

Property Rights in the Shift from ‘Community’ to ‘Michaelist’^{*}

Abstract. This paper examines Franciscan theories of property rights in the second and third decades of the fourteenth century. The writings of Bonagratia of Bergamo and Michael of Cesena are studied in particular because they were active in both decades, where different concerns might have shaped how they conceived of their poverty, and thus how property ownership worked. It is shown where and how much their description of what constitutes Franciscan poverty did change, despite the fact that the texts of both decades relied on the same papal declarations on Franciscan poverty, notably *Exiit qui seminat* (VI 5.12.3). In addition, an effort has been made to illuminate how deeply Roman law ideas about property rights shaped the writings of all sides of the debates.

One of the most neglected phases of the Franciscan poverty controversy is the decade and a half before the emergence of the (broadly speaking) Michaelist position on Franciscan and evangelical poverty in the 1320s.¹ This is surprising, if only because many momentous changes that occurred in the second and third decades of the fourteenth century had a direct bearing on how Franciscan poverty

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1. The list of edited and unedited texts in Heyse, AFH 42 (1949): 213–16, e.g., remains largely unaltered. Abbreviations are introduced in their respective sections, except for the following, which are more general, and for legal references, which follow the guidelines set out in J. A. Brundage, *Medieval Canon Law* (London 1995) 190–205. Divisions of texts are cited in order of decreasing generality, with page numbers following in parentheses unless there are no other meaningful divisions of the text.

AF	<i>Analecta Franciscana: sive, Chronica aliaque varia documenta ad historiam Fratrum Minorum spectantia edita a Patribus Collegii S. Bonaventurae adiuvantibus aliis eruditis viris</i> , 17 vols. (Quaracchi 1885–)
AFH	<i>Archivum franciscanum historicum</i> (Quaracchi) 1908–
ALKG	H. Denifle – F. Ehrle, edd., <i>Archiv für Literatur- und Kirchengeschichte des Mittelalters</i> , 7 vols. (Graz 1955–1956)
BF	J. H. Sbaralea – C. Eubel, edd., <i>Bullarium franciscanum</i> , 7 vols. (Rome 1983)
<i>Exiit</i>	<i>Exiit qui seminat</i> (VI 5.12.3), in Friedberg, 2:1110–21
<i>Exivi</i>	<i>Exivi de paradiso</i> (Clem. 5.11.1), in Friedberg, 2:1193–1200
Friedberg	A. Friedberg ed. <i>Corpus iuris canonici</i> , 2 vols. (Editio lipsiensis secunda; Leipzig 1959). References to canon law are to this edition, excluding those to the <i>Extravagantes Iohannis XXII</i> (see Tarrant on p. 20n98)
G&F	G. Gál – D. Flood, edd., <i>Nicolaus Minorita: Chronica. Documentation on Pope John XXII, Michael of Cesena and The Poverty of Christ with Summaries in English. A Source Book</i> (St. Bonaventure, NY 1996)
<i>Glos. ord.</i>	<i>Glossa ordinaria</i> ; the editions used are given when first used
Krueger	P. Krueger et al. edd. <i>Corpus iuris civilis</i> , 3 vols. (Dublin 1966). References to Roman law are to this edition
<i>RegB</i>	Francis of Assisi, <i>Regula bullata</i> , in C. Esser ed. <i>Opuscula sancti patris Francisci Assisiensis</i> (Grottaferrata 1978)
Tocco	F. Tocco, ed., <i>La Quistione della povertà nel secolo XIV secondo nuovi documenti</i> (Naples 1910)

was conceived, and how it could or should be spoken about. It is the purpose of this essay to examine what changed regarding the (eventually deposed) ‘mainstream’ position on Franciscan poverty during, roughly, these two decades. However, instead of speaking only about what constitutes poverty, what I would like to do instead is reverse the approach and examine how the theory of property rights changed between the texts of the so-called Community to those of the Michaelists.² While it would be difficult to provide a total history of this period in the space of an article, a reasonably complete picture can be seen if we consider the following topics: the account of property rights as it is described in the treatises of the so-called Community during the ‘Great Debate’ of 1309–1311; the changes in the Order’s *Constitutiones generales*; a brief look at some of the more ‘legal’ aspects of Pope John XXII’s writings on Franciscan poverty; and, finally, the early Michaelist account of property rights. Other aspects, such as the criticisms of Ubertino da Casale (ca. 1259–post 1328), are adduced to provide further context. The emphasis throughout is to examine the more legal-theoretical nature of these texts.

Before turning to these specific topics, however, it is important to clarify what I mean by some of the loaded terms used in the paragraph above. The easiest of these is the term ‘Michaelist.’ Older literature often referred to the Michaelists as *fraticelli de opinione*, but Michaelist is to be preferred because it highlights the fact that Michaelists were centered around the Minister-General, Michael of Cesena (d. 1342), who was deposed in 1328.³ Michaelists, quite simply, did not acknowledge the deposition because it was instigated by a pope whose declarations about evangelical poverty, they thought, had made him a heretic and, *ipso facto*, less than any catholic (*quia si papa est haereticus, minor est quolibet catholico*).⁴

2. Cf. P. Grossi, ‘*Usus facti*: La nozione di proprietà nell’inaugurazione dell’età nuova’, *Quaderni Fiorentini per la storia del pensiero giuridico moderno* 1 (1972) 287–355 (292), although I am not sympathetic to the bigger themes of this essay. See the critical evaluation in R. Lambertini, *La povertà pensata. Evoluzione storica della definizione dell’identità da Bonaventura ad Ockham* (Collana di storia medievale, 1; Modena 2000) 40–41.
3. C. Dolcini, ‘Il pensiero politico di Michele da Cesena 1328–1338’, *Crisi di poteri e politologia in crisi: Da Sinibaldo Fieschi a Guglielmo d’Ockham* (Bologna 1977) 147–221, remains the best single study of Michael’s thought. A brief, but recent account of Michael’s activities around the time of Pope John XXII’s reign can be found in M. Robson, *The Franciscans in the Middle Ages* (Woodbridge 2006) 130–40.
4. Quoted in *App. maior*, 407–08, *App. mon.*, 854–855, and *OND* 1.92–95 (295); see p. 25n126 for an explanation of the abbreviations. Both Michael and William were relying on the gloss *In haeresim* to C. 24 q. 1 c. 1. See J. Miethke, ‘Der „theoretische Armutsstreit“ im 14. Jahrhundert. Papst und Franziskanerorden im Konflikt um die Armut’, *Gelobte Armut. Armutskonzepte der franziskanischen Ordensfamilie vom Mittelalter bis in die Gegenwart*, edd. H.-D. Heimann et al. (Paderborn 2012) 243–283 (273–74), for a recent narrative of the sequence of events. For the *Glossa ordinaria* to Gratian’s *Decretum*, I have relied on Gratian, *Decretum mit der Glossa ordinaria von Johannes Teutonicus in der Bearbeitung von Bartholomaeus Brixiensis* (Mainz 1472), URL: <http://www.bsb-muenchen.de/>, digitized by the Bayerische Staatsbibliothek.

Besides Michael of Cesena, the most noteworthy Michaelists were Bonagratia of Bergamo (d. 1340), Francis of Marchia (ca. 1285/90–ca. 1345), and William of Ockham (ca. 1287–1347). With few exceptions, it used to be the case that everyone but Ockham languished in relative obscurity, but it is increasingly untrue today.⁵

The historiography of the Community has not fared so well, unfortunately. The problem is compounded by the imprecision with which earlier studies deployed the term 'Community.' The basic problem is that the word suggests a homogenous group, united in its opposition to an equally monolithic group of dissident 'Spiritual' Franciscans, which is itself no less slippery a term. Even refinements such as the subdivision into 'moderate' and 'relaxed' wings of the Community paints too united a picture.⁶ It is, in fact, a complicated story; and since this is not the place to delve into this issue, let me clarify the pragmatic way the term is used here.⁷ As the texts under consideration repeatedly use the phrases *pro ordinis parte* and *in nomine ordinis*, there is reason to associate the opinions expressed in these texts with the leadership of the order rather than all non-"Spiritual" Franciscans, or even some nebulous subset of the order in general. Thus, instead of speaking of the Community in the pages that follow, I have instead opted to speak of the leadership of the order, with the understanding that they believed they were

