theoretical foundations of natural law, but are important for understanding the character of his enterprise. These are *De habitu religionis christianae ad vitam civilem* (Pufendorf 1687; an English translation from 1698 in Pufendorf 2002b) and *Ius feciale divinium* (Pufendorf 2004; an English translation from 1703 in Pufendorf 2002c). Also of interest is the critical analysis of the German Empire *De statu imperii Germanici*, published in 1667 under the pseudonym Severinius de Monzambano (a German translation in Pufendorf 1976).

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 225-256.

the contractual basis of institutions such as language, property, household and the state, and a justification for a state power that was sovereign in relation to ecclesiastical authorities, though not necessarily absolute.[2] Pufendorf's works on natural law were translated into major European languages, and the shorter work was used in university education throughout Protestant Europe. While his theory was rarely accepted in its entirety, it set the parameters for discussion on natural law until the second half of the eighteenth century.[3]

In his works, Pufendorf defended the idea held by many previous writers that human beings are free by nature. He conceptualised this freedom by referring to the idea, also inherited from a long line of late medieval and early modern scholars, that human beings have subjective rights that belong to them prior to any human agreements or legislation.[4] By the natural liberty of human beings Pufendorf meant, firstly, that they have an innate right to certain elements of their person (life, body, so-called simple reputation and chastity) and, secondly, that they have a natural right to govern their actions independently of other human beings.[5] These rights did not have as visible a

[2] Interpretations of Pufendorf's theory of natural law are to be found in Welzel 1951 and 1958, Rabe 1958, Krieger 1965; Denzer 1972, Hammerstein 1977, Laurent 1982, Nutkiewicz 1983, Schneewind 1987 and 1998, Tuck 1979, 1987, and 1999, Palladini 1990, Seidler 1990 and 2002, Dufour 1991a and 1991b, Tully 1991, Zurbuchen 1991, Carr 1994, Goyard-Fabre 1994, Behme 1995 and 2002, Saastamoinen 1995 and 2001/2 (2004), Schino 1995, Carr and Seidler 1996, Haakonssen 1996 and 2004, Grunert 2000, Hochstrasser 2000, Müller 2000, Dreitzel 2001, Hunter 2001 and 2004. See also the literature mentioned in Holzhey and Schmidt-Biggemann 2001, 854–62.

[3] On Pufendorf's influence, see Modéer 1986, Palladini and Hartung 1996, and Geyer and Goerlich 1996, as well as the literature mentioned in Haakonssen 1996, 43, n. 49, and Holzhey and Schmidt-Biggemann 2001, 860–862.

[4] On medieval and early modern rights theories, see, besides articles in this collection, Tuck 1978, Brett 1997, and Tierney 1997.

[5] In the following, I will use the terms 'innate rights' and 'natural rights' interchangeably. This means that natural rights do not include rights that, in Pufendorf's view, exist prior to the establishment of civil society but are based on human agreements. I will also exclude the right to choose one's religious beliefs in the state of nature, which Pufendorf discusses in *De habitu religionis christianae ad vitam civilem* (§1–8). While this undoubtedly is a right human beings have prior to all mutual agreements, it is not, strictly speaking, a part of Pufendorf's theory of natural law. As he explains in the preface to *De officio,* natural law "is confined within the orbit of this life" and "forms a man on the assumption that he is to lead this life in society with others". The right to choose one's religious beliefs, however,is founded on the theological principle that "everybody is obliged to worship God in his own person", so that those who live in the state of nature have to decide for themselves what the best way to serve God is. *De habitu* §2–3. Consequently, this right is part of what Pufendorf calls moral theology in the preface to *De offcio*, i.e., a discipline that deals with the human being in so far as he "has an expectation of reward for piety in the life to come". The relationship between the right to choose one's own religion in the state of nature and Pufendorf's theory of natural law is a complex topic which cannot be discussed here. On Pufendorf's views on religion and religious toleration, see Döhring 1992, 1993 and 1998;

role in Pufendorf's own works as the duties imposed by natural law. His writings did, however, offer conceptual tools for theories that gave natural rights a more prominent role. John Locke, Jean Barbeyrac, Gershom Carmichael, and Jean-Jacques Burlamaqui, among others, were strongly influenced by Pufendorf's works, and elements of Pufendorf's theory were transmitted to the even more rights-centred political thought of the British colonies of North America through their writings.[6] It is, therefore, of some interest to understand the foundation and character of those innate rights that constitute natural liberty in Pufendorf's theory.

There is no consensus about the foundation of innate rights in Pufendorf's theory among modern scholars. According to the more widely-held view, his fundamental concept is natural law understood as a command of God, though recognized by reason alone. The first principle of this universal moral norm is to promote peaceful sociality (*socialitas*) among human beings, and its particular precepts are recognized by reflecting the norms and institutions human beings need in order to maintain it.[7] Innate rights, then, are corollaries of the so-called absolute duties imposed by natural law; i.e., duties that obligate all human beings "in any sort of state or condition" independently of all institutions based on human agreements.[8] Most supporters of this interpretation hold that natural rights are based on the obligations other people have towards the right-holder. This means, for example, that my natural right to my own body is a corollary of other people's obligation to respect my bodily integrity.[9] At least one commentator holds, however, that innate rights are primarily founded on the obligations natural law imposes on right-holders themselves, which means that I have a right to my body because it is a necessary means of fulfilling my personal moral duties.[10]

Disagreements do not, however, stop here. The whole idea that natural rights are corollaries of natural law has been questioned by a number of Swedish commentators, above all Karl Olivecrona,[11] who claims that Pufendorf holds that rights included in natural liberty constitute an objectively existing sphere of 'one's own' (*suum*) which is given to each

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Zurbuchen 1991, 1996, 2002a, and 2002b; Hunter 2001, and the literature mentioned in Pufendorf 2002b, 141–143, and Pufendorf 2002c, 227–228.

[6] On this development, see Haakonssen 1991 and Haakonssen 1996, c. 10.

[7] *De jure* II.3.15–20.

[8] Op. cit., 3.24.

[9] Denzer 1972, 85–90; Tuck 1979, 1 and 159–160; Zurbuchen 1991, 27; Behme 1995, 80–86; and Scheenwind 1997, 134.

[10] Haakonssen 1996, 40–1.

[11] Olivecrona 1977. Olivecrona developed ideas discussed in Hägerström 1965, and his interpretation has since been defended in Mautner 1989 (1999), 52 (174).

individual by their natural condition and inclinations. This sphere exists independently of natural law, and also establishes the natural equality of human beings. The most important precept of natural law, then, is to abstain from damaging that which belongs to others either by nature or as a result of human agreements. In this interpretation, Pufendorf's account of natural rights comes close to what several scholars, including Olivercrona himself, have regarded as the Grotian position.[12] More recently, Thomas Mautner has specified this interpretation by pointing out that even if there is a correspondence between one's natural rights and other people's natural obligations in Pufendorf's theory, this does not mean that the latter have priority over the former or that these rights could be reduced to corresponding duties.[13]

Supporters of all of these interpretations can find passages in Pufendorf's works which appear to justify their case, which indicates that Pufendorf's account of natural rights is not as clear as one would hope, and that it may even be inconsistent. In what follows, I will first examine the textual evidence for these competing interpretations. I will then argue that, in Pufendorf's theory, there are two foundations for natural rights. We have innate rights to our own person because such rights are a means of fulfilling our personal moral duties, whereas our natural right to govern our own actions is a corollary of other people's obligation to regard us as their natural equals. To conclude, I will present some remarks concerning the role of natural liberty in Pufendorf's theory of civil society.

DEFINITIONS AND DIVISIONS

Like many authors before him, Pufendorf points out that the word *ius* has several meanings. He mentions a legal code, a decision rendered by a judge, and what we would call a subjective right but unlike Grotius not justice.[14] As a subjective right, *ius* belongs to the so-called moral entities (*entia moralia*), which Pufendorf distinguishes sharply from physical entities. By physical entities he means natural objects to which God has given material

[12] Olivecrona 1977. The idea that in Grotius's theory natural rights are not founded on natural law is nowadays best known from Tuck 1979, c. 3, 1983, 1987, and 1993, c. 5. Tuck's interpretation is criticized in Haakonssen 2002, Tierney 1997, 319-329, Shaver 1996 and Zagorin 2000.

[13] Mautner 1989 (1999), 41–44 (163–166).

[14] *De jure* I.1.20. In *De iure belli ac pacis* Grotius remarks that the word *ius* in the title of his book "signifies nothing other than what is just (*iussum*)", distinguishing this sense from both moral faculty and law. *De iure belli* I.1.3.2 (Grotius 1913). See Haakonssen 2002. To my knowledge, Pufendorf never uses the term *ius* as a synonym for *iustitia*, although these two terms are, of course, closely related.

characteristics and those inner features that produce their particular aptitudes and motions. Thus, as physical entities, human beings consist not only of their bodily features and motions, but also of the faculties and movements of their mind.[15] Moral entities are attributes or modes (*modus*) that are superadded to physical entities by means of imposition in order to direct and temper the voluntary human acts. What makes their existence possible is the ability of human beings to form notions to guide their faculties by "reflectively considering and comparing things". Yet their "primary author" is God in the sense that he wanted human behaviour to be tempered by certain principles, which "could not happen without moral entities". Most of these attributes were, however, "later superadded" to physical entities by human beings themselves in order to cultivate "the ordering of human life".[16] Pufendorf emphasizes that even though moral entities are not self-subsistent in the sense that they could exist independently of physical entities, the sphere of moral entities is still fundamentally distinct from the physical one. Moral entities "do not arise from the intrinsic substantial principles of things", but are always "superadded to things already existent and physically complete, and to their natural effects, by the will of intelligent beings who alone determine their existence".[17]

[15] *De jure* I.1.2.

[16] Op. cit., 1.3.

[17] Op. cit., 1.3–4. Several commentators have seen the doctrine of moral entities as an anticipation of the autonomous sphere of moral liberty in Kantian philosophy. Welzel 1958, 19–30; Denzer 1972, 67–74; Schneewind 1987 (1999), 124–130 (200–206) and 1998, 199–225; Kobusch 1993, 71–82, and 1996; and Behme 1995, 50–56. This line of interpretation has been criticized by Ian Hunter, who maintains, I think correctly, that the purpose of the doctrine is merely to declare that civil hierarchies of power and value are based on imposition and not on the mental characteristics of individuals. Hunter 2001, 163–168. A common feature in the proto-Kantian interpretations is the assumption that by physical entities Pufendorf means only creatures which are not able to govern their actions by reason and free will, whereas human beings are both physical and moral entities because they are endowed with these two faculties. Denzer 1972, 67–68; Behme 1995, 50–52; and Schneewind 1997, 120. This is, I think, a misunderstanding inspired by Kant's distinction between the phenomenal and noumenal spheres. In Pufendorf's theory, the inner faculties of human beings like reason and will also belong to the sphere of physical entities. Moral entities are truly nothing but 'attributes' or 'modes' which are superadded by imposition to "things already existent and physically complete", including human beings with their inner faculties. It is true, of course, that impositions often have their origin in human will, and that knowledge of moral entities affects human understanding and will. However moral entities themselves are not mental ideas, existing independently of them. For example, the question of whether a moral entity of being obliged to obey a sovereign inheres in a person or not is independent of the issue of whether the person in question thinks he has such an obligation. If he has, it is an objectively existing attribute that is superadded to his physical nature (including his reason and will) by the fact that he has given his consent to a sovereign's commanding power. If he denies the existence of

Among moral entities, right belongs, together with power (*potestas*) and obligation, among the so-called operative moral qualities, the main building blocks of what Pufendorf calls moral persons. The latter are moral entities "conceived analogously to substances" and may be either simple, like a sovereign, a citizen, a nobleman, or a wife, or composite, like the state, church, army, and so on. Moral persons are distinguished from each other mainly by the different powers, rights and obligations that are attached to them by imposition, and individuals can bear several moral traits simultaneously. Pufendorf emphasizes that when individuals assume or loose some moral trait, this has no effect on their character as physical entities. Hence, a person's higher position in civil hierarchy does not indicate that he is somehow superior as a human being to those below him.[18]

As moral qualities, rights are either active or passive, depending whether they entitle a person to do something or merely to have or receive something. In the former case, a right is a quality "by means of which we rightly command persons or possess things, or by virtue of which something is owed to us".[19] In this sense, a right is theoretically identical to power (*potestas*), which Pufendorf defines as a moral quality by which a person "is able to do something legitimately and with a moral effect". This effect "refers to someone else's becoming obligated to perform some task, or to permit or not hinder actions undertaken by another, or to the ability to confer on others a previously absent faculty to do something".[20] The words *potestas* and *ius* do, however, have different connotations. The term *potestas* "better conveys the actual presence of the said quality to things or persons, though it connotes less clearly the manner in which anyone has acquired it". The term *ius*, on the other hand, "gives clear and proper indication that the quality has been correctly acquired and is now correctly possessed".[21]

Pufendorf remarks that power (and thus an active right) is a highly diffuse moral quality with many different forms. In terms of its effectiveness, power is either perfect or imperfect. The former is accompanied by someone else's perfect obligation to behave in accordance with this right, and can therefore be exercised even by force against those who illegally obstruct it. An imperfect power, on the other hand, is accompanied by someone else's imperfect obligation, which means that it is morally virtuous and praiseworthy for an obligated person to respect a right holder's right, but it would be wrong to force him to do so.[22]

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such an obligation, this denial alone does not remove the moral attribute that inheres in him.

[18] *De jure* I.1.12–13 and 23.

[19] Op. cit., 1.20.

[20] Op. cit., 1.19.

[21] Op. cit., 1.20.

[22] Op. cit., 1.19.

Another distinction among powers (and active rights) is based on their objects. In this respect most forms of power can be divided into four categories. Power over one's own person and actions is *libertas*; power over other people is *imperium*; power over one's material possessions is *dominium*, and power over another's possessions is *servitus*.[23] There is also a fifth form of power, the power whereby something is owed to us. This one lacks a name of its own, and Pufendorf thinks that it would be convenient if the term *ius* were restricted to this particular form of power. However, because of customary usage he has decided not to overlook the other meanings of this word.[24] Accordingly, the term *ius* is frequently used as a synonym for *potestas* in Pufendorf's works.

Beside being an active moral quality, a right can also be viewed as a passive quality. In these cases, rights are moral qualities which do not entitle a person to do something but "through which they can rightly have, suffer, accept, or receive something".[25] In his short discussion on passive rights, Pufendorf speaks only about the right that entitles a person to lawfully receive something. This he divides into three types: 1) the right to receive that is not accompanied by someone else's obligation to give; 2) the right to receive in which the donor is under an imperfect obligation to give, and 3) the right to receive in which the donor is under a perfect obligation to give. Following Thomas Mautner, we may assume that there also is a passive right to have (*habere*) with a corresponding set of three types. As Mautner points out, it is not entirely clear that Pufendorf himself systematically considered all the conceptual combinations his categories made possible.[26] A passive right to have in which another party is under a perfect obligation not to interfere, however, plays a significant role in his account of natural rights.

RIGHTS AND OBLIGATIONS

These definitions raise the issue of the relation between rights and other people's obligations in Pufendorf's theory. They indicate that one's active right to do something is always accompanied by someone else's obligation not to hinder one's actions. Moreover, later in *De jure* Pufendorf makes it clear that such an obligation cannot be a corollary of the corresponding right, since obligations are always imposed on us by a superior, i.e., a person who has both a right to command others and an ability to punish those who

[23] Op. cit., 1.19.
[24] Op. cit., 1.20.
[25] Op. cit., 1.20.
[26] Mautner 1989, 49 (171).

disobey.[27] The only superior able to impose natural obligations which are relevant in the case of innate rights is God, whose will is known through natural law.[28]

All this makes it tempting to conclude that Pufendorf sees our innate rights as corollaries of the obligations natural law imposes on other human beings to behave in a certain manner towards us. Further evidence for this interpretation has been found in *De iure* III.5.3, where Pufendorf criticizes Hobbes's claim in *De cive* II.3 that to give a piece of property to someone else in the state of nature does not exclude third parties from using it, because they still retain their original natural right to all things.

> To understand this point more thoroughly one must know that right in the proper sense is not just any natural faculty of doing something, but only such as involves a certain moral effect on others who are of the same nature as I. Thus, in Aesop's fable, the horse had a natural faculty of grazing in the meadow, and the stag the same, but because these faculties of theirs had no effect upon the other, neither of them had a right. So also a man, when he puts insensate things or brutes to his own use, exercises only a purely natural faculty, at least if it is considered strictly in reference to the things and animals he uses, without regard to other men. But this faculty acquires the nature of a right, properly speaking, only at the point when it morally affects the rest of men in such a way that they ought not to hinder him or use these things against his will. For it is surely inept to wish to distinguish that faculty by calling it a right if everyone else can by virtue of an equal right hinder the one who wants to exercise it. We admit, therefore, that man naturally has the faculty to employ for his own use whatever insensate things and brutes he wishes. But this faculty, considered precisely as such, cannot properly be called a right, both because these things are not obligated to avail themselves for man's use, and also because, on account of men's natural equality vis-à-vis one another, one person cannot rightfully exclude the rest from such things unless he has secured a special privilege for himself from the express or presumed consent of others. Only when this has been done can he say correctly that he has a right to them.[29]

It has been maintained that in the above passage Pufendorf makes it clear not only that there is a correspondence between our rights and other people's obligations but also that obligation is the primary active moral quality from

[27] *De iure* I.6.9.
[28] Op. cit., 6.12.
[29] Op. cit., III.5.3. Translation in Pufendorf 1994, 169.

which rights as secondary qualities follow.[30] As Thomas Mautner has pointed out, however, such an interpretation is far from self-evident.[31] For what Pufendorf criticises here is the Hobbesian idea that natural rights include no reference to other people's obligations. All he maintains is that our active rights to do or possess something are always accompanied by the obligation on others not to prevent us from doing or possessing that particular thing. As such, this statement does not necessarily indicate that these rights are corollaries of this obligation other people have towards us. It is equally compatible with the idea that while these rights are always accompanied by the obligation of others to respect them, the fact that we have them is not dependent on such an obligation, but follows from some other principle.

The latter view was defended by Karl Olivecrona. His interpretation was based mainly on *De jure*'s discussion of the duty not to hurt other people, which Pufendorf characterizes as the most inclusive of our duties towards other human beings, for without it "the social life of men could in no way be sustained".[32] Following the general procedure of his theory, Pufendorf demonstrates this precept of natural law by observing how certain features of human nature make it a prerequisite for peaceful sociality among human beings. What interested Olivecrona, however, was Pufendorf's understanding of what it means to hurt other people.

According to Pufendorf, we hurt other people when we take away, destroy or damage something that belongs to them by a perfect right. Things belong to human beings by a perfect right in two ways. Some are their own through human conventions and institutions, whereas others "nature itself has immediately granted" them. In the latter group Pufendorf includes life, body, limbs, chastity, simple reputation, and liberty.[33] The inclusion of liberty in this list is somewhat confusing, since as was mentioned above, Pufendorf defines liberty as a power over one's own person and actions. Since life, body, simple reputation and chastity are all integral parts of one's person, all things listed above belong, strictly speaking, to the field of *libertas*. It can be gathered, however, that in this context Pufendorf uses the term 'liberty' to refer to the right to one's own actions, which will hereafter be called the right of self-governance.

[30] Behme 1995, 82–83; see also Denzer 1972, 87, 132. Tuck 1979, 1, 159–160, makes the somewhat stronger claim that Pufendorf anticipates late eighteenth-century British utilitarians by supporting the doctrine that 'to have a right is merely to be beneficiary to someone else's duty, and that all propositions involving rights are straightforwardly translatable into propositions solely involving duties.'

[31] Mautner 1989, 44–46 (1999, 166–168).

[32] *De iure* III.1.1.

[33] Op. cit., 1.1 and 3.

What is significant in this definition of hurt is that the innate right human beings have to their life, body, limbs, chastity, simple reputation, and self-governance is conceptually independent of the fact that other people have an obligation not to violate these rights. If hurting others means violating their perfect rights, these rights cannot be corollaries of the duty not to hurt others. While all active rights are accompanied by other people's obligation not to violate them, the fact that some of them belong to human beings by nature cannot follow from this obligation, but must have some other foundation.

To be sure, there is one natural right that is conceptually related to the duty not to hurt others. Pufendorf holds that when we have an obligation towards someone else, this implies that the person in question has a corresponding right.[34] Consequently, the fact that natural law imposes a universal duty of not hurting others indicates that human beings have an innate right of not being hurt by others.[35] This right does not entitle human beings to do something, it only allows them to keep something by prohibiting others from interfering. According to the classification above, it is a passive right to have something accompanied by other people's perfect obligation not to interfere. Such a right is an integral part of all active rights, both natural and adventitious, in the sense that it morally protects them from the interference

[34] Op. cit., 5.1. The opposite, however, is not always true. The example Pufendorf gives is a sovereign's right to punish which does not, in his opinion, imply that criminals have an obligation to suffer their punishment. This does not tell us much about innate rights, as Pufendorf regards the right to punish as an adventitious right which only comes into being together with civil sovereignty. It does show, however, that he is not committed to a doctrine according to which all rights are reducible to other people's obligations, a point highlighted in Thomas Mautner's critique of Richard Tuck's Pufendorf – interpretation. Mautner 1989 (1999), 50–52 (172–174). I do not, however, agree with Mautner's conclusion that the right to punish is "a passive right to do something". The distinction between active and passive rights in Pufendorf's theory is based on the idea that the former entitle human beings to do something, while the latter only entitle them to have, suffer, accept or receive something. *De jure* I.1.19–10. The right to punish must, therefore, be seen as an active right accompanied by other people's obligation not to violate it by preventing the sovereign from punishing those who disobey his commands. The reason why criminals do not have an obligation to undergo punishment is not their obligation to protect their own lives (Cf. Tierney 1997, 82), but Pufendorf's peculiar understanding of what constitutes punishment. According to him, the concept of punishment entails that it is inflicted on the punished person so that he suffers it unwillingly. This in turn, indicates that there cannot be an obligation to undergo punishment, since obligations are moral demands that a person should, in principle at least, be able to fulfil willingly, even without the fear of punishment. To say that the criminal has an obligation to undergo punishment is thus tantamount to saying that he should suffer it willingly. But in this case it would, in Pufendorf's opinion, no longer be punishment. *De jure* VIII.3.4.