5. Miethke, 'Der „theoretische Armutsstreit“', and Id., 'Dominium, ius und lex in der politischen Theorie Wilhelms von Ockham', *Lex und Ius. Beiträge zur Grundlegung des Rechts in der Philosophie des Mittelalters und der Frühen Neuzeit*, edd. A. Fidora – M. Lutz-Bachmann – A. Wagner (Politische Philosophie und Rechtstheorie des Mittelalters und der Neuzeit, Texte und Untersuchungen, II.1; Stuttgart-Bad Cannstatt 2010) 241–269, contain the most up to date bibliography; I am indebted to Professor Miethke for providing me with copies of these articles. Similarly, R. Lambertini, 'Political Theory in the Making. Theology, Philosophy and Politics at the Court of Lewis the Bavarian', *Philosophy and Theology in the Studia of the Religious Orders and at Papal and Royal Courts*, edd. K. Emery Jr – W. J. Courtenay – S. M. Metzger (Rencontres de Philosophie médiévale, 15; Turnhout 2012) 701–724 (707–17), provides an important, up to date account, which provides numerous references to his studies of this period in relation to other current scholarship.
6. D. Nimmo, *Reform and Division in the Franciscan Order 1226–1538. From Saint Francis to the Foundation of the Capuchins* (Bibliotheca seraphico-capucina, 33; Rome 1987) 51–78, which nevertheless remains a fundamental contribution to Franciscan historiography. See also D. L. Douie, *The Nature and the Effect of the Heresy of the Fraticelli* (Manchester 1932) 143–201; M. D. Lambert, *Franciscan Poverty. The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210–1323* (St. Bonaventure, NY 1998²) 157–269; G. Leff, *Heresy in the Later Middle Ages. The Relation of Heterodoxy to Dissent, c. 1250–1450* (Manchester 1999) 1:139–66, 238–255; and J. Moorman, *A History of the Franciscan Order from Its Origins to 1517* (Oxford 1998) 155–204, 307–25. They all suffer from a similar deficiency (which is easier to note than remedy), but remain invaluable nonetheless.
7. Cf. D. Burr, 'Effects of the Spiritual Franciscan Controversy on the Mendicant Ideal', *The Origin, Development, and Refinement of the Medieval Religious Mendicancies*, ed. D. S. Prudlo (Brill Companions to the Christian Tradition, 24; Leiden 2011) 277–305 (277–79). The best treatment of this knotty topic is M. F. Cusato, 'Whence "The Community"?', *Franciscan Studies* 60 (2002) 39–92.

speaking on behalf of the order much like the *relaxaciones* described by the likes of Angelo Clareno and Ubertino of Casale were meant to refer to many, but not all, Franciscans.⁸

What is important from the perspective of continuity is that both Michael's and Bonagratia's names are associated with attempts to suppress dissident opinions in the second decade of the fourteenth century only to be a source of dissident opinions themselves over the next two decades.⁹ The immediate question that comes to mind is whether the Michaelist theory of property rights differed from the views of the leadership of the order in the previous decade. Certainly no Michaelist ever suggested this; and, in fact, they continued to rely on the same authorities as before, notably *Exiit*. Yet much had changed. Ubertino's sustained criticisms of the order's so-called relaxations and violations of poverty notwithstanding, Pope John XXII's request for debate as well as his own declarations introduced new terminology and conceptual precision to the controversy. The order's constitutions of 1325 and 1331 bear manifest witness to the altered circumstances. There was, clearly, plenty of room for change. But did they, or can it simply be seen as a shift of emphasis with the underlying theory unchanged?

One shift of emphasis is well known, and is best mentioned at the outset: the role of *usus pauper* in the practice of Franciscan poverty. For the Michaelist-John controversy the question of *usus pauper* was moot, while it stood at the centre of controversy during the pontificate of Clement V (r. 1305–1314).¹⁰ The *usus pauper* controversy was a qualitative one; the question then was about *kind* of use was entailed by a Franciscan's vow of poverty. But what was understood throughout was that, whatever kind of use was appropriate to or required by the Franciscan

8. Of course, as noted by Burr, 'Effects' 279, even leaders of the order could be sympathetic to Olivi and his views of poverty. See, e.g., the opinion of Raymond Geoffroi, Minister-General in the years 1289–1295, included and refuted in *Infrascr. dant* 3.142–44 (see below, p. 5n12). E. L. Wittneben, *Bonagratia von Bergamo. Franziskanerjurist und Wortführer seines Ordens im Streit mit Papst Johannes XXII* (Studies in Medieval and Reformation Thought, 90; Leiden 2003) 29–34, provides careful analysis. Ubertino's complaints are analyzed in D. Burr, *The Spiritual Franciscans. From Protest to Persecution in the Century After Saint Francis* (Philadelphia 2001) 261–277, and more recently in Robson, *Franciscans in the Middle Ages* 119–24.
9. Wittneben, *Bonagratia von Bergamo*, is the most detailed examination of the role Bonagratia played, which included a key role in drafting the various appeals written in Michael's name; cf. Ead., 'Bonagratia von Bergamo († 1340). Eine intellektuelle Biographie in der politischen Diskussion des 14. Jahrhunderts', *Politische Reflexion in der Welt des späten Mittelalters / Political Thought in the Age of Scholasticism. Essays in Honour of Jürgen Miethke*, ed. M. Kaufhold (Studies in Medieval and Reformation Traditions. History, Culture, Religion, Ideas, 103; Leiden 2004) 247–267 (261).
10. For Clement and the circumstances surrounding the promulgation of *Exivi*, see now A. Bartocci, 'La Regola dei frati minori al Concilio di Vienne e la bolla *Exivi de paradiso* (1312) di Clemente V', *AFH* 96 (2003) 45–84.

status, it was a use free of property rights, both individually and in common.¹¹ Even so, the texts as we have them show that the Franciscan position on poverty had developed a much more elaborate theory of the nature of property rights than a simple division of use and ownership.

PROPERTY RIGHTS DURING THE 'GREAT DEBATE' (1309–1311)

The pontificate of Clement V was a period of internal controversy for the Franciscan order.¹² There was disagreement about a number of topics, especially on the interrelated matters of the teachings of Peter of John Olivi, who had passed away a decade earlier (1298), and on how the Franciscan vow of poverty was to be interpreted and observed.¹³ In 1309, Clement V canvassed Franciscan opinions about four related questions: (1) whether they knew of any heretics in the order; (2) whether the *Rule* was being observed in the order; (3) whether there were any errors in the books of Olivi; and (4) about the persecutions they (and others) were experiencing.¹⁴ As Eva Wittneben noted, the very phrasing of the questions suggests Clement was, initially at least, favourably disposed to the plight of the spirituals.¹⁵

11. Ubertino's *Reducendo* 36–53 (45) and 95–96 (47; see abbreviations in the next note) argued much like Pope John XXII would later that year (1322): that lordship and use cannot be separate in consumables. Ubertino's reference to Justinian's *Codex* rather than *Digest*, however, makes one wonder if someone else suggested the argument to him.

12. Please note the following abbreviations:

<i>Circa materiam</i>	<i>Declaratio communitatis circa materiam de usu paupere</i> , in Heysse, AFH 10 (1917): 116–22
<i>Infrascr. dant</i>	Bonagratia and Raymond, <i>Infrascripta dant</i> , in ALKG, 3:141–60
<i>Reducendo</i>	Ubertino da Casale, <i>Reducendo igitur</i> , in C. T. Davis, <i>Ubertino da Casale and his Conception of Altissima paupertas</i> (Estratti dagli «Studi medievali», 8; Spoleto 1984), 43–56
<i>Religiosi viri</i>	<i>Communitatis responsio 'religiosi viri' ad rotulum Fr. Ubertini de Casali</i> , in Chiappini, AFH 7–8 (1914): 659–75; 56–80
<i>Rotulus</i>	Ubertino da Casale, <i>Rotulus iste</i> , in ALKG, 3:93–137
<i>Sanctitas vestra</i>	Ubertino da Casale, <i>Sanctitas vestra</i> , in ALKG, 3:51–89
<i>Sap. aedi.</i>	<i>Sapientia aedificavit = Responsio communitatis ad Rotulum Ubertini</i> , printed together with the <i>Rotulus</i>
<i>Sol ortus</i>	Raymond of Fronsac, <i>Sol ortus</i> , in ALKG, 3:7–32
<i>Sup. tri. scel.</i>	Ubertino da Casale, <i>Super tribus sceleribus</i> , in Heysse, AFH 10 (1917): 123–74

13. See Burr, *Spiritual Franciscans* 88–110, for an analysis of the players and events. G. Tarello, 'Profili giuridici della questione della povertà nel francescanesimo prima di Ockham', *Scritti in memoria di Antonio Falchi* (Milan 1964) 338–448 (404–11), while older, is somewhat more sensitive to the juridical elements of the debate.

14. *Sol ortus* 18.22–19.2, described the questions in this way. Ubertino's *Sanctitas vestra* 51.10–22, orders the list somewhat differently.

15. Wittneben, *Bonagratia von Bergamo* 18.

Infrascripta dant (1311)

One of the responses was made by the former Minister-General, Raymond Geoffroi, who, rather cautiously, came out in favour of the Spirituals. This provoked a response from Bonagratia and Raymond Fonsac, known as the *Infrascripta dant*, which dates from about 1311, and which they apparently wrote before they saw any of Ubertino's responses.¹⁶ In this early document, when it deals with property rights, the focus is on examples of alleged violations of Franciscan poverty, and thus on how and what things are being used; the underlying assumption is, naturally, that the Franciscans are not property-holders in any sense, except where—*absit!*—they act as if they were. Thus, there is very little in the way of discussion about *ius*, *dominium*, or *proprietas*.

There is mention of how the Church 'appropriated to itself the ownership and possession of all buildings and things that the Friars Minor use, with simple use left to them as, so to speak, pilgrims ... thus, since they have simple use of fact, they cannot destroy them because they cannot worsen or ruin an item of a property-holder.'¹⁷ Here the central idea can be understood in Roman law terms in the following way: simple use, even a use of right, falls short of a right of disposal (*abusus*), which tends only to be available to the individual who has *dominium*.¹⁸ As for the alms given by pious donors, Bonagratia and Raymond explained that, unless the donor recalled the alms, it is assumed that their will remains set on the friars using the alms.¹⁹ One can see quite clearly here the kernel of the idea that friars use things by special licence as well as the idea that lordship of consumables can remain separate right to the point of their total consumption. (Unless specified otherwise, I shall use "lordship" to refer to proprietary lordship.)

Certain other features of lordship seem to remain with the order, however, albeit at arm's length. Important for Bonagratia and Raymond were the provisions

16. *Sol ortus* 21.4–11. Burr, *Spiritual Franciscans* 115–36, offers an assessment of Ubertino's responses to the four questions posed by Clement. On the dating, see Ehrle in ALKG, 3:138–40.

17. *Infrascr. dant* 146.28–147.6: 'tum quia ecclesia romana, cuius pedibus et dispositioni totaliter ex forma dicte regule subicitur dictus ordo, appropriavit sibi proprietatem et possessionem omnium edificiorum et rerum, quibus fratres minores utuntur, usu simplici tanquam peregrinantibus derelicto ... et ideo cum habeant simplicem facti usum, non possent ea destruere, quia non possunt deteriorare vel deformare rem proprietarii.'

18. B. Nicholas, *An Introduction to Roman Law* (Clarendon Law Series; Oxford 1962) 154.

19. *Infrascr. dant* 150.29–35: 'Nec diceretur forte ob hoc in alios usus convertere, quam dans voluerit. Quia enim intuitu pietatis donans voluerit concedere elemosinam, si non revocat, semper in eadem voluntate perseverare presumitur, ut in usum pium convertat, in hac extimatione fatianda succedere videtur prelati, nisi voluntas offerentis mutata doceatur; licet hoc pro certo non asseratur, sed posset rationabiliter dubitari, et ideo temere non sunt talia ut flagitia reprehendenda.'

of *Exultantes in Domino*, a bull issued by Martin IV in 1283.²⁰ This bull was important for Bonagratia and Raymond in two major respects. First, it insisted that the friars 'can fight in court for no temporal thing.'²¹ The inability to take legal action in court was to be a mainstay of the interpretation of the friars as fundamentally 'rightless.' Yet, the second important provision of the bull significantly mitigated the first, for it gave the friars control over the nomination and removal of *personas speciales*, who were to deal with the goods donated to the friars for their use. In fact, these agents of the friars had a 'full, general, and free power' to act in- and outside of court to protect not only the alms given for use by the friars, but even to protect the friars' 'immunities, liberties, rights, privileges, and concessions.'²² Although modern historiography has not been kind regarding the provisions of this bull,²³ Bonagratia and Raymond accepted the provisions of *Exultantes*, and thought it wrong to criticize them as they had been established by papal authority.²⁴ The key must have been that the friars did not exercise these powers directly, which suggest by their very denial that Bonagratia and Raymond considered them features of property ownership. In subsequent writings, they would expand on this point.²⁵

Infrascripta dant discusses use at far greater length, mainly in an effort to deny the relevance of *usus pauper*, which was a concept they thought added little to Franciscan poverty beyond an unacceptable level of obscurity.²⁶ Bonagratia and Raymond insisted that, rather than worry about this vague concept, the general constitutions of the order ensured use was restricted enough;²⁷ and the *Rule* itself demanded a 'beggarly' (*vilis*) use on many points, such as using cheap clothes and not riding animals. However, Bonagratia and Raymond claimed that such things were not 'of the substance of the *Rule*,' which means that the pope can dispense

20. BF, 3:501a–02a. This bull was reissued as an apostolic constitution in 1290 by Nicholas IV under the title *Religionis favor* (BF, 4:190b), five years after it was accepted by the order. On this bull, see now A. Bartocci, *Ereditare in povertà. Le successioni a favore dei Frati Minori e la scienza giuridica nell'età avignonese (1309–1376)* (Pubblicazioni del Dipartimento di Scienze Giuridiche Università degli Studi di Roma «La Sapienza», 32; Naples 2009) 306–14, and D. Burr, *Olivi and Franciscan Poverty. The Origins of the Usus pauper Controversy* (Philadelphia 1989) 100–01.

21. BF, 3:501a: 'iidemque Fratres, qui pro nulla re temporalis possunt in Iudicio experiri.'

22. BF, 3:501b–02a. These people are nevertheless said to act in the name of the church.

23. Ehrle, ALKG, 3:595, damningly, suggested the *syndaci* [sic] had become 'reine Puppen.'

24. *Infrascr. dant* 150.39–151.7. This was in line with the decision reached in 1285 to accept the provisions of the bull; see the *Acta capituli generalis Mediolani* (1285), II. *Constitutiones* no. 23, in Callebaut, AFH 22 (1929): 289.

25. See p. 10 below for a similar argument.

26. *Infrascr. dant* 154.14–18: 'Hec autem verba, scilicet dicere, usus pauper est de substantia sive essentia regule, adeo sunt obscura, quod etiam inter sapientes dubitationem pariunt et multo fortius apud minus sapientes vel novitios, quorum conscientie illaquearentur, si determinaretur, usum pauperem esse de substantia regule supradicte.'

27. The constitutions were said to 'add' to the *Rule*; see *Infrascr. dant* 152.16–153.24, for examples.

with them if he is so inclined.²⁸ However, this is not true for substantial elements (*substantialia*) of the *Rule*.²⁹

Thus the key for Bonagratia and Raymond regarding use, was that it was limited by the *Rule*, *Exiit*, and the constitutions of the order. It was a simple use of fact, which did not allow them to diminish or wear down non-consumables.³⁰ The interaction of use and lordship is not discussed in any detail, presumably because the separability of the two had been assumed since Gregory IX promulgated *Quo elongati* in 1230.³¹ Instead, what Bonagratia and Raymond spoke about was the manner in which the Franciscans were to use things. In a phrase hearkening back to the *Rule*, Bonagratia and Raymond explained that one was ‘to use things as not one’s own.’³² A Franciscan therefore had to avoid the desire to use things; this was more important than the nature of the thing used.³³ It was a question of will: the friars were not to have any possessive or dominative desire when they used the things they had vowed not to own. This position had a long pedigree.³⁴ The *Rule* itself enjoined the friars to live as strangers and guests,³⁵ and even as far back as Benedict a monk was to give up control over his own will.³⁶ The idea that Franciscans had to avoid using things with possessive or dominative intentions

28. *Infrascr. dant* 155.38–156.3: ‘et quia in huiusmodi rerum usibus constitutiones ordinis satis fratres coarctant, quas si excederent, peccarent; et quia in multis regula fratibus usum vilem indicit, sicut uti vestimentis vilibus et non equitare, nisi manifesta causa et similia, in quibus usibus frater posset peccare mortaliter notabiliter excedendo, quamvis hec non sint de substantia regule, quia nec papa tunc in hiis dispensare potest vel licentiam dare vel mandare, ut dictum est.’

29. *Infrascr. dant* 154.27–31: ‘Certum ist [sic] enim, quod substantialia sive essentialia adeo sunt annexa regule, quod contra eam nec summus pontifex dispensare potest sue licentiam indulgere; exemplum ponitur de abdicatione proprietatis et custodia castitatis. Et hec dicuntur in decretali: *Cum ad monasterium* [X 3.35.6] in fine.’ Cf. *Infrascr. dant* 156.6–16.

30. See above, p. 6n17.

31. See H. Grundmann, ‘Die Bulle «Quo elongati» Papst Gregors IX’, *AFH* 54 (1961) 3–25 for an edition and introduction; a detailed study of the bull can be found in F. Elizondo, ‘Bullae «Quo elongati» Gregorii IX et «Ordinem vestrum» Innocentii IV. De duabus primis regulae Franciscanae authenticis declarationibus’, *Laurentianum* 3 (1962) 349–394 (350–67; 379–82).