[35] A right of this type is mentioned, for example, in Pufendorf's discussion on the foetus in *De iure* I.1.7. He says that when an embryo starts to resemble a human being, she shares with other human beings the innate right not to be hurt by others.

of others. Yet it has no specific content until we know what things belong to each person either by nature or by human agreement. Consequently, in order to understand why certain rights are natural for human beings we must refer to some other principle.

NATURAL RIGHTS AND NATURAL INCLINATIONS

Olivecrona's interpretation emphasizes an important feature of Pufendorf's account of natural rights. Our innate rights to life, body, reputation, chastity and self-governance cannot be corollaries of other people's obligation not to injure these things. Olivecrona's understanding of the foundation of these rights in Pufendorf's theory is, however, problematic. According to him, the innate part of one's own is based on the natural condition and inclinations of human beings.[36] Were this the case, Pufendorf would deduce rights, which he defines as moral entities founded on imposition, from features human beings have as physical entities. This would be an inconsistent position, but before rejecting it we should notice that a few passages in *De jure* appear to support such an interpretation in so far as innate rights related to self-preservation are concerned. Olivecrona himself referred to the discussion on the moral legitimacy of war in *De jure* VIII.6.2, in which Pufendorf remarks that when someone threatens me with injury, "my care for my own safety gives me the power (*potestas*) to defend myself and mine by any means at my disposal, even to the injury of my assailant". However, in this passage the expression 'my care (*cura*) for my own safety' does not necessarily refer to the inclination to self-preservation. It can equally well refer to the obligation to take care of one's life imposed by natural law.[37]

A more unambiguous example of deducing natural rights related to self-preservation from a corresponding inclination is to be found in *De jure* II.2.3, where Pufendorf characterizes the rights human beings have in the state of nature as follows:

> Now the rights accompanying man's natural state can be easily gathered, first, from that inclination common to all living things whereby they necessarily seek in every way to preserve their body and their life, and to repel whatever appears destructive thereto; and secondly, from the fact that those who live in that state are subject to no man's commanding

[36] Olivecrona 1977, 100.

[37] This reading would still make the above remark somewhat inconsistent with Pufendorf's official justification of the right to violent self-defence (see below), but it does not mean that he deduces the right of self-preservation from a corresponding inclination.

> power. For it follows from the former that those placed into a natural state may use and enjoy any item of the common stock, and employ or do whatever contributes to their own preservation so long as the right of others is not hurt thereby; and from the latter, that they may defend and preserve themselves by using not only their own strength but also their own judgement and choice, provided these are formed by natural law. And in this respect that state also comes with the name of natural freedom, since apart from a preceding human deed anyone is understood to be within his own right and power, and not subject to the authority of any other man.[38]

In this passage, Pufendorf seems to be saying that the natural inclination to self-preservation gives rise to the right to use land, plants and animals for one's preservation as well as to the right to defend one's life. This would bring him close to Hobbes, who in *De cive* derived the idea that "the first foundation of natural right is that each man protect his life and limbs as much as he can" from the observation that a human being avoids death "by a real necessity of nature as powerful as that by which a stone falls downward".[39] What would distinguish Pufendorf from Hobbes in this case is that while Hobbes saw the laws of nature as being silent outside of civil society, Pufendorf would hold that rights related to self-preservation are constrained by rules of sociality even in the state of nature. Yet Pufendorf would agree with Hobbes in holding that natural law is merely a norm that imposes restrictions upon our natural right of self-preservation, not something on which this right is founded.

I think there is no denying that the formulation in *De jure* II.2.3 allows this interpretation. Nevertheless, there are good reasons to think that this formulation is inadvertent, possibly a remnant of an early stage of Pufendorf's theoretical development.[40] Firstly, when he discusses rights concerning self-preservation in more detail elsewhere in *De jure*, he carefully avoids making normative claims based on the inclination to self-preservation. For example, when Pufendorf wants to show that God allows human beings to use other creatures for their preservation, this inclination is not mentioned. That this is God's will is known from the fact that "since God has created man, He is understood also to have granted him the use of those things without which his gift cannot be maintained".[41] Correspondingly, in his discussion on the legitimacy of violent self-defence, Pufendorf does not refer to the inclination to self-preservation but justifies this right by pointing

[38] *De jure* II.2.3. The translation is from Pufendorf 1994, 141–142.
[39] *De cive* I.7. The translation is from Hobbes 1998, 27.
[40] In his early *Elementorum juresprudentiae elementorum* Pufendorf offers a general definition of a right (Book I, Definition viii) but says nothing on natural rights.
[41] *De jure* IV.3.2.

out that if all honest people abstained from defending themselves against the wicked, this would have catastrophic consequences in social life.[42]

Secondly, when Pufendorf discusses the rights human beings have in the state of nature in *De officio*, he names only one 'principal right'; namely the right to be subjected to and accountable only to God. By this he means that "every man is understood to be in his own rights and power and not subject to anyone's authority without a preceding human act".[43] The inclination to self-preservation is mentioned too, but not because it gives rise to corresponding rights.

> Due to the inclination common to all living things, a man cannot help striving to preserve his body and life by all means and repel all that threatens to destroy them, and apply all necessary means to that end;[44] and since no one in the natural state has another man as his superior to whom he has subjected his will and judgement, everyone decides for himself whether the measures are apt to conduce to his preservation or not.[45]

Here the inclination to self-preservation explains why people living in the state of nature use their right of self-governance primarily to decide how to preserve and protect themselves.[46] This view is in accordance with Pufendorf's doctrine of moral entities and should, I think, be seen as his mature position on this issue.

It should be added that there is one innate right in Pufendorf's theory which seems to be especially closely connected to the inclination to self-

[42] Op. cit., II.5.1. Pufendorf declares that if all human beings refused to defend themselves against aggressors, "all the benefits which nature or our labour has given us would have been conferred in vain". Moreover, "honest men would be exposed as an easy prey for the wicked", which would ultimately "mean the end of mankind".

[43] *De officio* II.1.8. In Pufendorf 1991, 117, the term *ius* is translated here by the word 'law' which makes the discussion difficult to understand. In his French translation, Jean Barbeyrac used the word *droit* here as an equivalent to *ius*. Pufendorf 1984, vol. 2, 7. This is, I think, the correct translation.

[44] Pufendorf 1991, 117, translates this sentence as: "And owing to the inclination which a man shares with all living things, he must infallibly and by all means strive to preserve his body and life and to repel all that threatens to destroy them, and take measures necessary to that end." This gives the impression that the inclination to self-preservation gives rise to a duty to protects one's life. However, there is no equivalent to the word 'must' in the original Latin text.

[45] *De officio* II.1.8. Translation partly my own, partly in Pufendorf 1991, 117.

[46] In the corresponding discussion in *De statu hominum naturali* Pufendorf also mentions only one principal right in the natural state, namely that of self-governance. *De statu* #8. This time the inclination to self-preservation is mentioned together with the remark that self-preservation is recommended by reason; i.e., that it is a duty imposed by natural law. *De statu* #10.

preservation. This is the right of necessity which entitles human beings to ensure their physical survival even by disobeying some precepts of natural law. Pufendorf remarks that the existence of such a right proceeds "from the fact that a man cannot avoid straining every nerve for his own preservation, and therefore it is not easy to presume such an obligation to be resting upon him, as ought to outweigh the zeal for his own safety".[47] Nevertheless, I disagree with those commentators who suggest that Pufendorf deduces this right entirely from the natural desire for self-preservation, and that it therefore has no real moral status in his theory and should rather be seen as a gap in the Pufendorfian *Rechtsordnung*.[48]

Pufendorf presents his general idea of the right of necessity when he explains its foundation in the case of human laws. He declares that those who impose laws on human beings have "as their purpose the promotion through these laws and institutions of men's safety or convenience". Therefore, they "are supposed always to have had before their eyes the weakness of human nature, and how man cannot help avoiding and repelling whatever tends to his destruction". As a result, "most laws" are understood to "make an exception of a case of necessity". Moreover, in the case of such necessity, disobeying the law does not mean that the law is "violated directly", since it is "presumed from the benevolent mind of the legislator, and from the consideration of human nature, that a case of necessity is not included under the law which has been conceived with general scope".[49]

It is true that things are more complicated in the case of natural law, since it includes several norms that should not be violated under any circumstances. This does not mean, however, that Pufendorf would abandon the theory of the right of necessity explained above. When people do have a right of necessity in relation to natural law, this is founded on the idea of a benevolent legislator, in this case God, whose main object is the survival of the human species and who has taken human weakness into account. If, for example, a person in a shipwreck has seized a plank which is not large enough for two people, he does not, strictly speaking, violate natural law if he prevents another person from getting on it.[50] Instead, he acts in an extraordinary situation which does not fall within the scope of natural law. This means that his right of necessity does not follow from the inclination to self-preservation, but from God's will, which makes it compatible with the doctrine of moral entities. In accordance with this interpretation, Pufendorf speaks about "the right or privilege (*favor*) of necessity", suggesting that our

[47] *De jure* II.6.1.
[48] Welzel 1958, 91; Behme 1995, 84–85.
[49] *De jure* II.6.2.
[50] Op. cit., 6.3.

behaviour in such situations should perhaps be seen as based on a special favour granted by the lawgiver, rather than a universal right.

INNATE RIGHTS AS A MEANS OF FULFILLING ONE'S OBLIGATIONS

It is apparent, I think, that in Pufendorf's mature theory innate rights related to self-preservation are not based on the corresponding natural inclination. This also applies to our innate rights to simple reputation, chastity and self-governance, the foundations of which Olivercrona left completely unexplained. It seems, therefore, that we must return to natural law in our quest to ascertain the basis of these rights.

Knud Haakonssen has suggested that in Pufendorf's theory our innate rights are not based on the obligations of other people towards us, but on the duties natural law imposes on us. What we have a duty to do, we also must have a right to do, and in this sense a right is "a moral power to act, granted by the basic law of nature in order to fulfil the duties imposed by this law".[51] Haakonssen does not explain in any detail the inference from personal duties to subjective rights in Pufendorf's theory; nor does Pufendorf, to my knowledge, ever explicitly declare that our innate rights are corollaries of our personal obligations. Yet I think Haakonssen's interpretation is the most plausible one in so far as innate rights to one's person are concerned. Pufendorf's discussion on the relevant duties strongly suggests that what gives human beings an innate right to such fundamental features of their *persona* as life, body, simple reputation and sexual integrity is the fact that they need these things in order to be good and useful members of society.

Life and body are, of course, such integral physical components of human beings that without them it would be utterly impossible for a person to practise the duties of sociality. For this reason Pufendorf holds that natural law forbids human beings from committing suicide just to avoid the normal troubles that accompany life (troubles that in his opinion 'far surpass' the few and short pleasures of worldly human existence) or violating their own bodies.[52] This means that human beings do not have "an absolute power over their lives".[53] They do, however, have a non-absolute one. They have, for

[51] Haakonssen 1996, 40–41. Haakonssen holds that this brings Pufendorf close to John Locke, who also held that "natural rights are powers to fulfil the fundamental duty of natural law". Haakonssen 1996, 55. The view that Locke regarded all natural rights as powers to fulfil the duties imposed by natural law has, however, been criticised in Simmons 1992, 68–79.

[52] *De jure* II.4.16, 19.

[53] Op. cit., 4.19.

example, the right to shorten their lives knowingly by working hard when this is beneficial to other people, and also the right to risk their own lives in order to save the lives of others, if they are worthy of such a sacrifice.[54] All this strongly indicates that what gives human beings a subjective right to their lives and bodies in relation to other human beings is that these things are a necessary means of fulfilling the duty to promote sociality. An integral feature of this right is that other people have an obligation not to violate it. Yet the fact that our lives and bodies belong to us follows from our personal obligation to be useful members of society and is not a corollary of this obligation.

It should be noted that the right to violent self-defence is not a direct corollary of this general right to one's own life and body.[55] Pufendorf takes seriously the argument that the death of a person who attacks me is in some sense as great a loss to humankind as my own death. Moreover, in many individual cases we cause more disturbances in society by defending ourselves by force than by offering our body calmly to the attacker. Consequently, his justification of the right to violent self-defence relies on the argument that if all honest people refused to defend themselves against the wicked, this would have catastrophic long-term consequences in social life and would ultimately lead to the destruction of humankind.[56]

As for simple reputation and chastity, they are also characteristics individuals need in order to be useful members of society. Simple reputation is a moral attribute by which a person is regarded as a good human being who is willing to observe natural law and the laws of his country, and be a useful companion in social life.[57] Pufendorf remarks that when a person's simple reputation is diminished because of a crime, other people need "to show more caution in dealing with such a man", and when his reputation is completely destroyed by a grave offence or vicious way of life, he may be treated as a public enemy.[58] In other words, when simple reputation is diminished, it is extremely difficult for a person to be a useful member of society; and when reputation is completely lost, this is utterly impossible. Because of this, human beings have an innate right to their simple reputation so that if someone accuses them of a crime without justification, that person violates the duty not to hurt others.

Unsurprisingly, chastity is primarily a female attribute in Pufendorf's theory. While the duty to maintain peaceful sociality requires both men and

[54] Op. cit., 4.16-17; *De officio*, I.4.4.
[55] My interpretation differs from that of Knud Haakonssen, who holds that in Pufendorf 's theory everyone has "a right of self-defence as a part of the right to self-preservation". Haakonssen 1996, 40–41.
[56] *De jure* II.5.1.
[57] Op. cit., VIII.4.2–3; *De officio* II.14.3–4.
[58] Op. cit., 14.5–6.

women to avoid promiscuous and lustful sexual behaviour, natural law imposes on women an especially strong obligation to abstain from non-marital sexual intercourse. Without such a norm, men would be uncertain of the paternity of their wives' children, and therefore unwilling to assist women in raising their offspring. Given the weakness of the female sex, this would, Pufendorf maintains, endanger the whole continuity of the human race.[59] As a result, chastity is a woman's most highly valued attribute among men, so much so that all nations regard it as proper to kill a man who tries to violate the sexual integrity of a woman other than his wife.[60] Consequently, it is necessary for women to maintain their chastity if they are to be good and useful members of society, and this gives them a subjective right to their sexual integrity outside of marriage.[61]

THE RIGHT OF SELF-GOVERNANCE

In Pufendorf's theory, innate rights to life, body, simple reputation, and chastity are what some modern scholars have called mandatory rights; i.e., necessary means of fulfilling moral duties.[62] This cannot, however, be true in the case of the innate right to self-governance. After all, by this right Pufendorf means the fact that human beings are by nature, prior to all human agreements, totally independent of other people's commanding power. If such a right were a necessary means of observing one's moral duties, this would mean that ceding even a part of this right would make one incapable of fulfilling the duties imposed by natural law.[63] However, Pufendorf considers it obvious that "the liberty attributed to those living in the civil state encompasses only some remnants of their natural freedom", and that slaves, who "undertake tasks with the approval of their master and acquire for them whatever issues therefrom", have hardly any self-governance remaining. [64] Nevertheless, such considerable restrictions on their right of

[59] *De jure* VI.1.5.

[60] Op. cit., II.5.11.

[61] Pufendorf makes it clear that the sexual integrity of women is morally protected only outside the matrimonial relationship. In "matters peculiar to marriage the wife is obligated to adapt herself to the will of the husband". *De jure* VI.1.11.

[62] On the notion of mandatory rights, see Simmons 1992, 74–79.

[63] Since innate rights to one's own person are necessary means of fulfilling absolute duties imposed by natural law, they cannot be given away, although they can sometimes be subordinated to the more pressing demands of sociality.

[64] *De statu* #8. Following Hobbes, Pufendorf insists "that the liberty of citizens usually called personal is neither more nor less restricted under one regular form of commonwealth as such than under another, and those who live in aristocracies or democracies have no

self-governance do not, in his opinion, prevent male citizens or their wives, servants and slaves from fulfilling their moral duties. This means that the innate right of self-governance cannot be mandatory, but must have some other foundation.[65]

The question of the moral foundation of the right of self-governance in Pufendorf's theory is sometimes avoided by assuming that he regards natural liberty as an empirically observable historical fact.[66] Such an interpretation could find support in the fact that, in Pufendorf's opinion, "there is hardly anyone so stupid as not think that he can live more correctly or comfortably by his own wits than by conforming himself to another's decision".[67] However, this natural inclination for self-governance in human beings cannot explain why self-governance is an innate right which other people are not entitled to violate. It should also be noted that, in Pufendorf's opinion, the only historically existing form of the state of natural liberty is the condition "that now exists between different states and between citizens of different countries, and which formerly obtained between heads of separate families".[68] Yet he does not restrict the innate right of self-governance to male householders and sovereigns. On the contrary, he maintains that all power relations between human beings are based on consent, which indicates that every human individual, whether a wife, slave and (as we shall see) even a newborn baby, has a natural right to self-governance. Such an opinion cannot be based on empirical observations. It is a normative theoretical postulate in the light of which empirically observable power relations are to be analysed and evaluated.

Why, then, is self-governance something that belongs to human beings by nature? When the idea of the natural liberty of human beings was asserted in early modern scholastic theories of natural law, it was often based on the

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grounds for boastfully exalting themselves over those who live in monarchies". *De statu* #8. Translation in Pufendorf 1990, 119. Compare *Leviathan*, c. 21.

[65] Knud Haakonssen has pointed out that eighteenth-century American theorists influenced by the Pufendorfian tradition related natural liberty to moral obligation by holding that "a being without a minimum of moral judgement about himself or herself is simply not a person or a moral agent". Since we have a duty "to maintain ourselves as moral agents under natural law", we also have a corresponding right. Haakonssen 1991, 49. Such an idea can explain why we cannot justifiably give up all of our liberty, but it cannot form the moral foundation of the natural right of self-governance, which is not only the right to make independent moral judgements but also the right to act independently of other people.

[66] This seems to be the assumption of Craig L. Carr and Michael J. Seidler when they remark that "[a]s existent realities, the natural freedom and equality of humankind are, for Pufendorf, historical givens, but as analytical devices they set the moral parameters of the problem of obligation". Carr and Seidler 1996, 359 (1999, 138).

[67] *De jure* III.2.8.

[68] *De officio* II.1.6.

fact that human beings are endowed with the faculty of reason.[69] This view was also adopted by John Locke, who was familiar with Pufendorf's theory.[70] One would, therefore, also expect to find a similar argument in Pufendorf.

In some passages Pufendorf establishes a close connection between the right of self-governance and the fact that God has given human beings the faculty of reason. One such passage is the discussion of the rights that accompany human beings in the state of nature in *De officio*, where Pufendorf remarks that since "men have the light of reason implanted in them to govern their actions by its illumination, it follows that someone living in natural liberty does not depend on any mortal to rule his actions, but has the power (*potestas*) to do anything that is consistent with sound reason by his own judgement and his own discretion".[71] As such, this statement gives the impression that the right of self-governance is founded on the fact that human beings are equipped with the faculty of reason. However, what Pufendorf is discussing here is not the foundation of natural liberty but the consequences that the possession of reason has for people who are in the state of liberty, i.e., for those who already have the right of self-governance. The point of this remark becomes clear when he adds that

> since no one in the natural state has another man as his superior to whom he has subjected his will and judgement, everyone decides for himself whether the measures are apt to conduce to his preservation or not. For no matter how attentively he listens to the counsel of others, it is still up to him whether he will take it or not.[72]

In this statement, the possession of reason is not the moral foundation of the right of self-governance, but a feature that explains why a person who lives in the state of natural liberty is solely responsible for his own decisions. This idea is expressed in even clearer terms in the corresponding discussion in *De statu hominum naturali*.

> From the fact that those who live in a natural state are subject to no man's authority and acknowledge God as their only superior, it follows that without God's special revelation they have nothing else to direct

[69] Las Casas, for example, maintained in *De regia potestas* that "liberty is a right (*ius*) necessarily instilled in man from the beginning of rational nature and so from natural law". Cited in Tierney 1997, 278.

[70] In his *Two Treatises of Government* (II.63) Locke remarks that the freedom "of Man and Liberty of acting according to his own Will, is grounded on his having Reason, which is able to instruct him in that Law he is to govern himself by, and make him know how far he is left to the freedom of his own will". Since all normal adults possess this much reason, there cannot be any natural power relations among them. Op. cit., II.4.

[71] *De officio* II.1.8.

[72] *Ibid*. Translation in Pufendorf 1991, 117.

> their actions besides their own judgement properly conformed to the natural law. For insofar as he is not subject to another's direction, a person having a principle of acting within himself must govern his actions according to his own judgement. Thus, if someone relies very heavily upon the advice of another whom he deems wiser than himself, or if the other offers that advice of his own accord in whatever way he may draw to listen to the other: perhaps the latter's suggestion makes the teaching of sound reason more discernible – the final decision regarding his own affairs nonetheless reverts to each person himself.[73]

The fact that human beings are equipped with reason is, in other words, a feature which makes people who are in the state of liberty – sovereigns above all civil – responsible for their own decisions, regardless of how wise their counsellors happen to be.