32. *Infrascr. dant* 155.26: ‘uti rebus ut non suis.’

33. *Infrascr. dant* 146.26–28: ‘quia in hiis rebus non usus pretiosarum rerum est in culpa, sed ipsa utendi libido, ut dicit Augustinus et ponitur XLI. d. [D. 41 c. 1].’

34. A. S. Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge 1997) 10–22, offers perceptive analysis.

35. *RegB* 6.2 (231): ‘Et tanquam peregrini et advenae [cf. 1 Pet. 2:11] in hoc saeculo in paupertate et humilitate Domino famulantes vadant pro eleemosyna confidenter’; and *Testamentum* 24, in Esser ed. *Opuscula* 312.

36. C. H. Lawrence, *Medieval Monasticism* (Harlow, UK 2001³) 27, notes that for St Benedict, ‘The monastic life began with the intention to renounce self-will and to place oneself under the will of a superior.’ St Basil held a similar position: ‘The novice was to renounce his own will and obey the superior in everything, in spirit as well as in act, on the model of Christ, who was “obedient unto death”’ (ibid. 9–10).

remained a feature of Franciscan writings on poverty in the thirteenth century.³⁷ But it was a commonplace of Roman law, too, as Bonagratia, a *princeps litigiorum* in Angelo Clareno's characterization, would have been well aware.³⁸ The *Digest*, for example, explained that 'we acquire possession by body and soul, not by soul alone, nor by body alone.'³⁹

Two Responses to Ubertino's Rotulus

We have two similar responses to Ubertino's *Rotulus*. The first, *Religiosi viri*, was probably composed in time for the opening of the Council of Vienne (October 1311), while the second, *Sapientia aedificavit*, was likely composed in the spring of 1312 or thereabouts.⁴⁰ Due to their similarities, it is best to consider them together.

What set Franciscans apart from other religious was their commitment to the highest poverty, which was fundamentally a poverty of expropriation made concrete through the abdication of all ownership, both individually and in common.⁴¹ Thus, in the case of donations, the *ius* and *dominium* remains always with the

37. See, e.g., the rule commentary of Hugh of Digne (ad *RegB* 6.1), in D. Flood ed. *Hugh of Digne's Rule Commentary* (Grottaferrata 1979), 155.25–156.7, where the key phrases are 'Sic alienis tam libris quam rebus aliis utimur, vescimur cibis et induimur vestimentis,' and 'sua uti auctoritate non valent.' A similar sentiment can be found in Olivi's commentary (ad *RegB* 6.2), in Id. ed. *Peter Olivi's Rule Commentary*. Edition and Presentation (Veröffentlichungen des Instituts für europäische Geschichte Mainz, 67; Wiesbaden 1972), 160.4–31. Cf. Peckham's comments in C. L. Kingsford – A. G. Little – F. Tocco, edd., *Fratris Johannis Pecham, quondam archiepiscopi cantuariensis, tractatus tres de paupertate, cum bibliographia* (Aberdeen 1910) 40, about the connection between use and goodness; see Grossi, 'Usus facti' 339, who nevertheless generally over-emphasizes the supposed voluntarism of Franciscan thought.

38. O. Rossini, ed., *Angeli Clareni opera II. Historia septem tribulationum ordinis minorum*, with an intro. by H. Heilbling (Fonti per la storia dell'Italia medievale. Rerum italicarum scriptores, 2; Rome 1999) 297; see further M. Damiata, *Guglielmo d'Ockham: Povertà e potere*, 2 vols. (Florence 1978–1979) 1:197.

39. Dig. 41.2.3.1 (698): 'Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.' As Ulpian said, 'Nihil commune habet proprietas cum possessione' (Dig. 41.2.12), though of course possession often serves as the foundation of ownership; see Nicholas, *Introduction* 107, 110–15. Further discussion in A. Berger, 'Encyclopedic Dictionary of Roman Law', *Transactions of the American Philosophical Society*, NS. 43.2 (1953) 333–809 (637), and D. L. C. Miller, 'Property', *A Companion to Justinian's Institutes*, ed. E. Metzger (Ithaca 1998) 42–79 (49–65).

40. ALKG, 3:91–92; and Chiappini, AFH 7–8 (1914): 657. Chiappini thought the authorship of both texts belonged to Ryamond of Fronsac, and considered Bonagratia of Bergamo an important contributing author; Heyse, AFH 10 (1917): 104n3, expressed reservations.

41. *Religiosi viri* 570–574 (69): 'Et volendo commendare hanc paupertatem, que est abdicatio omnis proprietatis tam in speciali quam in communi, dicit regula demonstrando paupertatem expropriationis sic alte, "hec est illa celsitudo altissime paupertatis, que vos [...] pauperes rebus fecit, virtutibus sublimavit"' [*RegB* 6.4]. Cf. *Religiosi viri* 611–616 (70).

donor, and the friars were claimed to have no *actio*, that is, legal recourse for what one is owed,⁴² against the person holding the alms or money.⁴³

Simply put, rights of seeking or demanding do not belong to the friars.⁴⁴ One might be forgiven for thinking it hard to consider the lack of an *actio* a particularly compelling feature of penuriousness when the friars have, by *Exultantes*, the power to appoint and remove from office those who have control over the pursestrings; the leaders of the community, however, did not find the arrangement strange. The provincial ministers had the authority to nominate the procurators, but the procurators belong to the pope and the Church, as Martin IV's bull legislated. Any action they undertake is done in the name of the Church.⁴⁵

Much the same can be said about Ubertino's complaint that these agents of the friars—*depositarii*, *bursarii*—who are led as if they were their own personal errand boys, and who were to spend money on books at the whim of the friar. Often, while these youths carry the strongbox with the money in it, the friar himself will carry the key. Such individuals appear to be more like lords of not only the money, but of the spending of servants.⁴⁶ Yet, argued the leaders of the community, appearances aren't everything. No *ius* or *dominium* is acquired by carrying a key, for the lordship of the money remains with the donor.⁴⁷ The rationale once again lies in a consideration of the intentions of the donor and the friar. Donors do not intend to give anything to the friars beyond what agrees with their *Rule* and profession; to do otherwise, would be to ruin a friar's hopes for eternal life.⁴⁸ For

42. Inst. 4.1 pr. (47): 'actio autem nihil aliud est, quam ius persequendi iudicio quod sibi debetur.' Broadly speaking, two kinds of *actio* were known in Roman law, personal (*actio in personam*) and real (*actio in rem*) actions. A personal action is when the relationship is person against person (usually a matter of debt), while a real action is person against thing (usually a matter of ownership). See the discussion in E. Metzger, 'Actions', *A Companion to Justinian's Institutes*, ed., Id. (Ithaca 1998) 208–228 (217–220), and Nicholas, *Introduction* 99–105.

43. *Sap. aedi.*, 108.8–11: 'Secundo, quia ius et dominium semper est donantis, non potest congauere frater, ut de suis divitiis gaudet dives, et sic temporalis vanitas est exclusa. Tertio, quia nullam actionem habet frater contra servanem, quomodocunque se habeat.' Cf. *Religiosi viri* 228–241 (665), explaining *Exiit* (2:1112).

44. *Religiosi viri* 975 (78): 'ius petendi vel exigendi tale relictum [sc. aliquid annuum] non competit fratribus.'

45. *Religiosi viri* 361–389 (64).

46. Ubertino, *Rotulus* 104.20–39; cf. C. T. Davis, 'Le pape Jean XXII et les Spirituels. Ubertain de Casale', *Franciscains d'Oc. Les Spirituels ca. 1280–1324* (Toulouse 1975) 263–283 (268).

47. *Sap. aedi.*, 107.25–27: 'respondetur, quod sicut pecunia in manu nuncii euntis ad locum propinquum pro re fratri necessaria erat in dominio dantis, ita et pecunia in bursa nuncii longe euntis cum fratribus vel sine fratribus. [...] respondetur, si frater portat clavem aliquando, tunc portaret eam ut clavem capsule vel arche, in qua est pecunia aliena, cuius clavem commendavit dominus pecunie ipsi fratri, per hoc fratri nullum ius vel dominium acquirendo.'

48. *Religiosi viri* 17–21 (56): 'Et si alias est dicere, quod dominus simpliciter et absolute dare intendi fratribus: respondetur quod nullus dare intendit fratribus, nisi prout competit regule et professioni eorum, sicut dicit declaratio [*Exiit*]. Quis enim eis daret elemosinam, ut faceret

their part, the friars themselves do not intend to take possession of things like money. They do not use things in general as *propria*.⁴⁹ Thus, it is not inappropriate for a friar to indicate his needs to the *nuncius* so that they can be taken care of. The friar knows he has absolutely no *ius*, and he does not mean to suggest that he is a lord of the money simply because he revealed the details of his needs.⁵⁰

What, then, are the qualities of owning property? Three points are made about the friars' relationship with money:

- (i) First, no *actio* or *ius* belongs to the friars against anyone for that money, which the depositor or nuncio of the lord has (the same holds for similar things);
- (ii) Second, the lord can reclaim the item when he wishes; and
- (iii) Third, the friars are not permitted to conserve the item except for urgent or imminent future necessities.⁵¹

Far different was the way an entrant could dispose of his goods prior to entering the order. Although Ubertino was unimpressed with this practice, *Religiosi viri* insisted, citing the *Rule* for support, that the entrant could dispose of his goods as he wished, even if that meant expending it on the needs of his brothers-to-be. In a very clear allusion to Justinian's *Codex*, they explained that that is the kind of power people generally have over their own things: 'the laws say that everyone has a free faculty of disposing of his own things, and that each person ought to be the legitimate master and lord over his own things.'⁵² This arrangement was in fact already enshrined in the general constitutions of Padua (1310), but it is just possible that Ubertino's complaints led to an omission of the clause that allowed

eos perdere vitam eternam?'

49. *Religiosi viri* 415–428 (65).

50. *Religiosi viri* 93–97 (58): 'nullus sani intellectus presumere debet, quod frater qui intimat nuntio tali suam necessitatem, intelligatur intimare ut dominus pecunie, in qua ex regula et declaratione [*Exiit*], scit se penitus nullum ius habere.' Cf. *Religiosi viri* 728–733 (72).

51. *Religiosi viri* 215–220 (61) 'Primo quia nulla actio vel ius competit fratribus contra quemcumque, pro illa pecunia quam, [aut] quodquod simile, habet depositarius vel nuntius domini. Secundo quia dominus potest eam repetere, quando vult. Tertio quia non permittetur fratribus, quod servetur pro eis nisi pro necessitatibus urgentibus vel de proximo imminentibus' (addition editor's).

52. *Religiosi viri* 331–337 (667): 'Ex quo [*RegB* 2.7] patet, quod si libere possunt de rebus suis facere quidquid volunt, quod prima possunt de eis pauperibus fratribus erogare sicut extraneis. Non enim haberent liberam facultatem de rebus suis facere quidquid vellent, si non possent Fratribus pauperibus erogare; quod esset contra verba regule, et contra iura dicentia, quod quilibet habeat liberam facultatem de rebus suis disponendi, et quod in re proprio, unusquisque debet esse legiptimus moderator et arbiter.' Cf. *Cod.* 4.35.21 (175): 'In re mandata non pecuniae solum, cuius est certissimum mandati iudicium, verum etiam existimationis periculum est. nam suae quidem quisque rei moderator atque arbiter non omnia negotia, sed pleraque ex proprio animo facit: aliena vero negotia exacto officio geruntur nec quicquam in eorum

an entrant to donate books and ‘other important things to convents or brothers in common.’⁵³

Regarding the second point, *Religiosi viri* also suggests that ‘the lordship of the money always remains in the power of the donor until it is converted to the needs of the friars.’⁵⁴ Although the passage would seem to suggest that there was an interval between the donation and the eventual use by the friars, according to (iii) we should perhaps infer that the time between conversion and use was (to be) instantaneous; or, in the case of non-consumables, even while the friar was using the thing. That is, the lord could recall his donation at any point up to when the friar was actually using the thing. Yet there remains an inconsistency if the donated money were spent on non-consumable items such as books or clothing. Is the idea supposed to be that once the money has been spent on a book, and thus ‘consumed,’ that it was too late for the lord to recall his donation? One possible answer is to suggest that lordship transferred at that point to the Church, to which ‘pertains the right, ownership, and lordship,’⁵⁵ but this is never specified outright. Neither *Religiosi viri* nor *Sapientia aedificavit* give a satisfactory answer to the question.

Property Rights in the Declaration on Usus pauper

One of the most mature works the leaders of the community ever produced is the *Circa materiam*, which was likely written around the turn of 1310.⁵⁶ Explicit authorship rests with the Minister-General, then Gonsalvo of Valboa, and the masters of theology then residing in Avignon, which *Sol ortus* listed as Vital du Four, Alexander of Alexandria, who would become the next Minister-General,

administratione neglectum ac declinatum culpa vacuum est.’

53. CPadua. 1.11c (AF 17:7): ‘Huiusmodi autem novitii, professionem facturi, nichil pro se in testamento vel alias retineant. Sed, si legaverint libros vel alia notabilia conventibus vel fratribus in comuni, ministri vel custodes de discretorum consilio possint et debeant de predictis legatis eisdem, cum professi fuerint, sicut secundum Deum viderint, providere.’ CAssis.¹ 1.15 (AF 17:63) dropped the second sentence entirely; the editors suggested Ubertino’s influence in a footnote. See p. 15n68, below, for these abbreviations.

54. *Religiosi viri* 83–85 (58): ‘et semper remanet pecunie dominium penes dantem, donec conversa sit in fratrum necessitatem.’

55. As stated by Innocent IV in *Ordinem vestrum* (BF, 1:401b), and often repeated.

56. Heyse, AFH 10 (1917): 105–06, so dates the text. Tarello, ‘Profili giuridici’ 406, wrote that it demonstrated ‘profound juridical erudition’; E. Müller, *Das Konzil von Vienne, 1311–1312. Seine Quellen und seine Geschichte* (Münster 1934) 336, is responsible for the ‘most mature’ label. The leaders of the community seemed to agree: it is mentioned three times in Raymond of Fronsac’s *Sol ortus*, 3.7, 3.19, 3.27 (19, 21, 22).

Giles of France,⁵⁷ and Martin of Alnwick. Fr Heyse attributed lead authorship to Alexander of Alexandria.⁵⁸

One of the great virtues of *Circa materiam* is its brevity, all the more precious for how rare it is in the mendicant poverty controversy. Even so, the text presents a strong case for rejecting the inclusion of *usus pauper* in the vow of poverty. Yet in doing so, it also presents a clear picture of the propertyless poverty that is included in the *Rule*.

Circa materiam analyzes two kinds of poverty: penury and strictness in use, and the familiar abdication of lordship and ownership of things; only the second type of poverty falls under the vow.⁵⁹ That is, the friars have no lordship or ownership, nor any right, having instead simple use of fact. The two practical outcomes are that friars do not have any ability to reclaim things in court,⁶⁰ and that the friars must use things like they belonged to someone else. The authors made the point that this kind of use must be considered a positive, extrinsic act: one is not merely denying his will, but is actively not-wishing for *proprium*, both individually and in common, that is, to render himself unable to have things in this way.⁶¹ The authors then concluded that this 'interior act of poverty' is more meritorious than the mere outward act of poor use, which may strike some as an unfortunate line of argument since John XXII would make a similar claim—he spoke of the interior disposition—in his own bulls.⁶² By avoiding this desire to use (*ipsa utendi libido*), one could have a use of simple fact at the table of a rich man without worrying about whether the food ought to be considered poor or rich.⁶³

57. Identified as Giles of Ligny by Heyse, AFH 10 (1917): 104n6.

58. *Sol ortus* 3.419; Heyse, AFH 10 (1917): 104. Cf. Moorman, *History* 199–200.

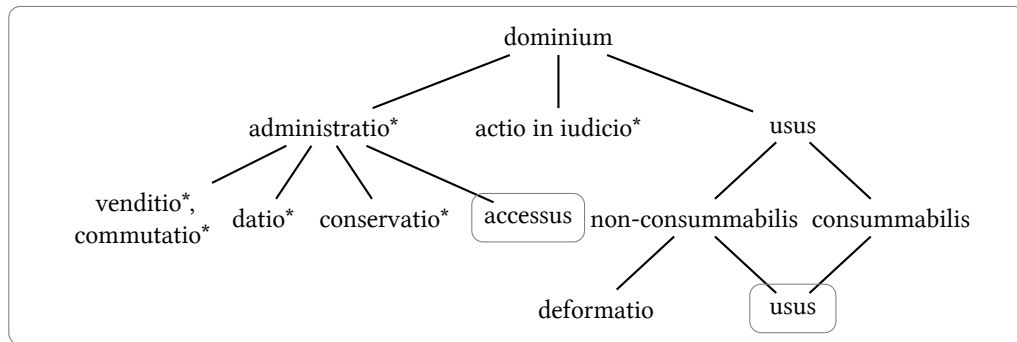
59. *Circa materiam*, 116.

60. *Circa materiam*, 117: 'quod Fratres nullum dominium habeant nec proprietatem in aliqua re et quod in nulla re temporali possint habere aliquid iuris, set tantum simplicem facti usum, et quod nullam rem possint repetere ut suam, et quod profexores eiusdem abdicationis debent habere, secundum condecetiam status, usum artum in rebus utendis.'