A stronger connection between the rational faculty and the right of self-governance is established when Pufendorf in *De jure* criticises the view that superior abilities alone give some persons (a human being or God) the power to impose an obligation on those with lesser abilities.

> [W]e remain unpersuaded that the right to impose an obligation on someone who has in himself a principle of self-governance arises from the superiority of nature alone. For natural pre-eminence does not always entail an ability to govern someone less endowed by nature, nor are divers grades of perfection among natural substances automatically linked with subordination and the dependence of one on the other. Indeed, since the person on whom an obligation is to be imposed has in himself a principle for regulating his own action that he can judge is adequate for himself, there is no clear reason for thinking him immediately convicted by his own conscience if he acts according to his own rather than natural superior's discretion.[74]

In this passage, the fact that human beings are endowed with the faculty of reason is clearly pointed out as a factor which explains why they do nothing wrong if they decide not to obey someone else merely because of his superior natural abilities. This means that superior abilities do not create an obligation to obey in those with lesser talents. It should be noticed, however, that what the possession of reason does not explain in this passage is why a person with superior abilities violates natural law if he tries to force those with inferior abilities to obey him without their prior consent. In other words, it does not explain why self-governance is a natural right which other human beings are obliged to respect.

[73] *De statu*, # 9. Translation in Pufendorf 1990, 120.
[74] *De iure* I.6.11. Translation in Pufendorf 1994, 125.

Pufendorf's clearest statement on the relationship between the faculty of reason and the right of self-governance is included in his discussion of parental power in *De jure* VI.2.4. Here, a comparison with John Locke highlights an important feature of Pufendorf's theory. In his *Two Treatises*, Locke holds that natural liberty only belongs to normal adults who have the intellectual abilities to recognize natural law. Since children are not able to do this, they cannot be regarded as free. They only have the potential to become free when their rational faculty has fully matured.[75] In contrast to this, Pufendorf maintains that parents and their children have equal rights in principle. This is made clear when he criticizes the idea that parental power is based solely on the fact that children are procreated by their parents. Pufendorf's argument against this view is that even though "our offspring may be of our substance", this substance is passed into "a person who is similar to us, and our equal in so far as the rights naturally belonging to human beings are concerned".[76]

In other words, the right of self-governance is literally an innate right which human beings have from the moment of their birth. The fact that children are not yet endowed with reason does play a role in Pufendorf's justification of paternal power, but not because this would mean that they lack the right of self-governance. His argument is that the inability of children to know right and wrong and to survive on their own gives rise to parental duties and rights that temporarily override the equality of natural rights that prevails between children and their parents. The parents have a duty to raise their offspring to become useful members of society, because otherwise "it is impossible to conceive of social life". They cannot fulfil this obligation unless they have a right to govern their children's actions, which right "necessarily puts upon" children an obligation to obey their parents.[77] The need for parental power disappears when children become capable of recognising natural law and surviving on their own. Thus, while the right of self-governance is something human beings in theory have, even as newborn babies, the possession of rational abilities still explains why mere superiority of natural talents cannot establish power relations among full-grown human beings.

Two things are significant in the foregoing. Firstly, while reason has a role in the justification of the natural right of self-governance, it is not the ultimate foundation of this right. This right belongs to human beings from the moment they are born. Secondly, this innate right of self-governance can be subordinated to obligations imposed by natural law. This aspect strongly

[75] *Two Treatises* II.55–59.
[76] *De jure* VI.2.4.
[77] *Ibid*.

suggests that the right of self-governance itself is founded on some duty to promote sociality. As was mentioned above, however, the duty in question cannot be one that obligates the right-holder, since this would make it inconceivable that human beings could alienate large portions of their self-governance in domestic and civil power relations. As a result, we are left with the possibility that the right of self-governance is founded on some duty other people have towards the right-holder.

We have seen that our right of self-governance cannot be founded simply on other people's duty not to violate our personal autonomy. While such a duty is included in the duty not to hurt others, the fact that we have a natural right of self-governance must be conceptually independent of this particular moral obligation. However, none of this precludes the possibility that our right of self-governance is a corollary of some other obligation people have towards us. This idea is in fact affirmed in *De jure* III.2.8, when Pufendorf criticizes the Aristotelian idea of natural slavery in the following terms:

> Since nature has made all men equal, and since slavery cannot be understood apart from inequality (for to be a slave surely implies acknowledging a superior; freedom however, does not require one to have an inferior, as it suffices not to be subject to a superior), it is understood that naturally, or apart from any antecedent deed, all men are free.[78]

In this statement, the innate right of self-governance is founded on the natural equality of human beings. The expression 'nature has made all men equal' does not refer here to any similarities in the mental or physical characteristics of human beings but to a precept of natural law which requires us to regard all human beings as morally equal by nature.[79] In Pufendorf's theory, this duty is based on the observation that human nature is characterized by so sensitive a feeling of self-esteem that if a person feels that others do not appreciate him enough, he is "usually no less, but in fact often more upset than if some harm is done to his body or things". Moreover, human beings see a great dignity in being a human, from which it follows that it is impossible for them to enjoy peaceful co-existence with someone who does not regard them as equally human. Consequently, natural law requires everyone to esteem and treat every other human being "as his natural equals, or as human beings in the same sense as him".[80]

The obligation to regard other people as one's natural equals implies that one has to recognize that the rules of sociality bind all human beings

[78] Op. cit., III.2.8.
[79] Op. cit., 2.2.
[80] Op. cit, 2.1.

equally.[81] It also means that unless a person has acquired some special right by means of human agreements, he "should not claim more for himself than for the rest, but allow others to enjoy a right equal to his own"[82] since to claim a right to command other human beings without their consent clearly contradicts this principle, such claims are forbidden by natural law. From this follows "the equality of *power* or *liberty*" which prevails between human beings who are in the state of nature. By this principle, human beings "are understood to be equal in so far as no one, apart from an antecedent human deed or pact, has a power over another, and every man is a governor of his acts or power".[83] In this way, our innate right of self-governance is ultimately based upon other people's obligation to regard us as their natural equals.[84]

One could argue against this interpretation by pointing out that in his discussion on the rights that prevail in the state of nature Pufendorf declares that it is due to their natural liberty that human beings are regarded as equal in that state.[85] This would seem to indicate that natural equality is based on natural liberty, not the other way around.[86] However, in his discussion on the

[81] Op. cit., 2.2.

[82] Op. cit., 2.4.

[83] Op. cit., 2.9.

[84] That this principle applies not only to adults but also to small children, who are not capable of being insulted if some one rejects their full humanity, follows from Pufendorf's practice of deducing the individual precepts of natural law by using rule-consequentialist reasoning. People have a duty to regard all human beings as their natural equals, because general observation of this precept is a prerequisite for sociality, even if individual violations of it do not always provoke unsocial behaviour in others.

[85] In *De jure* II.2.4. Pufendorf declares that, in the state of nature, "anyone is understood to be within his own right and power, and not subject to the authority of any other man", wherefore 'anyone is considered equal to anyone else whom he himself is not subject to, and whom he does not have subjected to himself.' Correspondingly, he remarks in *De officio* 2.1.8 that natural liberty is 'the reason why every man is held to be equal to every other, where there is no relationship of subjection.'

[86] Craig L. Carr and Michael J. Seidler hold that in Pufendorf's theory the natural equality of human beings "follows directly" from the liberty that prevails between human beings in the state of nature. Craig and Seidler 1996, 359 (1999, 138). They do not, however, refer to the passages mentioned above but to *Elementa* II.Obs.4.22; *De jure* III.2.2; and *De statu* #13. Yet none of these three paragraphs confirm the interpretation that natural equality is based on the liberty that prevails in the state of nature. In *Elementa* II.Obs.4.22 natural equality follows from a general principle of reciprocity without any clear theoretical argument, whereas in *De jure* III.2.2 Pufendorf merely remarks that natural equality means equal obligation to obey natural law. In *De statu* #13 he in fact deduces natural liberty from natural equality in rejecting the doctrine of natural slavery by arguing that 'whatever right anyone asserts against another is appropriately enjoyed by the latter as well', and that 'no one should fashion himself a special right valid against others which they may not in turn exercise in a similar instance.'

rights that prevail in the state of nature Pufendorf is not speaking about the foundation of natural equality but explaining what makes people who already are in the state of natural liberty – above all rulers of independent states – actually equal with each other. His point is that their equality is not founded on their ability to kill each other, as Hobbes claimed, but on the fact that they all are independent of the commanding power of other human beings.[87] The moral foundation of this equality of liberty, however, is in their mutual duty not to claim any rights themselves that they are not prepared to grant others, and so ultimately in their mutual duty to regard each other as natural equals. Unlike the equality of liberty that characterizes people who are in the state of nature, this natural equality also prevails between human beings within the household and civil society. In these cases, it is expressed above all in the duty to recognize that all power relations between them are not based on divine ordinances or natural superiority but on consent.

NATURAL LIBERTY AND CIVIL SOCIETY

To summarize: in Pufendorf's theory innate rights that constitute natural liberty are all corollaries of obligations imposed by natural law. There are, however, three types of obligation that are relevant in this respect. Firstly, our passive right not to be hurt by others is a corollary of other people's obligation not to hurt us, i.e., to abstain from violating our rights. This right morally protects our rights form the interference of others but does not specify what our rights are. Secondly, our innate rights to life, body, simple reputation and chastity arise from the fact that they are a necessary means of fulfilling our personal obligation to be useful members of society. Finally, our natural right of self-governance derives from other people's obligation to regard us as their equals by nature and, therefore, not to claim for themselves any right to govern us without our consent.

This dependence of natural rights on natural law is in accordance with Pufendorf's remark that it is as impossible for human reason to discover morality in human acts without reference to law than it is "for a blind man to judge between colours".[88] Innate rights are moral qualities God has imposed on human beings through natural law. The dependence of natural rights on natural law also helps us to understand why Pufendorf puts more emphasis on the latter than the former. To be sure, the mere fact that natural rights are corollaries of duties imposed by natural law does not necessarily mean this. As Knud Haakonssen has shown, natural rights founded on personal duties played a crucial role in eighteenth-century North-American political

[87] *De jure* III.2.2.
[88] Op. cit., I.2.6.

thought.[89] What is distinctive about Pufendorf's account of innate rights in relation to later natural rights theories is his idea that the innate rights constituting natural liberty are all corollaries of the obligation to promote sociality among human beings, and that the needs of sociality may, therefore, sometimes outweigh an individual's innate rights. We have already seen how Pufendorf uses this principle in the case of parental power, but he also employs it as the theoretical framework for his refined account of legitimate resistance.[90]

As against Hobbes, Pufendorf holds that the civil sovereign is able to injure his citizens. This is so because "there surely exits among them a community of natural rights, at least, which suffices to make someone capable of being injured by another".[91] More precisely, the sovereign can injure citizens either as a sovereign or as a human being. In the former case he violates the rights his citizens have as citizens, whereas in the latter he violates their natural rights. This happens, for example, if he "disgraces a good man who does not merit it", if he "assaults the chastity of honourable virgins or pollutes the bedchambers of others through his adulteries", or if "he takes the life of an innocent person through sheer violence, by suborning false accusers, or by getting judges to hand down an unjust sentence".[92]

Despite the sovereign's ability to cause such injuries, Pufendorf is reluctant to grant individual citizens the right to resist the sovereign even when the sovereign unjustly threatens their lives. He admits that by doing so the sovereign takes the role of an enemy and releases the citizen from all contractual obligations towards him. Yet for the individual citizen the only rightful options in such a situation are either to flee to another state or, if this is impossible, to face death. This is so because violence against the prince "nearly always" causes "grave disorders" in civil society.[93] In cases like this, one's duty to promote peaceful sociality outweighs one's natural right to defend one's own life.

The situation is different, however, when the people led by a well-informed elite rise up against the sovereign.[94] Such a political body has the

[89] Haakonssen 1991, 47–52, and 1996, 327–332.

[90] On Pufendorf's account of political resistance, see Seidler 1996.

[91] *De jure* VII.8.4. Hobbes holds that the sovereign cannot injure his citizen because there is no pact between them. *Leviathan*, c. XVIII (Hobbes 1991, 121–124). Pufendorf does not accept this claim, but does insist that injury is not simply a matter of violating pacts. *De jure* VII.8.2.

[92] Op. cit., VII.8.4.

[93] Op. cit., VII.8.5.

[94] Like many early modern political theorists, Pufendorf does not explain what exactly he means by the term 'the people'. It is apparent, however, that when he speaks about the people as a political agent that resists the prince, he thinks of them as being led by some eminent members of society, not by the common people. See Seidler 1996, 94.

right to oppose the prince even by violent means if he tries to transgress the limits on his power imposed upon him under the pact by which the commonwealth was established. It also retains this right if the sovereign uses "extreme and unjust force" against his people.[95] In other words, Pufendorf seems to assume that violent resistance undertaken by a well-led collective agent is not so great a threat to sociality that natural law completely forbids it.[96]

Pufendorf's method of basing natural rights on natural law has other consequences for social life as well. Locating the foundation of our natural right to self-governance in other people's obligation to regard us as their natural equals makes this right a purely social phenomenon. The natural right of self-governance is not an expression of an intrinsic feature in human nature (say, rationality or free will). Nor is it a necessary means of fulfilling one's personal duties imposed by natural law. It is simply a moral entity which post-lapsarian human beings, characterized by a strong sense of self-esteem, must mutually recognize if they are to maintain peaceful social coexistence. This means that even though civil and especially domestic power relations drastically diminish the self-governance of those who are subjected, Pufendorf is able to maintain that this does not violate their humanity or render them unable to act as moral agents.[97]

What the innate right of self-governance does mean, of course, is that these power relations must be understood as being based on consent. Pufendorf does not assume, however, that this consent has to be a conscious act of will. The consent does not have to be expressed "by such signs as are regularly accepted in human transactions". It can also be "inferred from the nature of the affair and other circumstances".[98] As Jean Barbeyrac noted in

[95] *De jure* VII.8.6–8.

[96] As Michael Seidler has shown, it was not inconsistent for Pufendorf to approve the revolution of 1688 in England. Seidler 1996, 98–104.

[97] For example, Pufendorf not only accepts the possibility of voluntary slavery, but also thinks that slavery is a suitable state for a certain type of person. While "some men are blessed with such a natural ability that they are not only able to look out for themselves but also, indeed, to govern others", others are "too dull-witted to be able to govern themselves, except badly, or they do nothing unless they are directed or impelled by others, even though nature has endowed them with a strong body by means of which they can shower many advantages upon the rest". When people of the latter type are subjected to the authority of the more prudent, "they have no doubt reached a state that agrees with their native character" and "a kind of friendship strikes up between the slave and his master". Pufendorf admits, however, that the master-slave relationship is not always without problems. When a "bad turn of fortune or the rank of his mother" forces a man "with good mind and ability" to serve someone less able than himself, the former cannot help hating his master. *De jure* III.2.8. This does not indicate, however, that being a slave violates his humanity.

[98] Op. cit., 6.2

his French translation of *De jure*, this formulation fails to make a distinction between tacit consent and what Roman lawyers called a presumptive or supposed consent. The former "arises from certain things done, or omitted on purpose", whereas in the latter case the consenting person is ignorant of the matter, but we think that he has given his consent either because we believe that if he knew the circumstances, he would freely give it, or because we think that he has an obligation to do so.[99] In Barbeyrac's opinion, this sort of consent "is of no use or necessity in civil life".[100] It seems highly plausible, however, that in Pufendorf's opinion it is this kind of consent that gives rise to the political obligation of the majority of male householders, who either "do not understand the character of civil society" or "are ignorant of its advantages".[101] While the innate right of self-governance gives male householders autonomy in the state of nature, within civil society their consent for the sovereign power can be deduced from the fact that they would give this consent if they properly understood the benefits of living under such power.[102]

In other words, citizens have given their consent to the sovereign power under which they live by simply being citizens. For most male householders, the main political significance of the innate right of self-governance is that there are no power relations between householders that are independent of the sovereign power, and that the prevailing civil order is not founded on the intrinsic superiority of those who are above them in the civil hierarchy. In principle, this opens up a vision of a meritocratic state in which every position in this hierarchy (save the position of the king in inherited monarchies) is available to all male citizens who have suitable abilities. In practice, however, this element in Pufendorf's theory primarily empowers the sovereign, to whom it gives the right to mould civil hierarchies according to what he considers to be the needs of the state, independently of pre-

[99] Pufendorf 1987, vol. 1, 369, n. 3. See Birks and McLeod 1986, esp. 65–68. On the idea of presumed or implied consent, see also Haakonssen 1991, 37, and 1996, 316.

[100] Pufendorf 1987, vol. 1, 369, n. 3.

[101] *De jure* VII.1.3.

[102] That Pufendorf regards this type of consent as a means of justifying power relations between human beings is apparent in his discussion of parental power, where he remarks that the power parents have over their children is based not only on the duty of the parents to take care of their children, but also on "a presumed consent of the children themselves, and therefore on a tacit pact". The latter is based on the assumption that if children had a mature rational faculty, they would understand that they need their parents to survive and would therefore consent to the authority of their parents. Pufendorf especially points out that this reasonably presumed consent is as valid as an expressed one. *De jure* VI.2.4. Unsurprisingly, Barbeyrac finds the whole assumption "ill founded and superfluous". Pufendorf 1987, vol. 2, 184, n. 2.

existing hierarchies of value or position.[103] Pufendorf is far less interested in promoting the idea of equal opportunity among male citizens since life is short, sociality requires everyone to choose at an early age "a course in life which is honest, advantageous, and suited to his capacity". But the course people take in their lives is decided not only by their inclinations and abilities but also by available opportunities, the authority of their parents, the social position into which they are born, and sometimes also by the command of the civil power or by the sheer requirements of necessity.[104]

While male householders may be all equal in the imagined state of nature, in civil society the demands of sociality require them to accept that these factors affect their lot in life. They should therefore not protest if their lot in this world happens to make them less capable of achieving higher social positions than some of their compatriots.

[103] *De jure* III.2.9 and VIII.4.25–32. See Saastamoinen 2002, 195–199.
[104] *De jure* II.4.15.

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Chapter 10

LIFE, LIBERTY, AND THE PURSUIT OF HAPPINESS

Human Rights in Barbeyrac and Burlamaqui

Petter Korkman (University of Helsinki, Finland)

It is something of a commonplace in literature on the history of legal and political thought to link modernity in moral and political thought with the rise of a subjective rights theory. For those who, like Leo Strauss and his followers, are sceptical of the blessings of modernity, the prevalence of a modern language of subjective individual rights relates to the demise of a credible moral worldview. Others implicitly or explicitly regard the language of subjective rights as the foundation of a basically sound and compelling liberal understanding of morality and politics. For the historian of ideas, identifying modernity with the rise of individual rights provides yet another setting for the debate on the dating of modernity. Is modern subjective rights language the fruit of early modern natural law theory from Hugo Grotius to the human rights declarations? Do we owe the formulation of a language of subjective individual rights to late medieval authors – the Fransiscans, for example or are subjective rights even older than that?

Recent scholarship, however, provides grounds for a further alternative in the dating discussion. According to Knud Haakonssen, even the modern natural law theories articulated in the seventeenth and eighteenth centuries derive rights from duties, and thus make duties, not rights, the fundamental feature of the moral universe. This, Haakonssen holds, is a good reason not to regard the rights language of early modern natural law theorists as an example of a genuine language of subjective rights. In a genuine modern subjective rights language, individuals are rights holders first and foremost, since this is how men make contracts, create political institutions, and so on.

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 257-283.

Since early modern natural law theorists view individuals as bound by duty first and foremost and having rights only as a consequence of those duties, their language of rights fails the test of modernity – it is not a genuine language of subjective rights. Haakonssen also suggests, perhaps somewhat sweepingly, that the rights language of early modern natural law theorists is morally conservative and politically impotent.[1] His conclusions entail that if subjective rights language is the true mark of modernity, then modernity did not begin with the Fransiscans or with Grotius and Hobbes. Neither does it begin with the natural law theorists in the eighteenth century like Locke, Barbeyrac, Burlamaqui, etc. The modern language of subjective rights as Haakonssen understands it does not even begin with the early human rights declarations, however symbolic these have later become for the primacy of rights claims. The authors of the American *Declaration of independence* of 1776 were in fact quite content to derive their inalienable human rights from natural law duties, as Haakonssen makes clear.[2] The rights to "life, to liberty, and to the pursuit of happiness" listed in that declaration are thus not the primary features of the moral universe, but politically impotent expressions in a morally conservative language. This, Haakonssen's arguments suggest, is all that we will find in our studies on medieval or early modern rights discourse.

The most fundamental question raised by Haakonssen's analysis is philosophical rather than historical – if such discipline markers make sense here. The central challenge for discussions of the history of subjective rights discourse is to provide some analysis of what a language of subjective rights is. The present chapter contributes to that discussion by comparing the rights theories of two natural law theorists from the eighteenth century: Jean Barbeyrac (1674–1744) and Jean-Jacques Burlamaqui (1694–1748). Both discuss inalienable rights, and both were read by the authors of the early human rights declarations. Both argued that men have a natural and inalienable right to life and liberty, while Burlamaqui's theory added the right to pursue happiness as a fundamental natural right. The political implications of their rights theories differ dramatically, however.