61. *Circa materiam*, 119: 'Dicendum, quod sicut in preceptis negativis est dare actum positivum, puta velle non mentiri vel non occidere, ita et in voto paupertatis est dare ac ponere, quia non consistit in simplici negatione actuum voluntatis, ymo actus voventis paupertatem est nolle in effectu proprium, nec in speciali nec in communi, et redere se impossibilem ad habendum. Et ad hoc sequitur actus extrinsecus positivus quem habet vovens paupertatem circa quamlibet rem qua utitur, quia utitur re ut non sua set ut alterius.' Cf. *Circa materiam*, 119, and the reference to Augustine's *De doctrina christiana* (3.12.18) on the point that 'Non usus set libido in culpa est.'

62. See ACC¹ 84; QVR, 563, 586. See p. 2098, below, for the abbreviations.

63. *Circa materiam*, 122; *Infraser. dant* 146.26–28. See Burr, *Spiritual Franciscans* 120 and 122, for discussion.

Figure 1: The 'Community' on *dominium*

A Summary of the Community's Position

Property ownership as it is described in these four texts, then, can be represented tentatively in the following way (Fig. 1).⁶⁴ Although the feature list regarding property rights has been a carefully qualified catalogue of what Franciscans do not, or must not, have, it is, by the same token, a list of the characteristics of property ownership. Just as *dominium* is the underlying or "absolute" right of ownership in Roman law,⁶⁵ the fundamental characteristic in the leadership's view seems to be the 'free faculty of disposing'; conceptually, everything else seems to fit easily underneath. Below this level, we can divide things into three broad categories: administrative powers, legal powers, and types of use. In normal situations, a friar would have only the limited ability of simple use. (The Michaelists would employ *facultas* to describe this rightless ability, but the term is not used in this sense yet.) Other people, especially regular laypeople, might have a far greater range of actions available to them. Broadly speaking, they may manage something they own by giving it away, selling or exchanging it, or simply stockpiling and saving it for later. They may also control, in general, access to it, either directly or through a delegate. Franciscans, too, might exercise this form of control, which by itself, they insisted, was not a type of proprietary control. They defended this position by stressing the importance of intention in particular, but also by claiming the inability to take any legal action. Taken together, the texts defended the state of "propertylessness" in both the ethical and legal spheres.⁶⁶ After all, as *Religiosi viri*

64. Note that in the following diagrams, dashed lines indicate speculative relationships, boxed text indicate 'powers' possessed by everyday friars, and an asterisk indicates power the Church (or donor) has over ecclesiastical goods (including what the friars use).

65. P. Birks, 'The Roman Law Concept of *Dominium* and the Idea of Absolute Ownership', *Acta Juridica* 1 (1985) 1–37; Nicholas, *Introduction* 153–57.

66. This is different from the interior–exterior act arguments made, e.g., by Vital du Four in Tocco, 51–52; for discussion see Wittneben, *Bonagratia von Bergamo* 117, and Davis, 'Jean XXII et les

noted, the abandonment of one's will was no small sacrifice.⁶⁷ When a Franciscan happened to control access to the donations in a strongbox, he did not mean to control access, he just happened to have control. This disposition mapped perfectly onto the way a Franciscan was to use things in general. The final category of use received much more attention. Here the emphasis was on simple use, the only type of use a friar could exercise. They could not mis-use things, nor dispose of them in any way they wished. They had merely, as one text put it, use by licence. If the account of use seems rather simple so far, the Michaelists would paint a more complex picture in the next decade.

CHANGES IN THE GENERAL CONSTITUTIONS

As we have seen, the leaders of the order relied on the general constitutions to make their case that Franciscan poverty was strict enough for the order.⁶⁸ Although this answer did not satisfy a critic like Ubertino, who saw violations of the constitutions at nearly every turn, and which were not strict enough anyway, the constitutions promulgated between 1310 and 1325 had to weather several momentous publications by popes Clement V and John XXII. Thus, they are important sources for looking at how the leadership of the order understood property rights.⁶⁹

How, then, did the general constitutions change between 1310 and 1325? With respect to the nature of poverty, quite a lot. Until the constitutions issued at Padua in 1310, the picture remained fairly static since the time of Bonaventure and the constitutions of Narbonne. Prior to Padua in 1310, the biggest changes were limited

Spirituels' 278–79. Other friars were wont to stress intentionality without reference to legal arguments (Tocco, 61–62) or vice-versa (Tocco, 62–63).

67. *Religiosi viri* 431–436 (669): 'Vtinam attendisset, quod si pauperes aliquando intrant ordinem et qui pauca relinquerunt, tamen nullus est qui non relinquit propriam voluntatem. Nec parum relinquit, qui non solum relinquit quod habuit sed quod potuit habere: nec parum facit, qui propter deum, non solum demittit terrena sed abnegat semetipsum.' Cf. Walter Chatton's *Tractatus de paupertate evangelica*, in Douie, AFH 25 (1932): 41.

68. The following abbreviations are used without further explanation:

C⟨place name⟩. *Constitutiones generales*: Narbonenses (1260); Assisienses (1279); Argentinenses (1282); Mediolanenses (1285); Parisienses (1292 & 1295); Paduanæ (1310); Assisienses¹ (1316); Lugdunenses (1325); Perpinianenses (1331) — all in AF 13 & 17

Lit. stat. *Litterae statutoriae fr. Michaelis de Caesena*, in AF 17:56–58

69. The *constitutiones* have not received much attention, but see B. Thomas, 'La povertà e l'obbedienza nelle costituzioni dell'Ordine dei Minori (1239–1517) e dei Frati Minori Conventuali (1517–1932)', *Miscellanea francescana. Rivista di scienze teologiche e studi francescani* 111.1–2 (2011) 77–122 esp. 80–92, which covers CNarb. (1260), CAssis.¹ (1316), and CPerp. (1331). See also B. Roest, *Franciscan Literature of Religious Instruction Before the Council of Trent* (Studies in the History of Christian Traditions, 117; Leiden 2004) 140–46. In what follows I have not included any discussion of CPerp.; the changes in those *constitutiones* are so great that they deserve their own treatment.

to an express prohibition against living in places where it was impossible to live without the need to stockpile grain and wine.⁷⁰ Many of the other additions simply expanded the list of prohibited excesses in Franciscan buildings, such as vaulted ceilings and glass windows.⁷¹ The Parisian constitutions reaffirm the prohibition against litigating in court for recovering bodies for burial, but add that they should take care to avoid creating any scandal with respect to burials and testaments.⁷²

In 1310, there is not much evidence of the heightened tensions between the Spirituals and the leaders of the order expressed in terms of Franciscan poverty.⁷³ We see, for instance, a further specification of the way in which bequests may be received.⁷⁴ In an effort to curb excesses and superfluity in the order, the Paduan statutes also include a strong prohibition against procuring, directly or indirectly, any licence from prelates of the order.⁷⁵

The constitutions of Assisi¹ (1316) and Lyons (1325) present a very different picture.⁷⁶ Not only are there many additions and modifications, but even the order within the chapters is changed. At Assisi, we can see an attempt to ensure the outward manifestation of poverty was neither too lax nor too extreme. While earlier constitutions had simply repeated the clause from Narbonne that Franciscan clothing was to be cheap or beggarly (*vilis*) in both price and colour, CAssis.¹ went much further. The brothers had to observe a uniformity of dress ‘decently’ in terms of value, colour, and size: they had to avoid deformity, uniqueness, preciousness, and superfluity. More important than this, perhaps, was the point that

70. CParis. 3.3a (AF 13:292): ‘Et ideo interdicimus quod nullus de cetero capiatur locus, ubi fratres absque congregacione vini et bladi vivere non possunt; et ubique locorum huiusmodi abusio pro viribus extirpetur.’

71. CParis. 3.17–18b (AF 13:296).

72. CParis. 3.22–22c (AF 13:298). At the same time, there is an increased emphasis that their existing privileges should not be prejudiced in any way; see CParis. 3.22e (AF 13:298).

73. The same cannot be said of the seventh chapter ‘De correctione delinquentium,’ which more than doubled in length; see AF 17:13–23.

74. CPadua. 3.7c (AF 17:7): ‘Si tamen aliquis in codicillis fratribus hereditatem suam legaverit, tunc eodem modo se debent habere fratres ad illud legatum, sicut de collatione pecunie vel rei immobilis in Declaratione expressum est, videlicet: si aliquis hereditatem suam fratribus legando exprimit modum fratribus illicitum, ut si dicat “lego hereditatem meam ut fratres eam adeant”, tunc a tali legato fratres abstinere debent. Si vero non exprimit aliquem modum, tunc, simili modo licito intelligitur esse legata.’ Cf. 1.11c (AF 17:7).

75. CPadua. 3.18a (AF 17:8): ‘Et propter excessus, iam factos circa hoc, ne trahantur in contumeliam, praecipimus fratribus universis ut nullus, per se vel per alium, per quasumque personas, in ordine vel extra ordinem, directe vel indirecte, faciat vel procuret talia fieri, vel licentiam a prelatis ordinis de cetero postulari. Et ad observantiam predictorum ministri et custodes, guardiani et eorum vicarii, ac visitatores per obedientiam teneantur, transgressores acriter puniendo et attemptata in contrarium de cetero destruendo.’

76. See AF 17:52–53, for a summary of changes in CAssis.¹, especially as they relate to the internal Franciscan conflict. Following the practice in AF 17, I use a superscript “1” to distinguish these constitutions from an earlier collection of 1279.

the worth(lessness) of the clothing was left to the judgment of the prelates—a point that John would also make.⁷⁷ Similarly, the prohibition against receiving money was expanded as well with a reference to Nicholas III and Clement V, who had declared how the prohibition was to be understood.⁷⁸ Michael of Cesena also enters the picture at this point, for he issued a statutory letter (*litterae statutoriae*) to the individual provincial ministers sometime in August or September of 1316.⁷⁹ Michael seemingly felt the need to go beyond the 'newly reformed and shortened (*correptas*) general constitutions' because he knew from experience that the brothers were generally (*comunitar*) prone to breaking or not observing a good many of the statutes. Thus, he thought it advisable to add a few points which were to be observed by all.⁸⁰

All of his 'extra' points are concerned with the practice of poverty, and there are no real surprises because Michael did not really make any additional demands on the observance of the friars.⁸¹ Michael, too, was worried about *vilitas* in attire: it was to be observed, without any *curiositas* in the stitching; but at the same time, there should not be any indecent length or breadth in the sizing.⁸² Footgear was also to remain off-limits except 'for manifest necessity or evident infirmity.'⁸³ Michael was perhaps stricter about money: it could not be received or deposited except 'for present or imminent future necessity' (*pro necessitate presenti vel de proximo imminente*).⁸⁴ This was a phrase that had a venerable history in writings on

77. CAssis.¹ 2.1 (AF 17:63): 'Cum regula dicat quod fratres omnes vestimentis vilibus induantur, ordinamus quod hec vilitas attendatur iudicio prelatorum in pretio pariter et colore. Et omnes fratres, quantum ad valorem, colorem, longitudinem et latitudinem tam habituum quam capuciorum et manicarum, uniformitatem decenter observent, deformitatibus, singularitatibus, pretiositatibus, et superfluitatibus penitus resecatis.' See QE 52–148167–75. Cf. CNarb. 2.1 (AF 13:71).

78. CAssis.¹ 3.1 (AF 17:64): 'Cum regula dicat quod fratres non recipiant pecuniam per se vel per interpositam personam, et qualiter hoc intelligi debeat per dominos summos pontifices, scilicet Nicolaum tertium et Clementem quintum, aperte fuerit declaratum, ut hoc melius observetur, precipimus ut declarationes predictae, quantum ad istum articulum et alia que pertinent ad observantiam paupertatis, quolibet mense semel vel saltem infra duos menses in capitulo legantur fratribus, ne ignorantia sit ipsis occasio delinquendi.'

79. The letter has been printed several times; see AF 17:56 for the list and for the range of dates.

80. *Lit. stat.*, 57 and 58. It is worth mentioning that the letter was recalled (*sunt revocate*) in 1319 at the general chapter in Marseilles.

81. The complete list of topics includes: clothing, money, gardens, buildings, riding animals, wearing shoes, and eating meat.

82. *Lit. stat.*, 57: 'In primis mando et precipio quod vilitas servetur in tunicis superioribus et inferioribus, et indecens longitudo, latitudo et multitudo ac curiositas in sutura evitetur penitus in eisdem. Qui autem contrarium fecerit, per ministrum vel custodem privetur tunicis et, si expedire videbitur, acius puniatur.'

83. *Lit. stat.*, 58. Variations on 'pro manifesta necessitate vel evidenti infirmitate' are common throughout all the different constitutions.

84. *Lit. stat.*, 57.

Franciscan poverty, and can be seen as far back as the Constitutions of Narbonne.⁸⁵ Even necessary money needed to be converted within an acceptable time frame, or, said Michael, it will be taken away.⁸⁶ As for gardens, Michael, citing *Exivi*, accepted their existence, but confirmed the prohibition against selling what the friars grew (*hortalitia*).⁸⁷ In short, Michael's early work as Minister-General seems to have been devoted to attacking excesses on both sides, rather than have been focused solely on suppressing the Spirituals⁸⁸—though we may wonder if the excesses were so evenly distributed.

The Constitutions of Lyons are perhaps the most interesting of them all. They date from 1325 and thus were composed after the dissemination of both versions of *Ad conditorem canonum* (1322–23), *Cum inter nonnullos* (1323), and *Quia quorundam mentes* (1324). At the same time, some of the earlier bulls of John were palatable to the leaders of the order, notably *Quorundam exigit* (1317), which dated from the period in which Michael of Cesena and John XXII were working in tandem to bring everyone under regular obedience.⁸⁹ Thus, it seems as though the leaders of the order thought it best to include what they could of John's in support of the basic position they were trying to promote.⁹⁰ Of course, John's later declarations were received with less acclaim, and it seems to have been the practice of the drafters of the Constitutions of Lyons to ignore John's bulls of the 1320s—perhaps as chapters of an as of yet unsettled debate—in favour of *Exiit* and *Exivi*. Even so, the most noteworthy feature of these constitutions is that the third chapter, which deals with poverty in general ('De observantia paupertatis'), grew to be several times longer than previous incarnations of this chapter.

Thus the earlier prohibition against the friars receiving money, which had already been expanded by multiple references to Nicholas III and Clement V in the constitutions of 1316, now included several direct quotations (and explicit citations of the specific *paragraphi* of each), explaining in careful detail how one must understand the prohibition against receiving money.⁹¹ As before, the limitations on the use of money continue to be based on the judgment of the leaders (*sui prelati*

85. CNarb. 3.3 (AF 13:73); see also CAssis.¹ 3.2 (AF 17:65) and CLugd. 3.5 (AF 17:143).

86. *Lit. stat.*, 57: 'Et que sic deposita fuerit, in rem deputatam et licitam infra terminum, assignatum a te vel a custode, convertatur; et, si conversa non fuerit, frater, qui fecit eam deponi, privetur eadem, sicut dicit nova constitutio generalis.' As the editors note, Assisi. makes no such stipulation; but cf. CAssis.¹ 3.3 (AF 17:65) and CLugd. 3.2, 3.5a (AF 17:142, 143).

87. *Lit. stat.*, 57; see *Exivi*, 2:1198. *Exivi* is a tricky bull to interpret; as Bartocci, 'La Regola' 82–83, has pointed out, both sides were prone at times to claim it as a vindication of their claims.

88. Cf. Burr, *Spiritual Franciscans* 169–70.

89. *QE* 178.191–179.194. Also of importance in this connection are two other bulls: *Sancta romanana* (1317) and *Gloriosam ecclesiam* (1318). See *ibid.* 196–204, for discussion of these three bulls.

90. Cf., e.g., CLugd. 2.1 (AF 17:137–38) and *QE* 167.52–171.92.

91. CLugd. 3.1–3.1C (AF 17:139–41), quoting or paraphrasing *Exiit*, § Ceterum (2:1115) and *Exivi*, §§ Denique (2:1196) and Porro (2:1196).

iudicio), and legitimate uses of money remain for writing or purchasing (required) books, clothes, dealing with illness, long and likely difficult journeys.⁹² Yet another new stipulation, which was one that implicitly responded to a criticism of John in *Ad conditorem*, was that friars were completely forbidden to exchange even small items like books outside the order 'since this can in no way be done without special licence of the lord Pope, to whom belongs the lordship of the aforesaid things.'⁹³ Of course, ever since the papal *retentio dominii* of the goods Franciscans use came into effect, which was only made explicit in 1245 by Innocent IV, only those goods over which the donors refused to continue to exercise proprietary rights came under the right, ownership, and lordship of the Church.⁹⁴ Thus, in theory, many things remained outside of the direct control of the Church, before and after the change in policy pronounced in *Ad conditorem*. Thus, the constitutions continue on rather blithely with yet another addition that is ambiguously in tune with papal policy, both pre- and post-*Ad conditorem*:

Also, the other things, the *dominium* of which the lord Pope does not retain, which will come to the brothers in the future, the brothers may not sell (or divide up for sale) in the other ways mentioned above without the express licence of the donors in whose power the *dominium* is reserved.⁹⁵