Barbeyrac never published his own systematic treatise of natural law theory. His views on this and natural rights are rather to be found in his long prefaces and footnotes to his French translations of Grotius's *De jure belli* and especially Pufendorf's *De jure naturae et gentium* and *De officio hominis et civis*. As I have argued at more length elsewhere, Barbeyrac's own theory constitutes a modified kind of Pufendorfian natural law.[3] The question of natural rights is one key area which brings the differences

[1] Haakonssen 2002, 27–28.
[2] Op. cit., 50–51.
[3] See Korkman 2001.

between Pufendorf and his predecessor to light, as Barbeyrac modifies his master's theory to provide a more Lockean, and as I will argue here, a more genuinely modern language of inalienable human rights as areas of self-governance that no human authority can interfere with. Burlamaqui's natural law treatise emerged from his lectures at the academy of Geneva, which were largely based on Barbeyrac's translations of Grotius and especially Pufendorf. Burlamaqui has often been viewed as an unoriginal thinker and as an overly faithful pupil of Barbeyrac[4]: I will instead argue that his rights theory differs substantially from Barbeyrac's, in spite of borrowing heavily from it. Both Barbeyrac and Burlamaqui can be counted as Pufendorfians in the sense that they elaborated their own views within the framework of Pufendorf's natural law, and their different theories of rights can be viewed as an illustration of the ambivalences of rights in Pufendorfian natural law theory.

LIFE

Pufendorf's natural law theory is basically a theory about divinely imposed universal duties or 'offices'. These duties are all derived from one fundamental principle. Since God endowed human beings with a nature that makes them unsuitable for a lonely life, he clearly intended that men should promote sociability, that is, a safe and fruitful social life. The natural laws are derived from this fundamental 'sociability' principle.[5] From these natural law duties, certain rights can also be deduced as means of fulfilling of those duties. All human beings, Pufendorf holds, have a natural right to "life, body, limbs, chastity, liberty".[6] The idea that human beings naturally have a right to life and liberty was therefore not a new invention of the authors of the early human rights declarations, but rather a assumption in the natural law theories of the time. In order to understand the different interpretative possibilities offered by the rights language of the time, we need to take a closer look at these rights. I will therefore now examine how the three inalienable rights celebrated as self-evident by the American *Declaration of Independence* were understood by Pufendorf, Barbeyrac and Burlamaqui. A quite clear feature of their discussions is that they all derive these rights from natural law duties. This is clearly the case for the right to life, which implies a right to care for one's self-preservation through violent self-defence, if need be. Let us accordingly start our enquiries with the right to life.

[4] See e.g., Derathé 1950, 86.
[5] Pufendorf, *De jure* II.3 §15, *De officio* I.3 §§8–9.
[6] *De officio* I.6 §3.

According to Pufendorf, a universal ban on violent self-defence would spell the end of the human race.[7] This is the ultimate reason that he offers for his view that there must be a natural prima facie right to violent self-defence. This seems to dissociate the right to violent self-defence from Pufendorf's general discussion of the duty to care for one's own preservation. Generally speaking, every man on Pufendorf's theory has a duty to defend his own life so as to continue as a useful member of society. If a person can save his own life without risking harm to other people, then he has a full obligation to do so: he does not have a right to deprive society of a useful member.[8] The general duty to care for one's own survival, however, does not on Pufendorf's view entail an obligation to violent self-defence. From the perspective of the duty to promote sociability, violent self-defence is not a straightforward matter, Pufendorf argues. Such self-defence may often bring with it more unrest than a meek death at the hands of unjust violence would. In some cases the attacker may also be a person who otherwise benefits society greatly. Furthermore, the act of taking the life of another person in self-defence goes counter to the principle of sociability, which requires us to treat all others as people we can further sociability with. As a result, the principle of sociability does entail a general duty of self-defence, but it does not imply a duty of violent self-defence. Men do have a right to defend their own lives with violence in most cases, but not a duty. This right can, furthermore, be renounced in the same way as other 'privileges' are renounced, as Pufendorf puts matters, perhaps a bit carelessly.[9] This should not be taken to mean that a person could alienate the right to life to his master: Pufendorf affirms that the slave master gains no right to kill his slave at will.[10] What this means is simply that I retain a right to (apparently freely) decline exercising my right to violent self-defence in individual cases.[11] In some cases, as we will see in a moment, I may even have a duty to do so.

Barbeyrac protests against Pufendorf's account, both the view that violent self-defence is not a duty and the idea that the right to violent self-defence may be renounced at will, as one renounces a privilege. Natural law not only permits violent self-defence, Barbeyrac asserts, but positively commands it. If violent self-defence was merely permitted, persons would defend or not defend their lives by force of arms only to the extent that their natural instinct for self-defence (*instinct naturel qui porte chacun à se défendre*) demands it. Instinct and passion are not, however, trustworthy

[7] Op. cit., I.5 §6.
[8] *De jure* II.5 §1.
[9] Op. cit., §2.
[10] Op. cit., VI.3 §4.
[11] Pufendorf makes a significant restriction to this freedom of choice when he asserts that a person "who has dependents" owes it to these not to allow another to kill him for no good reason. See op. cit., II.5 §2.

guides, and this instinct in particular can be overcome in one tired of life. That God did implant self-love (*amour propre*) and the instinct for self-defence in our hearts, furthermore, bears testimony to the fact that God commands each of us to care for his own survival. In good logic, this duty must extend, Barbeyrac holds, even to killing in self-defence.[12] Pufendorf's account should therefore be rectified, Barbeyrac holds, since there is a full obligation to violent self-defence, which obviously makes the right to violent self-defence something that we cannot renounce at will. We are not at liberty to decide at will whether to defend our lives by violent means or not.

One of Pufendorf's arguments against a duty to violent self-defence was the idea that killing, even in self-defence, is unsociable and productive of calamities, especially if the attacker is more useful to society than I am myself. The obvious example of this is when a person is attacked by his king – a matter that Pufendorf does not discuss in connection with legitimate self-defence, but that he does turn to when discussing the rights of sovereigns in the *De jure*. According to Pufendorf, defending one's own life against the king is likely to produce great calamities. One must therefore flee one's country or allow one-self to be killed rather than defend one's life with violence against one's sovereign. Thus, the right to life discussed by Pufendorf may be overridden by the duty to further sociability.[13] Barbeyrac allows little room for such a duty to die. If my king (or my father, another example discussed by Barbeyrac) threatens my life through a movement of which he is not himself the master, then and only then do I have a duty to save the life of my king or father at the expense of my own.[14] If my ruler attacks me willingly and with evil intent, I have a full right to defend my life with sword in hand. In such an attack, he assumes more power than I as a subject can ever grant him, overstepping the boundaries of my natural and inalienable right to life. By thus overstepping the limits of his power, the king brings about a state of nature and of war between himself and me. By defending myself against this monster, my actions may indeed sometimes bring to power even more horrible tyrants, but the result may also be the reverse.[15] While it is indeed socially useful that subjects remain obedient, it is also socially useful that rulers are reminded that they cannot push their power beyond the limits. Violent self-defence against a consciously and unjustly aggressive prince is thus on Barbeyrac's view always more likely to further sociability in the long run.[16]

[12] *Le droit* II.5 §2, note 5.
[13] *De jure* VII.8 §5.
[14] Barbeyrac, *Le droit de la nature* II.5 §5 note 1.
[15] Barbeyrac, *Les devoirs de l'homme* I.5 §19, note 1.
[16] Barbeyrac, *Le droit de la guerre* I.4 §2 note 1.

While this means that Barbeyrac provides very little scope for a duty to die innocently at the hands of one's ruler, he does not entirely deny such a duty. If the sovereign attacks me without being master of his own actions, I ought to let him kill me, Barbeyrac concludes.[17] There is thus one case, albeit marginal, in which the duty of sociability overrides that of self-defence. This is enough to show that the right to life, interpreted as a right to violent self-defence can, at least in theory, be overridden if the fulfilment of other duties requires it. The divinely imposed duty to preserve one's own life may be silenced by the divinely imposed duty to further sociability. The right to life is inalienable but may sometimes be renounced momentarily. Barbeyrac adds that failure to kill rather than die may sometimes be excusable, if motivated by tenderness or respect for the unjust attacker, a statement which also allows some scope for choosing to die.[18] The main difference from Pufendorf's account thus seems to be that for Barbeyrac there is a prima facie duty of violent self-defence while Pufendorf only postulates a prima facie right. The main theoretical difference is that Barbeyrac refuses to derive the duty of self-defence from sociability.

Pufendorf distinguishes between three kinds of natural law duties based on the three different objects that these duties may have. This does not alter the fact that all three kinds have one common first principle, however. Whether their object is God (duties of religion), the agent herself (duties to self), or other members of the human race (duties to others), the obligations imposed by natural law are ultimately based on and deducible from the principle of sociability. In his first edition of the *Le droit de la nature et des gens*, Barbeyrac expresses his disagreement with the idea of deducing all natural law duties from the principle of sociability, suggesting that Pufendorf should have stuck with the dual derivation of natural law from sociability and self-love that he defended in his early *Elementorum jurisprudentiae universalis*.[19] Barbeyrac himself proposes a tripartite deduction of the duties of natural law. Some duties, like religious duties and the duty of caring for one's own survival, must not be deduced from the social utility that religion and care for self undoubtedly bring. Barbeyrac returns to this issue in the last edition of the same work, testifying to his lasting commitment to the issue and providing a clear statement of it.[20]

[17] *Le droit de la nature* II.5 §5 note 1; the same is true when I am attacked by my father, *Le droit de la nature* II.5 §14, note 10.

[18] Op. cit., §2, note 5.

[19] Op. cit., II.3 §15, notes 1 and 5.

[20] The first edition was published in 1706, and the second in 1712. The third and last edition emended by Barbeyrac was the "5th" edition published in Amsterdam in 1734. See Meylan 1937, 60.

> We can consider man either as created by God, or as endowed by his creator with certain faculties, both corporeal and spiritual, which have very different effects depending on the use they are put to, or finally as being led and even forced by his natural condition to live in society with others of his kind. The first relation is properly the source of all those natural law duties that have God as their object, and are understood under the name of religion. […] The second relation by itself furnishes us with all the duties that regard ourselves, and that belong to the love of self (*amour de nous-mêmes*) or, to avoid all equivocation, to self-love (*amour propre*). The Creator being all-wise and all-good has undoubtedly intended, in giving us certain faculties, bodily and spiritual, an end equally worthy of him and conformable to our own happiness. He therefore wants us to make such use of these faculties as responds to their natural destination. From this alone is born the obligation to care for our own preservation, without which our faculties would not be of much use, and the duty to cultivate and perfect them as much as is required by the end that they have been given us for. A man who finds himself thrown on an uninhabited island without hope of leaving it or of ever having a companion there, would not be any more justified in killing or mutilating himself, or in doing away with the use of reason, than he would be in ceasing to love and honour God. The third and last relation is thus the proper principle of those natural law duties only, which relate to other men.[21]

For Barbeyrac, the natural law duties are thus derived from three separate sources. While religion and the self-preservation of society's members are indeed socially useful, this utility is not the grounds for the religious and self-regarding duties of natural law. Thus Barbeyrac distances himself from what is sometimes termed Pufendorfian 'socialism', i.e., from the ambition to reduce all universally knowable duties, the duties of natural law, to social utility.[22] This does make a difference for the way in which Barbeyrac understands natural rights, as well. The right to life or to self-defence is not derived from the needs of sociability but from the divinely imposed obligation to take care of one-self, from the demands of 'enlightened self-love'.[23] This also helps explain the difference between Barbeyrac's theory and that of Pufendorf concerning the duty of violent self-defence.

Violent self-defence may, as Pufendorf made clear, be an ambivalent means to further sociability, but there is nothing ambivalent about its

[21] *Le droit de la nature* II.3 §15 note 5. My translation.

[22] The first to use the term 'socialist' for Pufendorf and Grotius was probably the Italian-born de Félices.

[23] Op. cit., II.4 §1, note 1.

contribution to my personal survival. Barbeyrac therefore argues, against Pufendorf, that the right to violent self-defence is not a mere privilege to be renounced at will, but a duty, albeit one that may and must in some painstakingly defined circumstances be renounced. At the same time, Barbeyrac's tripartite account does create a much stronger sense that duties may genuinely conflict, so that sociability requires one thing while self-love demands another. This stronger sense of conflict between different duties Barbeyrac exploits more fully in his discussion of the rights of conscience, which we will turn to in the next section. For now, let us note that Barbeyrac makes the right to violent self-defence a right that no person can renounce at will, since it is founded directly on a duty. This is indeed the defining trait of inalienable rights, Barbeyrac argues. His explanation of the term 'inalienable' (a term Pufendorf did not use as such) comes in a quote from the *Traité de la réstitution* of the pastor of the French Calvinist Church at Copenhagen, Jean La Placette, who uses the example of the natural right each man has over his own life.

> There are two sorts of rights. Some of which we are masters to such a degree that we can dispose of them as we like, and such is the right that one ordinarily has over one's own goods. Others are those which we do not have permission to renounce because a higher law forbids it, including the right that each has to his own life. For one may well defend one's life against an unjust aggressor, but one may not take it away oneself. The maxim stating that no injury is done to one who consents holds true only with rights of the first kind. But as for the latter, which are of their nature inalienable, consent given to their violation is null and of no effect.[24]

Barbeyrac makes this claim in a footnote commenting on Pufendorf's arguably careless statement, that a consenting person cannot be injured. This, Barbeyrac points out, is not always the case. Some rights are of such a nature that the rights bearer has no right to consent to injury to them. This is because the rights bearer is bound by "a higher law": in other words, because his rights are necessary means for performing a duty of which he cannot divest himself. Burlamaqui similarly elaborates on this point, explaining how "there are rights which of themselves have a natural connexion with our duties, and are given to man only as means to perform them. To renounce this sort of right, would be therefore renouncing our duty, which is never allowed. But with respect to rights that in no way concern our duties, the renunciation of them is licit, and only a matter of prudence".[25] Thus, both Barbeyrac and Burlamaqui argue that all inalienable rights are based directly

[24] La Placette, quoted by Barbeyrac in p. cit., I.7 §17 n. 2.
[25] Burlamaqui, *Principles of Law* I.1.7 §3.

on duties, and that any rights not so derived cannot be inalienable either. While Pufendorf did not use the term 'inalienable', his theory makes much the same assumption. The main difference between his theory and that defended by Barbeyrac and Burlamaqui concerns the way in which the basic human rights to life and liberty are derived from natural law duties and, more specifically, to the contrast between a unitary and a tripartite deduction of the natural laws.

The main theoretical difference is therefore not that Pufendorf makes the right to life alienable while Barbeyrac and Burlamaqui make it inalienable. Pufendorf in fact no-where claims that a person could alienate his rights to life or to self-defence. We have already noted how slaves, on Pufendorf's account, do not alienate these rights. Nor is the difference that Pufendorf makes the right to violent self-defence one I can renounce: Barbeyrac also allows that this right may in some cases be overridden by other concerns, in which cases it may and ought to be renounced.[26] Barbeyrac may think such cases are much rarer than Pufendorf makes out, and he does hold that an unjust conscious attack on my life is always a sufficient reason for violent self-defence – yet in the end, Barbeyrac justifies this latter point not by arguing that the duty to care for one's own life can never be trumped (indeed, he agrees it can), but by holding that since an unjust attacker is always likely to harm sociability and peace through his actions, killing him will be no disservice to sociability either. The right to life may be inalienable, and this is plainly because it is based on duty, but it can also be overridden once the duty it is based on is overridden by some other, stronger duty, the main example being one where duties of sociability override the duty of self-defence. For the discussion of the inalienability of the rights to life and to violent self-defence, the emphasis on a tripartite derivation of natural law does not, then, seem to have dramatic consequences. The real significance of the tripartite deduction for Barbeyrac's discussion of rights becomes clear only once we turn to the issue of liberty.

While Barbeyrac's theory differs only marginally from Pufendorf's in their discussions of the right to life, the political implications of their accounts are rather different. This becomes quite clear when the question is put with regard to the relation between the citizen and the sovereign. For Pufendorf, a sovereign who attacks me without justification does indeed infringe my natural right to life, but this transgression as such does not result in an active right on my part to defend this right. The citizen does not have a right to criticize his rulers; he is not at liberty to judge his sovereign. Even less, Pufendorf asserts, does such an unjust attack entail any right for other

[26] Barbeyrac, like Pufendorf, writes of renouncing, but to renounce is clearly not for them the same as to alienate. For Barbeyrac's use of the expression, see *Le droit de la nature* II.5 § 2n.1.

citizens to judge the sovereign or to assist the government's innocent victim. Barbeyrac on the other hand asserts that the citizen always has a right and duty to defend his own life against clearly unjust attacks sanctioned by the government in that the sovereign's breach of one's inalienable right to life constitutes a ground for judging him. The sovereign and his government may therefore be resisted and opposed both by the individual being attacked and by other members of society. It is not, Barbeyrac adds with Locke, even necessary to wait until the government takes to overt violence, since the sovereign can be deemed a danger to the right to life as soon as he is seen to usurp the means to do so (a sovereign enacting laws that give him the right to summary executions might be a case in point). Barbeyrac's discussion of the right of life does therefore have political implications that are quite absent in Pufendorf's theoretically rather similar theory.

LIBERTY

In one of his footnotes to the *Le droit de la nature*, Barbeyrac complains that Pufendorf and Grotius should not have forgotten to deal with the right that every human being has to defend his or her liberty. This protest comes within a chapter discussing just self-defence. According to Barbeyrac, a much better position was put forward by Locke: "[w]hoever strives to usurp an absolute power over another, thus puts himself into a state of war with respect to him, so that the other cannot but regard this procedure as a manifest attack on his life. […] Liberty is, so to speak, the stronghold of my conservation, & the foundation on which all my other possessions are based."[27] This observation invites two explanatory comments. On the one hand, liberty is often discussed by Pufendorf and his followers in a broad sense, as including the right to life. A government that proposes a law allowing summary executions strives to take away one of the passive rights to which every citizen must retain a natural right, and thus injures their liberty in the broad sense. On the other hand, liberty was typically used by Pufendorf and his followers in a narrower sense as well. In this sense, liberty consists in self-governance. According to Pufendorf, the right to self-governance is alienable and is in fact alienated in the social contract.[28] For Barbeyrac, the right to self-governance is an essential prerequisite for the right to life, and this is in fact one of the reasons why self-governance cannot be entirely alienable. If I give up my right to self-governance entirely, I ipso facto give up my right to decide whether and when I must defend my own

[27] Barbeyrac, *Le droit de la nature* II.5 §19, note 2; Locke, *Second Treatise of Government* II.3 § 17.
[28] See Saastamoinen's chapter in this volume.

life. My master or owner acquires a right to demand that I kill myself or to demand that I stand still while he takes my life without justification. Thus, giving up self-governance entirely would, Barbeyrac observes, involve giving up one's right to self-defence as well. To sell myself into slavery so that I lose all my rights would imply selling "one's own life, of which one is not the master".[29] The right to self-defence is, however, "tout-à-fait inalienable", as Barbeyrac says with reference to Abbadie's *Défence de la nation britannique*. Without the right to self-governance, there can be no right to life in the sense of a right to self-defence even against one's masters. In this, Barbeyrac takes a position that differs from Pufendorf's. For Pufendorf, each person is free to alienate all of his self-governance, even to the point of becoming a slave or of enacting above himself an absolute sovereign. Absolute power and slavery, if consented to, are thus in no way repugnant to nature.[30]

The right to self-defence is not the only or even the most important part of man's liberty, in Barbeyrac's account, in which the most crucial is liberty of conscience. Discussions of liberty of conscience cover two at least partly distinct topics, one of which concerns my right (and duty) to disobey a ruler or master whose commands are in some clearly specifiable manner entirely unjust and immoral, such as commanding me to kill an obviously innocent person. The other topic, and the one that we will start with, is the right to serve God in accordance with the demands of one's own conscience; i.e., the right to freedom of thought in religious matters. The historical background to Barbeyrac's insistence on the right to self-determination in religion is clear enough. Just like Pufendorf's *De habitu religionis christianae ad vitam civilem* of 1687 and Locke's *Epistola de tolerantia* of 1689, Barbeyrac's footnote texts and independent publications participate in the reaction against the persecutions of the Huguenot minority undertaken under Louis XIV after and in connection with the revocation of the Edict of Nantes in 1685. Barbeyrac himself was eleven when his family had to flee their native France, and the question of the rights of religious minorities constituted one of his main interests from his first early works in 1706, which included a French translation of Gerhardus Noodt's *Discours sur la liberté de conscience* and up to his mature works, including his main statement on religious toleration in the *Traité de la Morale des Peres de l'Eglise* (1728).[31]

In *De jure*, Pufendorf presents his secular argument for why the sovereign must have a right to monitor the dogma taught by the Church or

[29] Barbeyrac, *Le droit de la nature* VII.8 §6, note 2; taken from Locke, *Second Treatise of Government* II.4 §22.

[30] Pufendorf, *De jure* VII.8 §6.

[31] A fuller list of Barbeyrac's publications is in Meylan 1937, 245–247.

Churches. A state in which the Church can demand that men obey one set of rules by threatening eternal damnation, while the secular ruler threatens those who disobey his rules with corporeal punishment, "will be dissolved into an irregular state with two heads".[32] Pufendorf declares himself unwilling to chart in any greater detail just how far the state's right to determine religious worship extends. Later in the seventh book of the *De jure*, Pufendorf admits that men cannot renounce their duty to obey God even when they enter civil society. They "are therefore not bound by any commands of the civil sovereign, which are confessedly and openly repugnant to a command of God". Yet if the sovereign does attack the citizen, treating him as an enemy, the result is simply that the latter acquires the right to flee. If flight is not possible, the person persecuted for his religious beliefs must face death at his sovereign's hands rather than risk causing his death.[33]

For Barbeyrac, the issue of the limits of the state's power over religious beliefs is a matter that simply must be dealt with. In a footnote to the *Le droit de la nature*, he draws on Locke's *Epistola de tolerantia*, justifying his choice by referring to Locke's fame, as well as by asserting that the conclusion of Locke's letter "follows from a truth, that my Author has himself solidly proven in his treatise *De habitu religionis christianae ad vitam civilem*, namely that religion precedes civil society, and that it had nothing to do with establishing the latter".[34] Pufendorf should have drawn the same conclusions from his principles as Locke did, and concluded that the right to self-governance in matters of religious belief is utterly inalienable, and that the liberty of conscience thus constitutes a universal limit to all legitimate state power. Before looking further at Barbeyrac's complaints against Pufendorf, let us see in what sense Pufendorf's discussion of state and Church in *De habitu* provides a foundation for the right to self-governance in religious affairs.

Pufendorf's argument has two main components. One is his Protestant analysis of religious belief as an entirely personal matter. The believer does not need a community in order to serve God. My salvation is in no way furthered by my living in a state that officially defends the true religious beliefs. It is only furthered by my own sincere belief in true dogmas. The state can of course force me to express commitment to whatever beliefs its rulers deem true, but such force is useless as a means of making me a true believer, since sincere belief cannot be created by such means.[35] From thence, Pufendorf concludes that true religious conviction cannot be

[32] Pufendorf, *De jure* VII.4 §11.
[33] Op. cit., VII.8 §5, note 7.
[34] Barbeyrac, *Le droit de la nature* VII.4 §11, note 2.
[35] Pufendorf, *De habitu* §3.

furthered by using the means at the disposal of the state. This leads us to the second component of Pufendorf's argument, namely his understanding of the state. Since the state is of no use in procuring salvation, it cannot have been created for that end. The state was created in order to defend the "life, liberty and fortunes" of the citizens against the attacks of foes both without and within the community. Religious convictions as such are therefore absolutely outside the state's authority, nor could the social contract transfer to the state any authority to rule over men's consciences.[36] The state is thus by definition an institution unable to help men to salvation. The Church, correspondingly, must be understood simply as a voluntary association created with the purpose of seeking the truth together. No matter in what terms an individual commits himself to a religious congregation, membership of a Church always remains voluntary, nor can any individual commit himself to believe the Church or its authorities for the foreseeable future, no matter what beliefs it chooses to invent.[37] The individual can therefore not alienate his self-governance in religious matters either to the Church or to the state.

Pufendorf's *De habitu* did indeed set the stage for debates on religious toleration and freedom of conscience in the early eighteenth century, with Locke's rather Pufendorfian *Epistola de tolerantia* as one of the major contributions. Locke's letter, Barbeyrac points out, builds on the claim that the state exists merely to cater for the 'external' needs of the citizenry, and has nothing to do with the salvation of their souls. This is proved by a set of arguments familiar from Pufendorf's *De habitu*. Locke argues that the care for the citizen's souls has not been ascribed to the government either by God or by the citizens themselves. Pufendorf in fact strives to prove the former point in his discussions of Biblical passages in *De habitu*.[38] The citizens, Locke continues, would have no reason to alienate the care that they have for their own salvation, nor could they do so if they wanted to; a point that Pufendorf also insisted on.[39] The government, furthermore, differs from the citizenry only through its capacity for punishment, and since punishment has no effect on religious convictions as such, it cannot be of any use in saving the souls of the citizens – another argument familiar from Pufendorf.[40] Barbeyrac also mentions Locke's argument that the state as such has no privileged insight into religious truths over and above those of any individual believer.[41] Even Locke's discussion of the limits of toleration sounds like echoes from Pufendorf. The state, Locke explains, must not of

[36] Op. cit., §§5, 6.
[37] Op. cit., §33.
[38] Op. cit., §§13–31.
[39] Op. cit., §6.
[40] Op. cit., §3.
[41] Compare with *De habitu* §33.

course tolerate any beliefs that "are contrary to civil society", these being the only valid exceptions.[42] The result is thus that only teachings which are directly contrary to natural law and sociability should not be tolerated, the two main examples, for both Locke and Pufendorf, being atheists and Catholics; the former because they have no conscience, and the latter because Catholics, Locke and Pufendorf argue, swear allegiance to the Pope over and above their allegiance to their own king.[43]

Pufendorf was in many ways a disappointment to readers committed to the idea of religious toleration. There are two sides to Pufendorf's treachery. At the end of *De habitu* he affirms that the state can take action against any and every religious minority, as long as it provides at least the semblance of an excuse in terms of social utility. Given Pufendorf's conviction, that a state with one religion is generally more stable than one with many, such an excuse would seem to be available at all times.[44] This means that the state can enforce external conformity and demand that subjects express belief in common dogmas. Individuals who fail to comply can, as we have already seen above, be put to the sword, nor do they have any right to resist a sovereign who thus commands their death. While the individual does retain full responsibility for his religious convictions, he can thus at any time be required to abstain from expressing them, or even to renounce them publicly. This is clearly not the verdict Barbeyrac would have hoped for. Yet in a sense Pufendorf commits an even worse act of treachery when he singles out one exception to this rule. In *De habitu* Pufendorf states that a sovereign who punishes a minority for believing differently from what he himself does is in the wrong only if he does so "without making due Enquiry, whether their Doctrine was Erroneous or not".[45] A similar claim is made in *De jure*, where Pufendorf notes how a religious congregation with the one true faith has a right to toleration and more, since the sovereign ruler has a duty to embrace the true faith.[46] Arguments like these seem to give the lie to Pufendorf's insistence that the state is a purely secular institution.

Pufendorf's theory may perhaps be summed up as follows. First, every individual retains a right and duty to self-government with respect to his innermost religious beliefs. The sovereign nevertheless retains a right to rule the external expression of religious sentiments in the state and this right knows no real limits. The sovereign is, after all, the one who must decide what is required to procure the external stability of the state, and if his

[42] Pufendorf argues similarly in *De jure* VII.4 §8.
[43] Barbeyrac's summary of Locke's arguments is in *Le droit de la nature* VII.4 §11, note 2; for Pufendorf on atheism, see *De jure* III.4 §4 or *De officio* I.4 §9; on Catholicism, *De habitu* §52.
[44] *De habitu* §49.
[45] Op. cit., §7.
[46] *De jure* VII.2 §21.

decision is that religious conformity is needed, he can impose such conformity externally. The only problem with such a view is that it seems to render religious persecution of minorities legitimate without distinction. Such a theory does have some unsavoury implications, especially in light of the history of Christianity in the Roman Empire, and thus Pufendorf is forced to make a not very elegant addition to his theory, which would otherwise be at least coherent, if not very palatable. He therefore adds that religious persecution against the true faith is never legitimate. The important thing with this clumsy addition is not, however, the way in which it conflicts with his theory as a whole; the crucial thing to note here is how Pufendorf is forced to make this concession because his theory fails to provide any other defence for religious minorities, including Christian martyrs in Rome.[47]

While Barbeyrac does not agree with Pufendorf's conclusions, he does use Pufendorf's analysis as his starting-point. Barbeyrac provides a somewhat different and more elaborate version of Pufendorf's argument. When civil society was created, Barbeyrac argues, individuals did not (and could not) give up their natural liberty altogether. Each contracting party in fact "had his own advantage in view, and endeavoured to retain as much as possible of his natural liberty".[48] While the contracting parties did have to part with considerable portions of their natural right to self-governance in order to gain the security of a common ruler, they did not part with it altogether, nor could they do so. They have a duty to God directly to care for their own religious convictions, and this natural law duty is not derived from nor can it be overridden by concerns for sociability. In Pufendorf's theory, that is precisely what happens. The prima facie right to self-determination in matters of religious belief cannot entail the right to resist a sovereign or his representatives when they demand that I convert, since such a right to resist would endanger sociable peace. For Barbeyrac, men retain their natural liberty to defend their right to their own religious convictions with arms, if need be. To put it another way, the citizens part with natural liberty in order to gain legal protection for some portion of their liberty, a portion that Barbeyrac terms "civil liberty". This type of liberty "consists in not being subject to any legislative power but that established by the consent of the whole body, nor to any other empire than the one thus recognised, nor to any laws but those that this same legislative power can enact, in accordance with the extent of the power that it has thus received".[49] A sovereign who

[47] As Zurbuchen (2002, xvi) notes, the *De habitu* nevertheless does contain an argument to use against the French persecutions, since Pufendorf argues that the revocation of the Edict was itself illegal.

[48] Barbeyrac, *Le droit de la nature* VII.1 §7, note 1.

[49] Op. cit., II.5 §19, note 2; the argument is drawn from Locke's *Second Treatise of Government* II.4 §22.

oversteps the limits of the citizen's civil liberty by trying to force him to convert forfeits his right to rule and can be resisted both by the individual whose life is threatened and by other citizens. This is a conclusion that Pufendorf is unwilling to draw from his own account, and one that Locke and Barbeyrac draw for him.

If the government decides to impose religious unity within a country, it can clearly do so on Pufendorf's theory. The state may even justify such procedures by drawing on the utility of religious unity for a peaceful and orderly civil life. While a true Christian, on Pufendorf's own admission, cannot accept forswearing his true convictions, he must, if punished for insubordination, either flee or die at his sovereign's hands. He has no right to violently defend his rights of conscience (or even his life), nor does anybody else within the state have a right to defend him.[50] Neither do the soldiers and other officials commanded to unjustly seize and punish or kill the victims of kingly wrath have the right to passive disobedience, on Pufendorf's theory, since they must obey their orders and leave the morality to their superiors.[51] This is where Barbeyrac's position differs most dramatically from Pufendorf's. According to Barbeyrac, the instrument of violence is not always free from blame, and in some situations, a soldier or other official has a right and a duty to passively resist the orders of his superior, or to protest, or even to oppose his sovereign with arms. As an example of the first case Barbeyrac mentions an official ordered to search for Huguenots in their homes to bring them to justice. Such an official, Barbeyrac argues, does well to protest or even to oppose his sovereign, but the very least that he can do is simply to fail to find the innocent Huguenots, and to lie to his king. He must resist participating in actions that are obviously against the laws of nature, and that blatantly injure some other person's human rights.[52] This is another dimension of the inalienability of the rights of conscience in Barbeyrac's account. The individual can never relinquish moral responsibility for his actions, even when they are undertaken at the behest of his superior.

Although subjects are not in most cases sufficiently well informed to question the commands of their superiors, there are still cases in which a command is very clearly contrary to natural law. This is the case, Barbeyrac affirms, with actions that injure a person's universal human rights to life and liberty: the right to life and to self-determination in religion are, for him, self-evident. "We who are men, do we need to be taught what the natural rights of men are, and to what extent each wants to or can renounce to them?"[53] The answer is no: all human beings ultimately know where to draw

[50] Pufendorf, *De jure* VII.8 §5.
[51] Op. cit., I.5 §9.
[52] Barbeyrac, *Le droit de la nature* VIII.1 §6, note 4.
[53] Barbeyrac, *Receuil de discours*, 3.

the line. At the moment the government injures my human rights by threatening to kill me without just cause, or by forcing me to convert from my peaceable and tolerant religious beliefs, I can defend my life and liberty against the sovereign with arms in hand. I also have a right to expect my fellow citizens to stand up for me by declining to obey their sovereign, by protesting, or by defending my human rights with arms. A government that does not respect the human rights of its citizens, Barbeyrac adds with Algernon Sidney and Locke, is itself the cause of the revolution, or is itself rebellious, whereas the citizenry that takes arms to defend its right acts within its right and in support of the legal order.[54]

Barbeyrac's account of liberty, to sum up, entails a right of self-governance in matters of religious thought to all citizens, and even a limited right to freedom of expression. The only limit to this liberty is, as Pufendorf and Locke had formally agreed, that their beliefs should not be clearly harmful to social peace. Actions that injure other persons' rights and liberties are punishable by law as a matter of course, and the same holds true for inciting people to crimes by, for example, propagating violence against a minority. Yet while Pufendorf and Locke insisted that this makes disbelief in God, or atheism, a punishable crime, Barbeyrac takes a stricter approach to the matter. He does agree (as did most thinkers in his time) that the spread of atheism may have a serious impact, as it may lessen the efficiency of laws by taking away the fear of divine punishment. Barbeyrac also agrees that an atheist who spreads his beliefs in order to encourage those whose vicious inclinations make them grasp for any hope that sanctions in the afterlife might be mere fantasy is guilty of a crime in the same way as one who claims that theft or violation of faith are permitted. In other cases, the beliefs of an atheist must be just as much beyond the reach or civil laws as any other private religious convictions are.[55] In a sense, then, Barbeyrac radicalises the Pufendorfian and Lockean idea that the state exists for purely mundane ends. He dissociates the state from the last remnants of spiritual leadership by arguing that no matter what the individual's personal convictions are, they are his own affair, and he may not be required to renounce them. Liberty, as he understands it, constitutes a real limit to state authority. It is expressed in the right not to be forced through laws or commands to adopt one ideology, one religion, one understanding of the good life, rather than another. To do so is not at all within the scope of the tasks of human legislation. The purpose of the laws "is not to render truly virtuous those on whom the laws are imposed" but simply "to prevent citizens from doing each other some considerable harm, whether in their persons or in their property; and in doing

[54] *Le droit de la nature* VII.8 §6, note 1.
[55] Op. cit., II.4 §4, note 3.

so to curb the external actions of vice which tend towards such wrong, to the extent that society's peace demands and permits".[56] Barbeyrac continues:

> It has even been necessary, in order to prevent abuse of the legislative power, for the authority of legislators not to be extended to the point of forbidding, under pain of sanction, all that they might judge to be contrary to some moral virtue. For, not all being sufficiently enlightened, under such a pretext they could easily punish entirely innocent things. There are all too many examples of this. […] But do we not still see today, in various places, supremely unjust and inhumane laws which, under the fine pretext of advancing the glory of God and repressing vice, directly persecute virtue? Though they are doing no more than fulfil the essential obligation, as is only natural for each individual, to follow the light of one's conscience, people are being punished, and punished cruelly, because others wish to believe them guilty either of wilful and rectifiable errors, or of a malicious and unbending stubbornness.[57]

Liberty thus implies the autonomy of the individual within the realm of his private convictions. A state that does try to force an individual to virtue and religious truth takes on itself an authority that no man can have over another. It is in defence of this type of liberty that citizens could justifiably rise against their intolerant governments, as Barbeyrac states, anticipating that such a revolution might be hoped for in intolerant countries. Barbeyrac is quite likely thinking of Catholic countries like Spain and France.[58] Thus for Barbeyrac, the right to self-determination in matters of religious belief constitutes a genuine limit to state authority, one beyond which the government forfeits its legitimacy and becomes a just object for revolution from within. Such a state even becomes a legitimate object for interference and just war from other states, Barbeyrac asserts.[59]

THE PURSUIT OF HAPPINESS

The American declaration of independence introduced a universal right to "the pursuit of happiness" where many other similar texts instead listed the right to property. The idea of a right to pursue happiness does not seem to have been defended or even discussed by most thinkers in the early modern natural law tradition. However, in his *Principles of Natural and Political Law*, Burlamaqui makes the pursuit of happiness fundamental to

[56] Barbeyrac, *What is Permitted by the Laws*, 316, 318.
[57] Op. cit., 319–320.
[58] *Receuil de discours*, 5–6.
[59] *Le droit de la nature* VIII.6 §3, note 1.

natural law theory; Burlamaqui can also be read as defending a natural and inalienable right to the pursuit of happiness. It seems highly likely that Burlamaqui's provided the inspiration for including this right in the American *Declaration of Independence*. Let us now examine this third human right a bit more closely. In what respects does the individual's right to pursue happiness constitute a limit to state authority?

To understand Burlamaqui's discussion of the right to happiness, we must first look at the notion of right (*droit*) as Burlamaqui explains it. The general definition of right that he provides in the first chapter of the *Principles of Natural and Politic Law* takes advantage of ambiguities in the French word *droit*. Etymologically, Burlamaqui explains, the word derives from the Latin *dirigo*, "which implies, to conduct a person to some certain end by the shortest road". Burlamaqui continues: "Right, therefore, in its proper and most general sense, and that to which all the others must be reduced, is whatever directs, or is properly directed."[60] Here, right is used for a rule that indicates the shortest path. To do so is in fact part of the definition of a rule, as Burlamaqui understands matters. "A rule", he explains, "is an instrument, by means of which we draw the shortest line from one point to another, which for this very reason is called a straight line. In a figurative and moral sense, a rule imports nothing else, but a principle, or maxim, which furnishes man with a sure and concise method of attaining to the end he proposes."[61] The idea of right thus involves the idea that the action is right with respect to some end that the agent proposes to himself, and makes "right" rhyme with "straight": the French *droit* does indeed mean both straight and right.

If the concept 'right' is translatable by "the straightest means to the end I propose myself", then what is this end? Burlamaqui's reply is happiness. Every human being naturally strives for his own happiness, and this penchant is the source and *primum mobile* of all his actions. Through his rational faculty, man is able to plan how best to reach this natural goal. It is in this sense that Burlamaqui affirms that reason (or right reason) constitutes the foundation of natural rightness. Since reason points out the actions that make me happy as the right actions to perform, 'right' is "nothing else but whatever reason certainly acknowledges as a sure and concise means of attaining happiness, and approves as such". Burlamaqui explains this definition succinctly:

> This definition is the result of the principles hitherto established. In order to be convinced of its exactness, we have only to draw these principles together, and unite them under one prospect. In fact, since right *(droit)* in

[60] Burlamaqui, *Principles of Law* I.1.1 §2.
[61] Op. cit., I.1.5 §1.

> its primary notion signifies whatever directs, or is well directed; since direction supposes a scope and an end, to which we are desirous of attaining; since the ultimate end of man is happiness; and, in fine, since he cannot attain to happiness but by the help of reason; does it not evidently follow, that Right in general is whatever reason approves as a sure and concise means of acquiring happiness? It is likewise in consequence of these principles, that reason giving its approbation to itself, when it happens to be properly cultivated, and arrived to that state of perfection in which it knows how to use all its discernment, bears, by way of preference or excellence, the appellation of right reason, as being the first and surest means of direction, whereby man is enabled to acquire felicity.[62]

For Burlamaqui, the natural laws are in fact rules that aim at happiness. It is right to act in accordance with these rules. When Burlamaqui turns to discuss rights in the sense of entitlements to act or to have others act towards one in a specific manner, he insists that rights in this sense are derived from his general notion of right. "Right", Burlamaqui notes, "is frequently taken for a personal quality, for a power of acting or faculty. It is thus we say, that every man has a right to attend to his own preservation; that a parent has a right to bring up his children; that a sovereign has a right to levy troops for the defence of the state, & c." Burlamaqui continues: "In this sense we must define Right, a power that man hath to make use of his liberty and natural strength in a particular manner, either in regard to himself, or in respect to other men, so far as this exercise of his strength and liberty is approved by reason." Some of these rights, Burlamaqui also holds, are not alienable, primarily because they are granted in order that we may perform our duties,as in the case of the right to bring up children. This right cannot be renounced, because it is based on duty: reason approves of my instructing my child, but not of denying the child my care.[63]

Burlamaqui's ambiguous terminology may make one wonder whether the 'rights' that he discusses are in fact rights in any recognizable modern sense. Is the right to life really a right to care for oneself, or is it more properly a kind of duty? Does such a distinction make sense in a theory where natural law and natural right are both defined as rules prescribed "in order to conduct [man] safely to the end, which every one has, and indeed ought to have, in view, namely, true and solid happiness".[64] It seems more reasonable to say that when Burlamaqui speaks of rights, he means duties at the same time. This is not the main problem with his discussion of rights, however.

[62] Op. cit., I.1.5 §10.
[63] Op. cit., I.1.7 §2.
[64] For the definition of natural law, see e.g., op. cit., I.1.1 §1.

The crucial problem, as far as we are concerned in this section, is how one should understand his view of inalienable human rights, the rights to life, liberty, and the pursuit of happiness. Burlamaqui does defend these rights, and he provides a clear and concise definition of inalienability. He also affirms that a government that commits obvious injuries against the citizens, threatening their lives, thus proves itself tyrannical, and may be opposed with force by the people – his account is in fact taken from Barbeyrac, Locke and LeClerc almost verbatim.[65] Liberty is therefore an unalienable right that the citizens can legitimately defend:

> Even a people, who have submitted to an absolute government, have not thereby forfeited the right of asserting their liberty, and taking care of their preservation, when they find themselves reduced to the utmost misery. Absolute sovereignty, in itself, is no more than the highest power of doing good; now the highest power of procuring the good of a person, and the absolute power of destroying him at pleasure, have no connection with each other. Let us therefore conclude, that never any nation had an intention to submit their liberties to a sovereign in such a manner, as never to have it in their power to resist him, not even for their own preservation.[66]

What Burlamaqui's discussion leaves rather unclear, however, is the meaning of liberty. In what respects does Burlamaqui think the citizens ought to be self-governing? In Barbeyrac's and Locke's discussions, liberty of conscience provided the main example of human liberty. For Barbeyrac especially, the argument was that the state, as concerned with external stability alone, must leave the individual a maximal liberty of thought and expression. In Burlamaqui's case, it is not quite clear wherein liberty consists. Liberty certainly does involve the right to defend one's own life, and in some cases the lives of other people, as Burlamaqui's account makes quite clear. The citizens have a right to revolt against a sovereign who shows himself willing to freely injure the right to life of his citizens, as the above quote also suggests. Burlamaqui further asserts the inalienability of a right of conscience in the sense of a right and duty to obey one's conscience, and to refuse obedience to unjust orders:

> Man cannot absolutely, and without any manner of reserve, renounce his liberty; for this would be manifestly throwing himself into a necessity of

[65] Op. cit., II.2.6 §§16-38.
[66] Op. cit., II.2.6 §24.

> doing wrong, were he so commanded by the person to whom he has made this subjection.[67]

Yet Burlamaqui is not so clear on what kinds of action every citizen would or should recognize as being obviously wrong. To kill an innocent person would surely be wrong – whether it would be wrong to force a person to convert is not so clear, as far as Burlamaqui's statements in the *Principles of Natural and Politic Law* are concerned.[68] In fact, Burlamaqui seems to grant the government considerable influence over religion.

"The end of sovereignty", Burlamaqui writes, "is certainly the happiness of the people, and the preservation of the state. Now, as religion may several ways either injure or benefit the state; it follows, that the sovereign has a right over religion, at least so far as it can depend on human direction. He, who has a right to the *end,* has, undoubtedly, a right also to the *means*."[69] On the face of it, the sovereign's duty and right to care for the people's happiness is here articulated in quite secular terms. Pufendorf, Locke and Barbeyrac would all agree to the claim that the sovereign has a right and duty to interfere in the teachings of Churches if they find that these teachings constitute an immediate threat to public tranquility. Burlamaqui means something different from this however. For him, the sovereign's duty includes a care both for the external and the spiritual well-being of his citizens. "What we have been affirming evinces", Burlamaqui affirms, "that it is incumbent on the sovereign to make religion, which includes the most valuable interests of mankind, the principal object of his care and application. He ought to promote the eternal, as well as the present and temporal happiness of his subjects: This is therefore a point properly subject to his jurisdiction."[70] The superior thus has a right and duty to promote the salvation of his citizens' souls through legislation, clearly a view quite opposed to the stance taken by Pufendorf, Locke or Barbeyrac. Religion is not for Burlamaqui a purely private matter, nor does self-governance in religious matters constitute an inalienable part of liberty.

Burlamaqui's observations concerning the governments responsibility for promoting happiness through civil and ecclesiastical legislation bring home a quite crucial point concerning his theory. On Pufendorf's theory, all natural law duties ultimately derive from the principle of sociability, and thus they ipso facto concern external matters, like the conditions for stable

[67] Op. cit., I.1.7 §3.

[68] I will here only concern myself with Burlamaqui's views as expressed in the *Principles of Law*, but it should be remembered that the second half of this book was published posthumously; there is as to yet no clear assessment in the literature as to the extent of the liberties taken by the editors of the second half (one of whom was Jacob Vernet).

[69] Burlamaqui, *Principles of Law* II.3.3 §8.

[70] Op. cit., II.3.3 §8.

and profitable social life. On Barbeyrac's view, the duties of natural law derive from three separate sources. While the sovereign's right to rule is based on the needs of sociability, they are also limited by the universal right (and duty) to self-preservation and the equally inalienable right (and duty) to self-governance in religion. In Burlamaqui's theory, all normative claims ultimately derive from the natural human inclination to strive for happiness. Whatever I ought to do, or whatever I have a right to do, my duties and rights are derived from the fact that this action constitutes the shortest route to felicity. Happiness, on the other hand, is a state of man as a whole, not under merely some specific aspect. Burlamaqui's natural laws are thus laws for the whole man, for a creature with an undeniable desire for eternal life and happiness in the afterlife. If the human sovereign is to enforce the laws of nature in civil society, it quite naturally follows that he must pay particular attention to laws that aspire to make men more worthy of eternal bliss. While Burlamaqui asserts that the state must not coerce consciences, he never suggests, at least not in the *Principles of Natural and Politic Law*, that there may be more Churches or religions in a state than one. What Burlamaqui means when he states that the government has no right to "constrain consciences"[71] is apparently simply that the state must not arbitrarily invent new dogmas. Burlamaqui does not see any problem with the sovereign enforcing divine laws, however, and he affirms its right to "remove external obstacles which may prevent the observance of the laws of God, and to make such an observance easy. This is even one of his principal duties".[72]

Burlamaqui's account of liberty may also be problematic in another way. According to Burlamaqui, the pursuit of happiness is the most fundamental human inclination, constituting both the most fundamental duty and the most fundamental right that any human being can have. The pursuit of happiness is in fact the foundation of all our rights and duties. When individuals decide to create a civil society, they transfer the right and duty to enforce the natural law to the sovereign. While they retain a right to resist should the sovereign actively threaten their lives, they clearly alienate their right to decide on the means through which their happiness is to be pursued. Thus for Burlamaqui,

[71] Op. cit., §14.

[72] Op. cit., §12. This argument was familiar to most eighteenth century intellectuals from Saint Augustine's letters to the Donatist priest Vicentius, and had been severely criticized by Huguenot thinkers like Pierre Bayle. Augustine's letter was famously used by Catholic thinkers desirous to justify the persecutions of the Huguenot minority in France. Removing the external obstacles to conversion of all to the true Christian faith was thus often taken to imply removing religious minorities. Whether or not Burlamaqui was consciously promoting such a course of action, his use of the argument certainly marks his distance from Huguenot intellectuals like Barbeyrac.

civil laws do not exist simply to impose external restraints hindering citizens from infringing on each other's rights.

> We should therefore take care not to imagine that laws are properly made in order to bring men under a yoke. So idle an end would be quite unworthy of a sovereign, whose goodness ought to be equal to his power and wisdom, and who should always act up to these perfections. Let us say rather, that laws are made to oblige the subject to pursue his real interest, and to chuse the surest and best way to attain the end he is designed for, which is happiness. With this view the sovereign is willing to direct his people better than they could themselves, and gives a check to their liberty, lest they should make a bad use of it contrary to their own and the public good. In short, the sovereign commands rational beings; it is on this footing he treats with them; all his ordinances have the stamp of reason; he is willing to reign over our hearts; and if at any time he employs force, it is in order to bring back to reason those who have unhappily strayed from it, contrary to their own good and that of society.[73]

Burlamaqui thus invests the government with the task of directing the citizens' personal quests for happiness. "In order rightly to comprehend this effect of the civil laws", he explains, "it is to be observed, that the obligation, which they impose, extends not only to external actions, but also to the inward sentiments. The sovereign, by prescribing laws to his subjects, proposes to render them wise and virtuous. If he commands a good action, he is willing it should be done from principle; and when he forbids a crime, he not only prohibits the external action, but also the design or intention."[74] The sovereign must force his subjects to a virtuous life, thus guaranteeing their moral perfection and happiness. Sovereigns "cannot deserve the title of God's vicegerents upon earth, but inasmuch as they make use of their authority, pursuant to the views and purposes for which they were intrusted with it, and agreeably to the intention of the Deity, that is, for the happiness of the people, by using all their endeavours to inspire them with virtuous principles".[75] To do so, sovereigns must put themselves above their subjects in moral terms, and the subjects must conversely be thought of as in need of moral guidance, and as incapable of self-governance in moral and religious matters. Nor does Burlamaqui hesitate to make this assumption explicit. "It is with reason", he explains, "that politicians compare the people to minors; neither being capable of governing themselves. They must be subject to

[73] Op. cit., I.1.1 §3.
[74] Op. cit., II.3.1 §22.
[75] Op. cit., II.1.6 §11.

tuition, and this forbids them to withdraw from their authority, or to alter the form of government, without very substantial reasons".[76]

Burlamaqui does seem to follow Barbeyrac superficially in proclaiming a right to life and the inalienability of liberty. Burlamaqui even copies Barbeyrac's statements on how liberty of conscience implies a right (and duty) to disobey and resist the commands of a superior when these are "evidently unjust and criminal".[77] Yet it does not seem very clear what actions of the sovereign we can take to exhibit these qualities. In Barbeyrac's theory, the right of self-governance in religion did provide some substance to this principle. A sovereign who attacks his subjects because of the religious opinions, commits a crime against their human rights, thus overstepping the limits of his legitimate authority and inviting resistance and revolt. In *Principles of Law*, the very idea that there could be more than one Church within a state, or that a citizen might depart from the teachings of that Church, is quite absent. The state must, in performance of its didactic task of bringing men to virtue and happiness, support them in their quest for salvation by forcing them into happiness if the citizen's own wisdom is found insufficient. If there is any substance to Burlamaqui's liberty of conscience, then, this relates only to cases where the sovereign's actions are obviously contrary to the inalienable right to life; i.e., where the sovereign commands the murder of an (obviously) innocent person. This does not, one might speculate, cover cases where the sovereign commands the death penalty against a religious minority on account of its heretical views, since the sovereign is explicitly made the ruler of the citizen's conscience in matters of religious belief. Burlamaqui's theory of natural inalienable rights genuinely does not indeed entail any radical political consequences.

CONCLUSION

For later generations, the early human rights declarations have become fundamental examples of subjective rights language, and understandably so. The American *Declaration of Independence* of 1776 emphasises how government is instituted in order to secure men's natural inalienable rights, specifying separately the inalienable and self-evident rights to "Life, Liberty and the pursuit of Happiness". Clearly, such rights claims were not alien to the natural law theorists that the authors of the declaration drew on. Equally clearly, the rights theories of these theorists were in many cases quite ambiguous, not least as regards their political implications. A comparison of

[76] Op. cit., II.1.6 §9.
[77] Op. cit., II.3.1 §§27ff.

three such theories shows how authors who formally agreed to enumerating the two first of these rights as inalienable nevertheless disagreed substantially as to the scope and consequences of these rights claims. Thus, while Pufendorf holds the right to life to be inalienable, he also argues that no subject has a right to judge a sovereign who violates it, much less defend this right by violent means. Barbeyrac and Burlamaqui, while agreeing that a sovereign who consciously attacks an innocent subject can be judged to have forfeited his right to rule, and can be resisted both by the victim and by other members of society, or indeed by foreign powers, offer quite different understandings on the scope of sovereign power. These differences have important consequences both for the right to defend one's liberty and, ultimately, for the right to life. While a citizen who is punished for heresy or indeed for atheism must for Barbeyrac count as an innocent victim, Burlamaqui's understanding of the government as bound to provide moral and religious guidance puts violence against religious non-conformism squarely within its power.

The aim of this article is not to suggest that we should look to Barbeyrac as the first defender of a language of subjective rights in the modern sense of the word. The essential idea in Barbeyrac's theory, and the one that constitutes the hard core of all liberal thought, is the idea of a private sphere within which every person is his own master. This is not to say that every person is free to do as he likes with his or her life, or that one would be free to end one's life at will. If this is required before a rights theory can be accounted genuinely modern, then Barbeyrac's is not a case in point. What his theory does entail, however, is that each person remains master of his own religious and moral life in the sense that he or she has to decide what to make of it, and that this area of self-governance can be interfered with by no human authority. This is in effect the idea of a set of human rights that are more than mere privileges or permissions.

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Chapter 11

THE LOCKEAN RIGHTHOLDERS

S.–J. Savonius (University of Cambridge, U.K.)

THE DEFENCE OF RIGHTS

In 1689, after the English Revolution had jettisoned James II, John Locke had the opportunity to publish his *Two treatises of government*, an attack on political absolutism and its High-Church supporters. In the Allegiance Controversy, which ensued upon William of Orange and Mary's accession, and ebbed in the mid-1690s, it was only a minority of radical whigs that used the discourse of natural jurisprudence in order to vindicate active resistance and James II's deposition.[1] Among these radical justifications of the Revolution, Locke's *Two treatises* was perhaps the most consistent defence of the natural equality of rights as well as of the theory of civil liberty which Quentin Skinner has recently termed 'neo-Roman' and which was inspired by the accounts, given by such Roman moralists and historians as Cicero, Livy, Sallust, Seneca, and Tacitus, of the contrast between liberty and slavery.[2]

The *Two treatises* had been drafted in the context of the Exclusion Crisis and its repercussions in the early 1680s when Locke had set out to demolish the uncompromising absolutism of Robert Filmer's *Patriarcha*. Filmer had

[1] Goldie 1980.
[2] Skinner 1998. See also Tully 1993a and Tully 1993b.

V. Mäkinen and P. Korkman (eds.), Transformations in Medieval and Early-Modern Rights Discourse, 285-310.

directly denied the natural equality of rights and had sought to refute the neo-Roman theorists, who stigmatized absolutism as a system of slavery. The *Two treatises* was published, Locke claimed in August 1689, in order to "justifie to the World, the People of England, whose love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation when it was on the very brink of Slavery and Ruin".[3]

This article discusses Locke's understanding of the citizenry's "Resolution to preserve" their rights. One reason for focusing on the rightholders' disposition is that Locke's views about the traits relevant to claiming one's rights have not attracted much scholarly attention. Another reason is that this focus permits me to illuminate his acute awareness of the cultural forces that appeared to prevent men from claiming their rights, and his interest in diagnosing and remedying the moral ills of contemporary culture. It seems to me that his assessment of how the ability to exercise one's rights depends on one's cultural milieu and education, constitutes the core of what is distinctive about his civil philosophy. In the trilogy of 1689 for which he is now famous – in the *Two treatises*, *Epistola de tolerantia*, and the *Essay concerning human understanding* – he called both for a political and for a cultural transformation in authoritarian states. Crudely, the new intellectual milieu of politics was meant to help individuals live the life of a rightholder.

If an individual has the rightholder's status, he can, Locke assumed, uphold his rights by resorting to the militant power of appellation. This is to say that the rightholder can exercise his natural rights, without awaiting mankind's consent, appealing from the sphere of the *civitas* to normative nature. When he cannot appeal to the positive laws, he can "appeal to Heaven" and uphold his rights by killing the person who attempts to curtail his rights. For instance, if a "Man with a Sword in his Hand demands my Purse in the High-way, when perhaps I have not 12 d. in my Pocket; This Man I may lawfully kill".[4] But this is also to say that an individual may in practice enjoy the full range of his rights without his being a rightholder, if his rights could in principle be curtailed without his being able to challenge the abuse of his rights by appealing to normative nature. In other words, he is not a rightholder because his alleged "rights" are mere privileges that can be curtailed at any time. For instance, the parents' duty to educate their children can also be described, "to speak properly of" it, as "the Priviledge

[3] John Locke *Two treatises* (hereafter *TT*) preface, ll. 8–11. Hereafter footnote references to the *Two treatises* are made, where appropriate, with two-part or three-part numbers such as 'II.197' or 'II.197.2', the first part being the number of the treatise, the second the number of the paragraph within that treatise, and the third the line number.

[4] *TT* II.168.10 (emphasis retained) and II.207.11–14.

of Children";[5] it is a privilege because the children are unable to uphold any *right* to education.

In this article I argue that what defines the status of the Lockean rightholder is his appellate power. It does not matter how many rights he actually enjoys or what precise range of rights he enjoys. What matters is the way in which he possesses his rights. This emphasis on the right-holding agent marks a division within the discourse of rights between Locke's neo-Roman politics and the subsequent liberal tradition which offers us less illumination on what kind of agents can defend their rights.

It is worth stressing that Locke's understanding of the rightholder's status was ''neo-Roman" because modern political scientists have habitually considered him a crucial thinker in the "classic tradition of liberal political theory" and an advocate of the allied conception of individual rights, taken to stretch from his era to our own.[6] Potentially, there is a sharp divide between this tendency to conscript his theories into our modern controversies and the historical interpretations which stress his indebtedness to earlier theories of rights. Today, historians usually assume that his understanding of *what* rights the citizens have was derived from the rights discourses of medieval and Renaissance theologians and canonists. Recently Scott Swanson – taking a lead from the works, on the long trajectory of the discourse of natural rights, of Brian Tierney, Richard Tuck, and James Tully – has stressed the continuities in natural-right theories from the pre-Ockhamist writings of such theologians as Godfrey of Fontaines and John of Paris to Locke's *Two treatises*.[7] Locke himself, in order to support his anti-absolutism, referred his reader to the works of Henry de Bracton (or Bretton) and John Fortescue, the medieval judges taken to be major authorities on common law, and portrayed his opponents as innovators whose "Civil Policy is so new, so dangerous, and so destructive" that "former Ages never could bear the broaching of it".[8] In the *Patriarcha*, written before the civil war broke out in England, perhaps as early as in 1628–1631,[9] Filmer asserted that the tenet of mankind's natural liberty and right – later reaffirmed by Locke – "was first hatched in the schools", that is, in the medieval Roman Catholic universities.[10]

Yet it is also important to notice – as A. John Simmons has pointed out in his analysis of Locke's theory of rights – that nowhere in his works did Locke provide the reader with either a clear definition of moral rights or with

[5] Op. cit., 67.11–12.
[6] See, e.g., Simmons 1992, 14; Waldron 1993, 1.
[7] Swanson 1997. See also Tierney 1997; Tuck 1979 and Tuck 1993; and Tully 1980.
[8] *TT* II.239.42–51.
[9] Sommerville 1991, xxxii–xxxvii.
[10] Filmer, *Patriarcha* I.1, 2.

a complete inventory of rights.[11] One of the features that distinguishes his theorising from medieval and Renaissance theories is his lack of interest in the codifying and cataloguing of rights. In the *Two treatises* he did not aim to build a system of laws and rights. In the "Second treatise" he noted that it would have been "besides my present purpose, to enter here into the particulars of the Law of Nature".[12] Moreover, instead of focusing on the precise range of rights that men have, he concentrated on the ways in which men possess their rights and can exercise them, and on the ways in which their rights can be defended.

It was necessary, in Locke's view, to safeguard individual rights by constitutional arrangements and state power. In the "Second treatise" he insisted that, in the wake of the golden age, the individuals' property rights had been insecure until legislative powers had been "placed in collective Bodies of Men, call them Senate, Parliament, or what you please".[13] At the same time he claimed that the *civitas* should regulate the economic and ecclesiastical spheres so that no-one be governed by economic or clerical compulsion. Hence, "any Commonwealth" would have full fiscal power over the citizen, who, "by his uniting himself thereunto, annexed also, and submits to the Community those possessions, which he has, or shall acquire".[14] In the *Epistola de tolerantia* Locke maintained that the government should exercise Erastian control over such churches which endanger liberty. Notwithstanding his attention to these constitutional and statist safeguards, he avoided embracing constitutional republicanism and working through, with any great attention, the Harringtonian line of thought that the distribution of wealth has political implications. While James Harrington had planned a republican system of politics for the exercise of intelligence among free citizens,[15] Locke never presumed that the processes of reason could be fully systematized and separated from the individual in order to preserve his rights. In fact, he believed that there can never be sufficient safeguard against the possibility of the abuse of rights.

What, then, was the quintessential means of preserving one's rights? In order to understand Locke's stance, we must shift the emphasis from the external safeguards of rights to the rightholders' traits. Since no constitutional system could eliminate the possibility of the abuse of rights, the Lockean solution was to educate citizens who can challenge the authority of those who attempt to withdraw their rights. One of the hallmarks of

[11] Simmons 1992, 70 and 79.
[12] *TT* II.12.9–10.
[13] Op. cit., II.26–7; II.94.22–6. Cf. John Locke, *An essay concerning human understanding*, [hereafter *Essay*], IV.iii.18, 549: "the Idea of Property, being a right to any thing".
[14] *TT* II.120.2–5. Cf. Tully 1980, 164–165.
[15] Pocock 1992, xxi–xxii.

Locke's civil philosophy is the conception of the extra-constitutional appellate power that I wish to bring into focus in this article. But I also wish to draw attention to the equally basic postulate, largely overlooked in existing Locke scholarship, that the individuals can hold the power of appellation only if they have learnt to act correctly through understanding.[16] The Lockean rightholder must not act through feeling: he must not quit "his reason, which places him almost equal to Angels", for "fancy and passion must needs run him into strange courses, if reason, which is his only Star and compass, be not that he steers by".[17] This is why the discourses of human understanding and of rights became closely associated with one another, in Locke's civil philosophy.

This article has, after this introduction to Locke's defence of rights, three main sections. Next, in section two, I consider Locke's attack, launched in the *Essay concerning human understanding*, on the art of rhetoric and the disputation exercises of scholastic logicians. This attack was partly based on his belief that people's rights were threatened by those whose education had been directed to the object of acquiring rhetorical skill. In section three I turn to discuss the optimistic rationalism of his *Two treatises*, focusing on the neo-Roman power of appellation. Finally, in the fourth main section I suggest that after the Revolution of 1688–1689 Locke perceived more and more clearly that the citizen's "Resolution to preserve" his rights depends on whether his education has empowered him to follow reason.

MORAL DISCOURSE AND RHETORIC

In order to understand Locke's account of the doubtfulness of moral language, it is important to begin with the division of ideas into classes which he put forward in the *Essay*. His starting-point was that two simple ideas are joined together to form any complex idea, and that complex ideas are classified under substances, modes, or relations.[18] The *Essay* assigned moral ideas to the categories of modes and relations. Before paying attention to moral ideas, I want to concentrate first on the case of substances and on a further distinction that Locke drew between real ideas, which "have a Foundation in Nature; such as have a Conformity with the real Being", and "Fantastical or Chimerical" ideas, which "have no Foundation in Nature, nor have any Conformity with that reality of Being, to which they are tacitly

[16] Cf. *TT* II.4 ("the use of the same faculties"), II.61–63, II.93–94, and II.240–243.
[17] Op. cit., I.58.2–7.
[18] *Essay* II.xii "Of Complex Ideas", 163–166, and II.xxix.1, 363. See Ayers 1993 (originally 1991), II, 15–109.

referr'd, as to their Archetypes".[19] After this distinction had been established, it followed that those ideas of substances are "fantastical, which are made up of such Collections of simple Ideas, as were really never united, never found together in any Substance; v.g., a rational Creature, consisting of a Horse's Head, joined to a body of humane shape, or such as the Centaurs are described".[20] One substance, Locke explained, means the coexistence of certain properties; and each of us possesses the power and mental liberty to join together a number of properties, creating such fantastic substances as centaurs.

At the same time, Locke gave prominence to an associated argument that we can also form fantastic moral ideas freely. But there was a crucial difference between fantastic substances and fantastic moral ideas. Locke made it plain in the *Essay* that no natural archetypes of mixed modes and relations exist. When mixed modes and relations are made, the mind ties a certain number of ideas "together by a Name".[21] It follows that the meaning of a moral term cannot be checked against an archetype existing objectively, whether as an innate idea or in the external reality. In the case of substances, we can compare the idea with its archetype. For instance, no-one "joins the Voice of a Sheep, with the Shape of a Horse […] unless he has a mind to fill his Head with Chimæra's, and his Discourse with unintelligible Words".[22] Such a chimera could be detected easily by comparing it with the natural archetypes of sheep and horses. Crudely, we could point at horses neighing.[23]

By contrast, as moral ideas can only exist in the mind (unlike the sheep-horse or the centaur, purportedly), we cannot decide whether a moral idea is real or fantastic by referring to something without our minds. Echoing Thomas Hobbes's nominalist account of the veracity of moral terms,[24] Locke stated that in principle nothing hinders one from painting any view of the moral universe in one's speech. The moral discourses "are about Ideas in the Mind, which are none of them false or disproportionate; they having no external Beings for Archetypes which they are referr'd to, and must correspond with".[25] Locke went on to claim that having fantastic moral ideas "relates more to Propriety of Speech, than Reality of Ideas".[26] When he described the man who composes deformed moral ideas, he remarked that it is "as if a Man would give the Name of Justice to that Idea, which common

[19] *Essay* II.xxx.1, 372. See also *Essay* III.xi.17, 517.
[20] Op. cit., II.xxx.5, 374.
[21] Op. cit., III.v.4, 429.
[22] Op. cit., III.vi.28, 455–456.
[23] Cf. *Essay* III.xi.20–1, 518–519.
[24] Thomas Hobbes, *Leviathan*, 39. Idem., *On the citizen*, xii.1, 131–132. See Dunn 1969, 81; Goldie 1991b, 606–607; and Laslett 1988, 74.
[25] *Essay* III.xi.17, 517.
[26] Op. cit., II.xxx.4, 373–4. Cf. op. cit., IV.v.11, 578.

use calls Liberality".[27] The man will entertain a fantastic idea of justice if he allows the meaning of the name of justice to differ covertly from the meaning "common use" has given it. Such differences may slip detection in the case of indolent speakers' nebulous or undefined words, but Locke was primarily concerned about deliberate attempts to deceive others.[28]

The clue to understanding Locke's example of a man's giving "the Name of Justice to that Idea, which common use calls Liberality", lies in recognizing that his *Essay* attacked the *ars rhetorica* because of its pernicious influence on moral discourse. His concern about deliberate attempts at deception derived from the advice given to students of rhetoric in both ancient Rome and early-modern Europe, that they may deck liberality in the garments of justice for the sake of achieving some advantage by using the technique described by the figure of *paradiastole*.[29] Another example of this technique was, as the Ciceronian rhetoric-book *Ad Herennium* testified, the attempt to "show that what our opponent calls justice is cowardice, and lazy and corrupt liberality".[30]

Locke was convinced that students, having learnt the paradiastolic technique of rhetorical redescription, could easily mislead others, manipulating the meanings of moral words to suit themselves. His theoretical explanation for their success was that there are no natural archetypes of moral ideas. Here I want to focus, however, on the conclusion that Locke drew from their ability to deceive the audience. He concluded that the paradiastolic unsettling of language entailed the unsettling of people's rights.

Little scholarly attention has so far been devoted to Locke's antagonism in the 1680s and 1690s towards the contemporary system of scholastic and rhetorical education. When it has been discussed, what is distinctive about this antagonism – the political impetus for it – has been either ignored or denied.[31] This is perhaps extraordinary because we find his political concerns affirmed in the clearest possible terms in the *Essay*. On the basis of the *Essay*, we know that he was distressed to see that the techniques which prevailed in rhetorical and disputation exercises lent themselves to political

[27] Op. cit., II.xxx.3–4, 373–4. Cf. op. cit., III.ii.8, 408; III.v.1–6, 428–431; IV.iii.19, 550–551; and IV.v.4, 575.

[28] Locke to Philip van Limborch, 26 Oct. 1694, in: E. S. de Beer, ed., *The correspondence of John Locke* (8 vols. to date, Oxford, 1976–1989), V, 169–170. This work is hereafter cited as '*Correspondence*' in the footnotes. *Essay* III.x.9, 495; III.xi.11, 514; and III.xi.17, 517.

[29] On *paradiastole* and rhetoric, see Hobbes, *On the citizen* x.11, 123; Skinner 1990, 7–19; and Tuck 1996, 196–197.

[30] Anon. ['Cicero'], *Ad C. Herennium de ratione dicendi (Rhetorica ad Herennium)*, III.iii.6, 166 (trans. Caplan (ibid.) as well as trans. Skinner 1990, 7).

[31] See, e.g., Vickers 1988, 199–200. Cf. Schneewind 1994, esp. 206.

misuse: they had been used to "unsettle Peoples Rights".[32] Their use had not stopped –

> in logical Niceties, or curious empty Speculations; it hath invaded the great Concernments of Humane Life and Society; obscured and perplexed the material Truths of Law and Divinity; brought Confusion, Disorder, and Uncertainty into the Affairs of Mankind; and if not destroyed, yet in great measure rendred useless, these two great Rules, Religion and Justice.[33]

In 1689, making an unmistakable reference to the period of Locke's exile – to the years when he had feared for the future of Europe as Louis XIV seemed to have almost free rein to gain territory and to annihilate French Protestantism, and as an absolutist and Roman Catholic dynasty seemed to gain hold of England and ally it with France – the *Essay* accused scholastic "artificial Ignorance" of having justified "strange and absurd" doctrines "in these last Ages".[34]

It may seem to us, in hindsight, that Locke overstated his case. We need to understand that it was possible for him to claim that studies in logic and rhetoric jeopardized the people's ability to uphold their rights, because he inhabited an intellectual world saturated by the ideals and vocabularies of the scholastic and liberal-arts education. Without question, historians must reconnect Locke's conception of moral language in the *Essay* with this intellectual world, not with present-day philosophical debates. In order to recapture his vision, we must survey two assumptions underlying the teaching of rhetoric.

The first assumption embedded in the Renaissance humanists' system of education was that both sides of an argument can be presented with equal rhetorical force in a dispute. The rhetorical exercises in argument *in utramque partem* required that one pupil could argue both *pro* and *contra*. One of the resultant conventions of exercising had led, it may be added, to school teachers operating a system whereby one pupil argued *pro* and the other *contra*, and to the practice of physically changing seats when the time came for the pupils to swap positions.[35] The Ciceronian assumption that any question permits one to argue *in utramque partem* reverberates through the exercise of legal mooting taken by present-day law students at Cambridge: in each moot two competing students are assigned one point of appeal, and are

[32] *Essay* III.x.7, 494; and x.13, 497.
[33] Op. cit., III.x.12, 496.
[34] Op. cit., III.x.9, 495. This passage cannot be found in the so-called Draft B of the *Essay*, composed in about 1671: see Locke 1990.
[35] Cf. Michel de Montaigne, *Essays* I.xxvi, 60–61; and Burke 1989.

required to "argue for or against that point", taking turns as appellant and respondent, presided over by a judge.[36]

Precisely this kind of exercising, which seemed to make pupils deny the truth and construct arguments regardless of the validity of their position, was condemned by Locke in the 1690s.[37] In a draft now known as "Of the conduct of the understanding", which he began composing in 1697 and intended to be incorporated into his *Essay*, as its "largest chapter",[38] Locke maintained that,

> the custome of argueing on any side even against our perswasions dims the understanding and makes it by degrees loose the facultie of discerneing clearly between truth and falshood and soe of adhereing to the right side. Tis not safe to play with error and dresse it up to our selves or others in the shape of truth.[39]

Rhetoricians showed how there are always two sides to any question, and how both sides can always be defended in a dispute.[40] It followed, as Locke noted in the fourth edition of the *Essay*, published in 1699, that if the schools had not introduced certain principles, "beyond which Men in dispute could not retreat", disputes between two "skilful Combatants' would have continued endlessly as "one never fail'd of a medius terminus to prove any Proposition; and the other could as constantly, without, or with a Distinction, deny the Major or Minor".[41] Consequently, men, having learnt the art of disputation, were not "in civil Conversation […] ashamed of that, which in the Schools is counted a Vertue and a Glory; viz. obstinately to maintain that side of the Question they have chosen, whether true or false, to the last extremity; even after Conviction".[42] This art was likely "to turn young Men's Minds from the sincere Search and Love of Truth […] and to make them doubt whether there is any such thing". That the curriculum included training which contributed towards citizens' disingenuousness could scarcely be believed by "the rational part of Mankind not corrupted by Education".[43]

[36] Anon., Rules of the Selwyn College Law Society Mooting Competition"; Cicero, *De optimo genere oratorum* VII.20–21, 370.

[37] John Locke, *Some thoughts concerning education* (hereafter *Education*), e.g., §171, 229.

[38] Locke to William Molyneux, 10 Apr. 1697, *Correspondence* VI, 87. Schuurman 2000 15–126, esp. 97–106.

[39] John Locke, "Of the conduct of the understanding" [hereafter "Conduct"], §67, 217–218 (cited by the new paragraph numbers and Schuurman's edition).

[40] Skinner 1996, 8–10. Cf. Cicero, *On duties* II.8, 65; and *Essay* IV.xx.14–15, 715–716.

[41] *Essay* IV.vii.11, 600 (added to the fourth edition). The Latin equivalent of the term '*paradiastole*' was '*distinctio*': Quintilian, *The orator's education* IX.iii.65, vol. IV, 138–139; and Caplan, editorial note in anon., *Ad C. Herennium*, 169.

[42] *Essay* IV.vii.11, 601 (added to the fourth edition).

[43] *Ibid.*

What was going on in European societies was systematic education for the best part of the citizenry in what Locke termed bluntly "the great Art of Deceit and Errour" – education in "Rhetorick, that powerful instrument of Error and Deceit".[44]

I have stressed that, in Locke's view, the practice of disputation exercises taught students to argue in the most effective way whatever the cause they were asked to defend. Their disputes were contests for victory rather than truth.[45] It is now apposite to pay attention to the second key assumption embedded in rhetorical education. This was the Ciceronian assumption that rhetoric plays a crucial part in politics because reasoning alone cannot persuade men of the truths reason discovers.[46] One of Locke's objections to this assumption was based on his perception that rhetorical skills were not used to defend the claims of reason. Instead, they were misused to defend claims that were motivated by self-interest. In his view, outside the schools, in politics, the techniques of disputation helped men who desired "Esteem, Riches, or Power" to defend points regardless of their truth.[47] It is worth recalling that this critique of disputation resembles the way in which Hobbes's *De cive* vilified the eloquence of the members of large assemblies, "whose end (as all the masters of Rhetoric point out) is not truth (except by accident) but victory".[48] Locke's line of argument can be seen as a rethinking and continuation of Hobbes's attack upon the humanist ideal of a union between reason and rhetoric, and upon Isocrates's and Cicero's insistence that rhetoric is essential to public life.[49]

We can now see why, in Locke's view, rhetorical skills can be used to "unsettle Peoples Rights" when reason does not prevail in society. It is true that an individual may in practice enjoy the full range of his rights in a state where the rational elite guides the masses who act through feeling. Yet the elite, having studied rhetoric in order to learn to persuade the vulgar to act in the desired way, may deceive men to act in *any* desired way, and may curtail their rights at will. The paradiastolic manipulation of moral words hinders

[44] Op. cit., "Index", s.v. 'Rhetorick', 743; III.x.6–7, 493–494; and III.x.34, 508.

[45] Op. cit., IV.vii.11, 601–602 (added to the fourth edition); and *Education* §189, 241 (added to the third edition). See Skinner 1993, 71, on *victoria* as the Quintilianic orator's aim in forensic oratory.

[46] Cicero, *De inventione* I.i.1–v.6, 2–15; Cicero, *De oratore* I.viii.30–34 and II.viii.33–ix.35, vol. I, 22–27 and 222–223. Skinner 1996, 2–3; and Vickers 1988, 8.

[47] See *Essay* IV.iii.20, 552. Cf. *TT*, II.12.14–16. Cf. Cicero, *De oratore* I.ix.35–8, vol. I, 26–31, on Scaevola's objection to the insistence on the importance of oratory: the expulsion of kings from Rome was "accomplished by the mind of Lucius Brutus and not by his tongue" and "all that followed was full of planning and empty of talking" (trans. Sutton and Rackham).

[48] Hobbes, *On the citizen* x.11, 123. Skinner 1996, 2–3. See also Tuck 1989, 54–58.

[49] Hobbes, *On the citizen* xii.12–13, 139–140. Skinner 1996, 334 and passim; and Skinner 1993. Vickers 1988, 10–11.

men from forming valid judgements, hiding the real situation from view, and makes them unable to determine whether their rights are abused. In Locke's England, students of "Logick, and the liberal Sciences, as they have been handled in the Schools" learnt to speak prejudicially in their own cause and "to confound the Signification of Words, which, like a Mist before Peoples Eyes, might hinder their weak parts from being discovered".[50] Once the subject's understanding had been rendered impotent by rhetoric, he lost control over his rights, and was enslaved.[51]

Locke held that "he is certainly the most subjected, the most enslaved, who is so in his Understanding".[52] There were two distinct routes to slavery. First, physical force could be used to deprive a person of the "Power over his own life": for example, the captives taken in a war were enslaved by their conqueror.[53] Locke was no less insistent, however, that a person is enslaved if he cannot act correctly through understanding and is in a state of mental slavery. There was little difference between the states of "being acted by a blind impulse from without, or from within".[54]

PROVOCATIO

In the *Essay* Locke concentrated on the problems of moral discourse and mental slavery. When he considered, in the *Two treatises*, the prince's attempt to enslave the people, he brought to bear a different set of assumptions about the defence of rights. There is an optimistic line of argument in the "Second treatise" which suggests that rightholders cannot be subjected to mental slavery indefinitely. Locke claimed that despite "whatever Flatterers may talk to amuze Peoples Understandings" – that is, whatever the elite skilled in rhetoric does to mislead the subjects – the people will ultimately perceive that their rights are abused, and may then try, if feasible, to recover their liberty by taking up arms against their oppressors.[55]

The end of Locke's "Second treatise" denied triumphantly the power of rhetoric to cover authoritarianism and unsettle people's rights.[56] Even in the *Essay* Locke noted optimistically that the "Subject part of Mankind, in most

[50] *Essay* III.x.6, 493–494.
[51] See *TT*, II.52–53. See also *Essay* III.x.8, 494; III.x.9, 495 ("holding them perpetually entangled in that endless Labyrinth"); and IV.xix.14, 704 (added to the fourth edition).
[52] *Essay* IV.xx.6, 711.
[53] *TT* II.24 and II.85.10.
[54] *Essay* II.xxi.67, 279 (added to the fourth edition).
[55] *TT* II.94.1–9.
[56] Op. cit., II.224.5–10. See also *TT* I.60.23–7.

Places, might […] with Ægyptian Bondage, expect Ægyptian Darkness, were not the Candle of the Lord set up by himself in Men's minds, which it is impossible for the Breath or Power of Man wholly to extinguish".[57] Such optimistic rationalism did not entail treating the power of rhetoric nonchalantly: in the "Second treatise" Locke claimed that absolutism was supported partly because men's minds "had been corrupted into a mistake of true power and honour" by sycophantic courtiers and churchmen.[58] The preface to the *Two treatises* stated – echoing John Milton's, Pieter de la Court's, and other seventeenth-century republicans' anticlerical concerns[59] – that Englishmen had been misled to accept Filmer's doctrine by "the Pulpit" that had "publickly owned his Doctrine", which had been "Preachd up for Gospel".[60]

The *Two treatises* suggested that before 1689 the learned had misused their rhetorical skills to deceive the English and, by implication, after 1689 their skills formed a potential threat. But Locke also suggested that rational argumentation could defuse this threat. His publishing of the *Two treatises* rested on the assumption that if solid reasoning showed men that William III was their legitimate ruler, men would discontinue believing in Filmer's doctrines and supporting James II.[61] Similarly, in 1689 Philip van Limborch, professor of divinity at the Remonstrant College in Amsterdam, vouched that Locke's *Epistola de tolerantia* "could be read with great profit in England: it demonstrates so irrefutably […] that all religious persecution is contrary both to the spirit of religion and to the law of nature" that it would persuade all "led by reason".[62] Van Limborch's own *Historia Inquisitionis* permitted everyone to see the genuine image of the Inquisition so that they "never suffer themselves to be deceived by a false and disguised Appearance, but acknowledge it to be what it really is".[63]

The audacious defence of armed resistance in Locke's "Second treatise" was underpinned by his confidence in the power of individual citizens and in the authority of their God-given reason. This confidence, in its turn, relied

[57] *Essay* IV.iii.20, 552.

[58] Adapted from *TT* II.111.2–3. See also op. cit., I.5.1–4 and II.92.5–8; and Goldie 1991c.

[59] John Milton, *The tenure of kings and magistrates*, 47 (added to the second edition of 1649). Pieter de la Court, *The true interests and political maxims of the Republic of Holland and West Friesland* (1702), 203, 208.

[60] *TT*, Preface, ll. 32–39 (partly modified and extended in the third edition).

[61] Op. cit., Preface, ll. 33–42 (partly modified and extended in the third edition). Cf. Jacques Abbadie, *Defense de la nation Britannique ou les droits de Dieu, de la nature, & de la societé clairement établis au sujet de la revolution d'Angleterre,* Preface, sig. A3: "Il est incroyable combien une bonne cause soutient un auteur; & combien l'on doit peu craindre l'art des sophismes & les fausses couleurs de l'éloquence, avec le secours de la verité."

[62] Philip van Limborch to Locke, [c. 12/22 Apr. and] 26 Apr./6 May 1689, *Correspondence* III, 607–608 (trans. De Beer).

[63] Limborch 1731, I, v (second pagination).

on the anti-sceptical assumptions that there is always a true way of determining what the common good is, and that the rational citizen can determine whether the ruler is promoting his private interest or the common good.[64] Recently John Marshall has underlined how difficult it was, conceptually and psychologically, for Locke to begin supporting the right of resistance after 1681, and to abandon his fear for the turmoil it might induce.[65] Here I shall not attempt to assess Marshall's view about the influence of Locke's character on his political theorising. I want to concentrate on the conceptual and discursive resources, on the classical Roman accounts of the appellate power, which helped him to articulate his new position and which have not been discussed by Locke scholars.

Significantly, Locke articulated the doctrine of resistance in terms of an appeal to heaven. His basic principle was that "where the Body of the People, or any single Man, is deprived of their Right, or is under the Exercise of a power without right, and have no Appeal on Earth, there they have a liberty to appeal to Heaven, whenever they judge the Cause of sufficient moment".[66] His line of argument suggested that if citizens cannot hold the power of appellation, then they are not rightholders: a master-slave relationship has superseded rational citizenship.[67] This claim was embedded in what Hobbes had termed the "third seditious doctrine" – "that *tyrannicide is licit*" – defended by "the champions of Anarchy in Greece and Rome";[68] and it recalled Cicero's justification of Caesar's assassination.[69]

More precisely, the germ of Locke's argument may be found in the classical Roman *provocatio ad populum* under the Republic – the appeal from the magistrate's verdict to the people[70] – which the Romans considered the protection of liberty that restricts the magistrates' power of punishment

[64] See "Conduct", §49, 194; and *Essay* III.x.22, 504. Cf. Skinner 1990, 45.

[65] Marshall 1994, 8–9, 91–93, 212–220, 236, 239, and 241–243 on how "the remarkably cautious and secretive Locke" turned his coat because of Charles II's behaviour. Cf. Laslett 1988, 42.

[66] *TT* II.168.14–18.

[67] Op. cit., II.209–10 and II.241–242. My argument is diametrically opposed to the view, recently defended in Engster 2001, 189, that "Locke's theory was not a rejection of absolutist state theory – only a revision of it".

[68] Hobbes, *On the citizen* xii.2, 133.

[69] Cicero, *On duties* I.50–53, 21–23; II.23–25, 70–72; III.19, 107; III.32, 111; and III.82, 131. Cf. Milton, *The tenure of kings*, 13–18.

[70] Simon Hornblower and Antony Spawforth, eds., *The Oxford classical dictionary* (third edition, Oxford and New York, 1996), s.v. "imperium", "law and procedure, Roman", and "provocatio". Harry Thurston Peck, ed., *Harper's dictionary of classical literature and antiquities* (London, 1897), s.v. "provocatio". For the *provocatio* under the Roman Empire, see ibid., s.v. "appellatio". See also ibid., s.v. "ephesis", on the Athenians' appeal to their assembly.

and ensures that they focus on the common good. Seneca noted that there had been, during the early years of Rome's history, "an appeal to the people even from the kings".[71] In principle, a Roman citizen could appeal to the people if he felt that the magistrate had wronged him during the normal course of justice. Tellingly, when the French translation of the "Second treatise" was reviewed in Henry Basnage de Beauval's *Histoire des Ouvrages des Sçavans* in 1691, the reviewer, hostile to Locke's politics, portrayed the Lockean process of redress as though it should apply in cases of private justice only, recalling the original occasion for the Roman *provocatio*.[72]

Yet the *provocatio* was habitually associated with political contests in classical literature – thieves and murderers were unlikely to benefit from it. In Rome, monarchists refuted the republican right of appeal to the people, and under the Roman Empire the appeal was ultimately, no longer to the people, but to the emperor if no intermediate authority was competent. In Cicero's *De republica*, Scipio, presenting the argument for monarchy and lamenting the expulsion of Rome's last king, stated that in a republican anarchy "our people give orders to the magistrates themselves – they threaten, refuse to obey, ask for one magistrate's help against another, and appeal to the people".[73] Later on in the *De republica*, when Scipio presented the argument for republicanism, he asked Laelieus whether Rome had been a "commonwealth" when "the decemvirs ruled […] without any right of appeal to the people, and liberty had lost its guarantees". Laelieus replied that Rome had been a tyranny, not a commonwealth.[74] This was also Locke's view about "the intolerable dominion of the Decemviri at Rome".[75]

An important source of the republican understanding of *provocatio* in its political context was Livy's *Ab urbe condita*, which was edited by Jean Leclerc, Locke's closest disciple, in the early eighteenth century.[76] The republicans' broad political understanding of the *provocatio* reverberates through the passage from Livy's work that Locke wrote on the fly-leaf in his own copy of the 1698 edition of the *Two treatises*.[77] Earlier Locke had

[71] Seneca, *Ad Lucilium epistulae moralis*, epistle CVIII.31, vol. III, 250–251 (trans. Gummere): "provocationem ad populum etiam a regibus fuisse".

[72] Henry Basnage de Beauval, ed., *Histoire des Ouvrages des Sçavans,* June–Aug. 1691, art. III, 457–465, at 459–460. See Savonius 2004.

[73] Cicero, *On the commonwealth* I.63, 28.

[74] Op. cit., III.44, 75–76.

[75] *TT* II.201.

[76] Livy, *Titi Livii Historiarum quod exstat*, vol. x, "Index", s.v. "Libertas" and "Provocatio omnibus magistratibus", 177 and 277.

[77] The epigraph, first printed in the fourth edition of the *Two treatises* in 1713, is from Livy's portrayal of a speech by the Samnites' general, who also stressed that "that war is just which is necessary, and righteous are their arms to whom, save only in arms, no hope is

recommended that the young Lord Mordaunt's studies "begin with Livys history […] the best history of" Rome. To Mordaunt, "somebody should explain […] the customs and manners of the Romans as they occur in Livie" and "the Turns of State and the causes upon which they depend". If so, Livy's history affords him "the true foundation of politicks".[78]

Whilst Locke did not hesitate to state that the people shall judge whether their prince has betrayed his trust, the English royalists, including Hobbes, as well as the author of the anonymous *Avis important aux refugiéz* of 1690, the epitome of "Francophone Jacobitism", believed that there could be no human appellate jurisdiction above the king without that jurisdiction compromising his sovereignty and resulting in anarchy.[79] The royalists would have objected even to Locke's locating sovereignty in parliament as the appeal court, and not in crown, but his right to appeal went one step further, assuming a citizenry reasonable enough to hold the power to compel a prince. Strikingly, Locke's stress on *provocatio* as the defining characteristic of the rightholder's status and as the citadel of liberty also contrasted with the monarchomach justifications of armed resistance against political authority, developed during the French wars of religion, and with Harrington's Machiavellian interpretation of Livy.

Although Locke's "Second treatise" has been regarded as the culmination of resistance theories originating from the ferment of the radical Reformation,[80] his neo-Roman emphasis on *provocatio* distanced it from the monarchomachs' works. The author of the *Vindiciae, contra tyrannos*, the most famous of the monarchomach treatises, had been anxious to stress that "private individuals have no power, fill no magistracy, hold no command nor any right of the sword".[81] On the other hand, Niccolò Machiavelli had held that the maintenance of civil liberty requires both a power to bring charges against those who threaten the republic and also a constitutional mechanism which provides a lawful way of bringing these charges, without ruining the state. The Romans had shown, in Machiavelli's view, how the

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left" (*Livy* IX.i, vol. IV, 164–165). Locke 1993, 2; and Laslett, editorial note, *TT* (1988), 382. Cf. Marshall 1994, 242.

[78] Locke to Cary Mordaunt, Countess Peterborough [Sep./Oct. 1697?], *Correspondence* VI, 213.

[79] Anon., *Avis important aux refugiéz sur leur prochain retour en France*, 88–90. On Hobbes and on the royalist theologians' view that England is an absolute *and* limited monarchy because the king's absolute power is limited by virtue, see Goldie 1991b, 596–598.

[80] Skinner 1978, II, 347–348; and Tully 1980, ch. 1. On the monarchomachs' reliance on corporations of some judiciary status to oppose a tyrant, see also Van Kley 1996, 26–27; and Yardeni 1985, 322.

[81] Stephanus Junius Brutus, the Celt [pseudonym], *Vindiciae, contra tyrannos: or, concerning the legitimate power of a prince over the people, and of the people over a prince*, 60. See also op. cit., 168–169.

republic can both punish slanderers (such as Marcus Manlius Capitolinus, who was, as Algernon Sidney was to note approvingly, "put to death by the vote of the people")[82] and permit charges to be made according to law.[83] Harrington's *Oceana* rested on similar neo-Roman premises. In Oceana, "if any person […] shall appeal unto the people, it belongeth unto the prerogative to judge and determine the case". From "that which is proposed by the authority of the senate, and confirmed by the command of the people", there was no Lockean extra-constitutional process of redress, no right of appeal to heaven.[84] Harrington leant towards the assumption that the impersonal empire of laws, binding on everyone, is the citadel of liberty in a state which acts according to the virtuous citizenry's will.[85] This assumption entailed that individuals cannot override the laws and exercise the collaborative *imperium* that belongs to the commonwealth.[86]

Locke, by contrast, believed that citizens should always retain the power to challenge the decisions of even a popular assembly by appealing to heaven. Clearly, the exercise of the right to challenge the authorities is optional for the rightholder; he has no duty to challenge the authorities in a hopeless situation. In the "Second treatise" Locke pointed out that "the injured Party must judge for himself, when he will think fit to make use of that Appeal" to heaven,[87] or whether he will appeal to heaven at all:

> if the unlawful acts done by the Magistrate […] reach no farther than some private Mens Cases, though they have a right to defend themselves, and to recover by force, what by unlawful force is taken from them; yet the Right to do so, will not easily ingage them in a Contest, wherein they are sure to perish.[88]

Importantly, however, the men are oppressed and enslaved if the practical conditions make it impossible for them to enforce their claims. If they live under such conditions, they are not rightholders: their alleged "rights" are mere privileges, and the authorities can withdraw these privileges at will. Reduced to political slavery, the individuals bide their time until they can challenge the authorities. The elapsed time does not matter:

[82] Algernon Sidney, *Discourses concerning government* II.18, 182.
[83] Niccolò Machiavelli, *Discourses on the first decade of Titus Livius* I.7–8, I, 211–217.
[84] James Harrington, *The commonwealth of Oceana*, part 3, 167.
[85] See Skinner 1998, esp. 23–35 and 74–75.
[86] Cf. *Bibliothèque Universelle et Historique*, 10, Aug. 1688, art. VII, 355 (retaining the original emphases): in Rome, "On appelle *faux* se qui a été condamné dans une assemblée, par le plus grand nombre des voix; & on l'auroit appellé *vrai*, si cette même assemblée l'avoit approuvée." This journal is hereafter cited as "*Bibliothèque*" in the footnotes. The most comprehensive study of the *Bibliothèque* is Bots *et al*. 1981.
[87] *TT* II.242.15–17.
[88] Op. cit., II.208.1–9.

Locke was adamant that "the Grecian Christians descendants of the ancient possessors of that Country may justly cast off the Turkish yoke […] when ever they have a power to do it".[89]

In the "Second treatise" Locke transposed the classical notion of *provocatio* to the early-modern idiom of natural rights.[90] There was a similar movement from the Roman *provocatio* to appeals to normative nature in an article which appeared in the April 1689 issue of the *Bibliothèque Universelle*, the Amsterdam-based journal edited by Leclerc and other associates of Locke. It was noted in this article that "since natural equity is the spirit of law, we should always be able to appeal to it; for all the laws […] should be mere interpretations of the natural law, which experience and reason on their own reveal to us". In Cicero's time, "when Rome was governed by the consuls", the praetor Gaius Aquilius had been of "this temperament": his edicts, which favoured the poor, made him known for his sense of equity.[91] The rift between the Lockean discourse of natural jurisprudence and the classical legacy of republican thought has appeared deeper to such present-day historians as J. G. A. Pocock than it did to Locke, to his Francophone friends, who edited the *Bibliothèque Universelle*, and to his readers from Daniel Defoe to Thomas Jefferson, who did not draw any line of demarcation between Locke and the writers who, according to Pocock, belonged to the "Atlantic republican tradition".[92] Locke's *Two treatises* participated in the transformation in the discourse of rights which twisted the medieval juridical discourse towards the heritage of ancient prudence, rather than towards modern liberal individualism.[93]

EDUCATION TO REASONABLENESS

I began by noting Locke's claim that the people's "love of their Just and Natural Rights, with their Resolution to preserve them, saved the Nation

[89] Op. cit., II.192.14–17. See also Locke, "On William Sherlock" (originally late 1690 or early 1691) [MS Locke, c.28, pp. 83–96] in: Locke 1997, 317.

[90] Cf. Skinner 1998, esp. 18–21.

[91] *Bibliothèque*, 13, Apr. 1689, art. IV–1, 119–124, at 120–121: "L'équité naturelle étant l'ame de la Loi, on doit toujours […] y avoir recours; puis que toutes les Loix qu'on peut donner aux hommes, ne doivent être que des interprétations de la naturelle, que l'experience & la raison seules nous découvrent […] Le Préteur Gaius Aquilius […] lorsque Rome étoit gouvernée par les Consuls, suivit ce temperament […] il ajoûta une restriction à la Loi contre les fraudes, en faveur des pauvres, qui fait connoître son équité".

[92] Pocock 1975; and Pocock 1983. See also Champion 1992, esp. 197–198, 218, and 222. On the contemporary reactions to Locke's *Two treatises*, see Goldie 1999b.

[93] See Tully 1993d, esp. 261, on the emergence of the Lockean "constitution-enforcing conception of rights".

when it was on the very brink of Slavery". Of course he knew that his claim contrasted starkly with the real course of events in 1688–1689. The Revolution was not an act of popular resistance to vindicate rights against a tyrant, or to effect toleration, and neither was it perceived to be such a deed by the English majority.[94] And it soon dawned on Locke and his friends that it was unrealistic to expect a switch of intellectual allegiances all of a sudden. They became painfully aware of the potency of the assumption, contrary to Locke's optimism in the *Two treatises*, that denied reason was powerful enough to change men's beliefs and to serve as an antidote to the moving force of rhetoric.[95]

The encounters that Locke and his friends had with Jacobites soon after the Revolution appeared to attest, not only to the survival of absolutist doctrines in England, but also to the weakness of natural reason.[96] Hobbes's despair at Englishmen's insanity in the 1640s had prompted him to change his mind about the possibility of introducing a rational *scientia civilis* inimical to the art of rhetoric.[97] In the 1690s the survival of authoritarianism – royal authoritarianism in France, High-Church and Filmerian in England, Calvinist in Geneva and the *Refuge* – presented a similar dilemma to Locke over how to persuade men of the truths reason discovers. He might have endorsed a Jansenist pessimism about the power of reason in the lives of the majority,[98] or the view that when "we cannot reason some men out of their evil Opinions and Practices, we may try to laugh them out of them".[99] That he did not do so, probably depended partly on the optimistic atmosphere of 1688–1689.

While to Hobbes, horrified by the turbulent 1640s, it seemed the foolish and ignorant had overpowered the reasonable minority, 1688–1689 released Locke from his exile and promised him a chance to reform society so that reason might prevail. The post-revolutionary circumstances suggested, not that reason would *always* remain powerless, but that its weakness was

[94] See, e.g., Clark 1986, 3–4; Goldie 1991a; Hoak 1996; Israel 1996; and Israel 1995, 844–854.

[95] Cf. Locke to Furly, 16/26 Dec. [1687], *Correspondence* III, 314–315.

[96] Furly to Locke, 10 June 1689, *Correspondence* III, 638–639; and Furly to Locke, 27 Jan./6 Feb. 1691, ibid., IV, 192. Cf. *Bibliothèque*, 17, May 1690, art. V, 399–427, at 417–418. Cf. Locke, *Education*, §116, 180–181; and § 147, 207–208.

[97] Skinner 1993; and Skinner 1996.

[98] Cf. Nicole 2000.

[99] John Edwards [F. B.], *A free but modest censure on the late controversial writings and debates of The Lord Bishop of Worcester and Mr. Locke*, 13: "We may as lawfully deride a stubborn Adversary, as argue with him: And this we shall find to be the practise of the most wise and grave upon occasion, as is to be seen in several of the Writings of the Antients". Their ancient "Sarcastick Stile" Edwards contrasted with the style of "some others" (perhaps Locke and his friends) who "are flat, grave and reserv'd" (op. cit., 13–14).

associated with a particular cultural ethos.[100] Whilst syllogistic logic taught students to reason by rote, and rhetoric taught them to advance their self-interest by hiding the truth from view, it was unsurprising that men were "carried away headlong by the judgement of others 'like puppets that dance when others pull the strings'".[101] Neither the coup of 1688–9 nor the political re-education whiggish treatises disseminated[102] sufficed to empower reason: what was required was a culture war against the contemporary system of education.

The fourth edition of Locke's *Essay* called "opposition to Reason" – the disputant's failure to yield to reason – "by so harsh a name as Madness".[103] Refusing to abandon optimistic rationalism, Locke declared that if madness "so universally infects Mankind, the greater care should be taken to lay it open under its due Name, thereby to excite the greater care in its Prevention and Cure".[104] His defiance should not, however, blind us to a startling acknowledgement of the feebleness of rational argumentation: he asserted that if the mind combines two ideas which have no natural connection with one another, when "this Combination is settled and whilst it lasts, it is not in the power of Reason to help us".[105] Then "rational Discourses" are powerless to persuade even the ingenuous. For instance, let, from early childhood, "the Idea of Infallibility be inseparably join'd to any Person" in my mind, I shall swallow absurdities whenever "that imagin'd infallible Person dictates and demands assent without enquiry".[106] It was not enough to demonstrate truths to men, for what "captivates their Reasons, and leads Men of Sincerity blindfold from common Sence" was the wrong association of ideas established by "Education, Custom, and the constant din of their Party".[107]

[100] Cf. Robert Molesworth, *Etat present de Danemarc*, Preface, sig. **7: "les prejugez & les fausses idées […] & les disputes qui naissent de la vieille philosophie, aussi bien que la bassesse d'esprit […] qui universellement se contracte par une vie Monastique, requierent un long tems pour s'en defaire & jusques à ce que tout cela soit effacé par la conversation des gens sages […] la science d'un homme ne fait que le rendre plus inutile à la societé'. Molesworth was Locke's "Harty Admirer and Acquaintance" (W. Molyneux to Locke, 11 Sept. 1697, *Correspondence*, VI, 192–193).

[101] Adapted from Van Limborch to Locke, 18/28 Nov. 1697, *Correspondence* VI, 259 (trans. De Beer). Cf. "Conduct", §5, 156; and §16, 162.

[102] Goldie 1999b, xxxiii.

[103] *Essay* II.xxxiii.4, 395 (added to the fourth edition). See also op. cit., IV.xx.9–10, 712–713.

[104] Op. cit., II.xxxiii.4, 395 (added to the fourth edition).

[105] Op. cit., II.xxxiii.13, 398 (added to the fourth edition).

[106] Op. cit., II.xxxiii.17–18, 400 (added to the fourth edition).

[107] Op. cit., II.xxxiii.18, 400 (added to the fourth edition). *Education*, §37, 107 (added to the third edition): "what shall sullen Reason dare to say against the Publick Testimony? Or can it hope to be heard?"

Here, in his famous chapter on the association of ideas, Locke retreated from the absolute faith in rational argumentation. Simultaneously, he added to the *Essay* an even stronger emphasis on both the force of education and the slowness of reform. The first edition had claimed that if the principle of infallibility is instilled into Roman Catholic children's minds, it will later prevent them from being "moved by the most apparent and convincing probabilities, till they are so candid and ingenuous to themselves, as to be persuaded to examine" the principle itself.[108] Since, as he now claimed, the ineffectiveness of rational discourse derived from the wrong association of ideas, it was incumbent on "those who have Children, or the charge of their Education […] carefully to prevent the undue Connexion of Ideas in the Minds of young People".[109] If not watched and checked, unnatural combinations of ideas set moral notions and actions awry.[110] If they went unchecked, men under their deceit, "uncapable of Conviction", applauded "themselves as zealous Champions for Truth, when indeed they are contending for Error"; time alone could cure them providing the unnatural connections of ideas faded in their minds "by disuse".[111] Here Locke sounded notes of hope and warning: "Madness" was curable, but the cure for it was an arduous process of education to self-discipline, beginning "from the very first dawning of any Notions" in children's minds.[112]

REASON AND RIGHTS

Locke believed, I have suggested, that only the individual who can uphold his rights has rights; and that he can uphold his rights if and only if he is prepared to challenge and, if necessary, to kill anyone who attempts to withdraw his rights. As this appellate power to kill "is grounded on his having Reason",[113] it can be held only by those who act correctly through understanding, that is, by the individuals capable of acting according to the dictates of reason. The main conclusion to which Locke was committed is thus that reasonableness and rights go hand in hand.

This is exactly why, according to the *Two treatises*, madmen and idiots are not rightholders. Locke wrote that "Lunaticks and Ideots are never set free from the Government of their Parents" because "Madmen […] cannot

[108] *Essay* IV.xx.10, 713. Cf. op. cit., IV.xx.15, 717: "that a Man should afford his Assent to that side, on which the less Probability appears to him, seems to me […] impossible".
[109] Op. cit., II.xxxiii.8, 397 (added to the fourth edition). See also *Education*, §37, 107 (added to the third edition).
[110] *Essay* II.xxxiii.9 and 17–18, 397 and 400 (added to the fourth edition).
[111] Op. cit., II.xxxiii.13 and 18, 398 and 401 (added to the fourth edition).
[112] Adapted from op. cit., IV.xx.10, 713.
[113] Adapted from *TT* II.63.2.

possibly have the use of Right reason to guide themselves".[114] Nor are children rightholders. They must not challenge their parents' authority. A child must "be in subjection to his Mother and Nurse, to Tutors and Governors, till Age and Education brought him Reason and Ability to govern himself, and others".[115] After 1689, Locke was no longer so confident that maturation makes men reasonable; he began laying particular emphasis on education to reasonableness. He came to put his trust in a massive intellectual undertaking of enlightening the people so that they can follow the dictates of reason. In the 1690s he explored the new ways of governing assent rationally that derived from the tradition of the Cartesian logic of ideas.[116] In 1703, in the last word on politics before his death, he advised "a Gentleman, whose proper calling is the service of His Countrey; and so is most properly concerned in Moral, and Political knowledge" to give priority to learning "Right Reasoning".[117]

In Locke's view, those who are not reasonable may in practice enjoy their rights, but their "rights" are in fact mere privileges that can be curtailed at will, and their status is equivalent to that of a slave. This is the view that he began developing in the context of the Exclusion Crisis. In 1679, in the same context, Hobbes developed the contrasting view that we find in his last word on politics. "Law and Right differ", Hobbes claimed, because "Law is a command. But Right is a Liberty or priviledge from a Law to some certain person though it oblige others."[118] When seen from this Hobbesian vantage-point, the individual's political life can be described as an effort to maximize the enjoyment of his subjective "rights", or privileges.

In due course the Hobbesian perspective on the notion of rights became, it seems to me, that of a tolerant liberal, who believes that individuals should be free to pursue happiness in the peaceful and stable setting of a pluralist society. To paraphrase Locke, by "submitting to the Laws of any Country, living quietly, and enjoying Privileges and Protection under them", the individuals in a liberal state can hope to enjoy their "rights" to the maximum degree. The state prevents any individual from invading the rights of another individual. Locke dismissed such ideals of social happiness and pacification prophylactically. He asserted that "submitting to the Laws of any Country, living quietly, and enjoying Privileges and Protection under them, *makes not*

[114] Op. cit., II.60.9–13.
[115] Op. cit., II.61.15–19.
[116] Ayers 1993; and Schuurman 2004.
[117] John Locke, "Mr Locke's Extemporè Advice & c.", *Education*, Appendix III, 319–327, at 319–320.
[118] Chatsworth, Bakewell, Derbyshire, Hobbes MS D.5, discussed in Skinner 2002. Cf. Malcolm 2002, 81 and 142–143.

a Man a Member of that Society".[119] His vision was that of a community in which all rational citizens – instead of trying to maximize the range of their subjective privileges, having alienated their right to self-government – exercise the right to act politically for themselves and endorse the militant doctrine of *provocatio*.

[119] *TT* II.122.1–3 (emphasis retained).

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