The text is phrased in such a way that one might understand the point to be that since the donors retain lordship of what the pope does not retain (which

92. CLugd. 3.1a (AF 17:141–42): 'Idcirco ordinat generalis minister, de consilio et assensu totius capituli generalis, quod quicumque frater contra modos expressos in predictis declarationibus scienter pecuniam administraverit vel dispensaverit, aut in iudicio vel extra iudicium personas, servantes pecuniam pro necessitatibus fratrum nomine dantium, actione vel persecutione convenerit, easque servantibus quod et qualiter pecunia expendatur imperando vel cogendo preceperit, computumque ab eis violenter exegerit de expensa, repetierit, deposuerit aut deponi fecerit vel servari, capsulam pecunie vel eius clavem portaverit, vel ad ipsos servantes pecunias predictas pro aliis causis quam pro illis que in prefatis declarationibus exprimuntur vel inde eliciuntur, videlicet pro libris scribendis vel emendis, si sui prelati iudicio indiguerit, pro vestimentis, pro causa gravis infirmitatis qua actualiter laboraret, vel evidentis debilitatis vel senectutis ubi conventus sibi providere non posset, pro via prolixa quam facere haberet pro comuni utilitate vel evidenti necessitate in qua, iudicio sui prelati, non posset mendicando convenienter necessaria invenire, recursum habuerit et in hoc fuerit legiptime deprehensus, quia transgressor est artissimi regule precepti et pluries repetiti, libris et recursu ad pecuniam ipsam ac omni actu legiptimo privetur.' As before, any conserved money must be used within a set time: CLugd. 3.2, 3.5 (AF 17:142, 143).

93. CLugd. 3.7 (AF 17:143): 'Mandat generalis minister cum capitulo generali quod nullus frater donet, vendat, commutet, impignoret, seu modo alio distrahat extra ordinem, per se vel per alium, librum aliquem, fratri vel comunitati alicui assignatum, paramenta seu vasa, divino cultui dedicata, cum hoc nullo modo possit fieri absque domini pape licentia speciali, ad quem pertinet dominium predictorum.' Cf. ACC¹ 85 and ACC² 68–71 (234–35).

94. See p. 12n55, above.

95. CLugd. 3.7 (AF 17:143): 'Res etiam alias, quarum dominium predictus dominus papa non retinet, que fratribus obvenient in futurum, ipsi fratres non vendat vel aliis supradictis modis

amounts to everything the papacy does not already have under its control),⁹⁶ all lordship must henceforth remain with the donors. The Constitutions of Lyons, which postdate *Ad conditorem*, *Cum inter*, and *Quia quorundam mentes*, allowed any Franciscan who was concerned about the rejection of papal overlordship of the things the friars used to believe that the donors (now) always retained lordship.

Perhaps that was the goal. In general, however, the Constitutions solve the problem by avoiding these recent bulls and referring to the provisions of *Exiit* instead.⁹⁷

POPE JOHN XXII ON IUS AND USUS

Anyone familiar with the poverty controversy is well aware of the important role Pope John XXII played.⁹⁸ Although this is not the time to reconsider the nature of his contributions to the extent that they deserve, it is important nonetheless to examine, albeit briefly, some of the technical concepts he brought to bear in his bulls dealing with Franciscan poverty.⁹⁹

The pope's ideas about use first manifest in the earlier version of the bull *Ad conditorem* (8 December 1322), but are given an extensive reworking in the second version, which was published in the wake of Bonagratia's appeal from the following month (itself replete with citations of canon and Roman law).¹⁰⁰ In the

distrabant sine donantium expressa licentia, penes quos dominium reservatur.'

96. This is discussed in the next section.

97. CLugd. 3.1 (AF 17:139–40), citing *Exiit*, 2:1115. *Proprietas* is no less uncommon in the constitutions, but see CNarb. 3.21 (AF 13:76).

98. Please note the following abbreviations for John's writings:

ACC ⁽¹²⁾	<i>Ad conditorem canonum</i> , first version in G&F, 83–88; and second version in Tarrant, 228–54
QE	<i>Quorundam exigit</i> , in Tarrant, 163–81
QN	<i>Quia nonnunquam</i> , in Tarrant, 217–21
QQM	<i>Quia quorundam mentes</i> , in Tarrant, 257–87
QVR	<i>Quia vir reprobis</i> , in G&F, 553–613
Tarrant	J. Tarrant ed. <i>Extravagantes Iohannis XXII</i> (Monumenta Iuris Canonici, Series B: Corpus Collectionum, 6; Rome 1983)

99. We lack no shortage of studies of the pope and his involvement in the poverty controversy. Two recent studies are Miethke, 'Der „theoretische Armutsstreit“', esp. 259–75 (with ample bibliography), and P. Nold, 'Pope John XXII, the Franciscan Order and its Rule', *The Cambridge Companion to Francis of Assisi*, ed. M. J. P. Robson (Cambridge Companions to Religion; Cambridge 2012) 258–272 (unfortunately with none). The best recent full-length treatment is M. Brunner, 'Pope John XXII and the Franciscan Ideal of Absolute Poverty' (PhD thesis, University of Leeds 2006); see now also Ead., 'Papal Interventions in Mendicant Organisation. Pope John XXII and the Franciscans', *Franciscan Organisation in the Mendicant Context. Formal and Informal Structures of the Friars' Lives and Ministry in the Middle Ages*, edd. M. Robson – J. Röhrkasten (Vita regularis, 44; Berlin 2010) 353–375.

100. Wittneben, *Bonagratia von Bergamo* 158–64, 185–91, provides detailed analysis of the two ver-

later bulls, *Quia quorundam mentes* (10 November 1324) and *Quia vir reprobus* (16 November 1329), the pope added to the picture, but he did not substantially redraw it.

The leadership of the Franciscan order had been content to argue that an important component of religious poverty was the inward disposition a friar had when making use of things he did not own. John agreed; but he was convinced that the expropriation Franciscans enjoyed through the papal overlordship of the goods which they used had not made the friars any less preoccupied with temporal things. If anything, it had made things rather worse.¹⁰¹ John noted that there were many practical problems regarding the existing arrangement for Franciscan poverty, but he also noted a serious theoretical objection: it was not Franciscan use which was 'bare' (*nudus*), but the Church's lordship of what the Franciscans used.

While Franciscans were accustomed to speak of their 'simple' use of fact ever since the publication of *Exiit*,¹⁰² John opted for bare use of fact (*nudum usum facti*).¹⁰³ It is not clear why he chose to do so, but it is possible that the term suggested itself to him from his familiarity with Roman law discussions of use, which do speak of 'bare use' in a number of places. The pope argued that one could not be a 'bare user' (*nudus usuarius*) if the person is allowed to exchange, sell, or give away the item in question. These were activities more normally associated with lords than bare users.¹⁰⁴ In the revised version of *Ad conditorem*, the picture

sions of the bull, as does P. Nold, *Pope John XXII and his Franciscan Cardinal. Bertrand de la Tour and the Apostolic Poverty Controversy* (Oxford 2003) 149–65; neither, however, address John's reliance on the category of servitudes in the course of his treatment of *usus*; more surprisingly, neither does Tarello, 'Profili giuridici' 417–21. One should consult instead Brunner, 'Pope John XXII' 190–91, 197–98, and V. Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Recherches de Théologie et Philosophie médiévales, Bibliotheca, 3; Leuven 2001) 162–73.

101. For the pope, the expropriation and the diminished concern for temporal goods existed under the rubric of charity, the key element of Christian perfection; see ACC¹ 84–85. Cf. ACC² 45–57 (232–33). *Reducendo* 290–301 (52–53) and 348–350 (54) makes similar claims. As Davis, 'Jean XXII et les Spirituels' 267, has noted, John did not refrain from making use of 'Spiritual' arguments; see also J. Miethke, *Ockhams Weg zur Sozialphilosophie* (Berlin 1969) 378.

102. See *Exiit*, 2:1113; and their 'simple use' ever since Bonaventure's *Apologia pauperum* (1269). A. Tabarroni, *Paupertas Christi et apostolorum: L'ideale francescano in discussione (1322–1324)* (Nuovi studi storici, 5; Rome 1990) 23–32 and 73–83, is a valuable examination of *Exiit* and the two versions of *Ad conditorem*.

103. ACC¹ 85.

104. ACC¹ 85: 'Quis enim nudum usuarium poterit dicere cui rem usariam licet permutare, vendere ac donare? Procul dubio haec naturam usus noscuntur excedere, nec ad usuarium sed ad dominum potius pertinere. Haec evidenter arguunt talem usuarium minime fore nudum, quae quidem de rebus nonnullis mobilibus fratres ipsi faciunt, adserentes sibi per ordinationem huiusmodi hoc concessum.'

becomes clearer. Although the pope now spoke of simple use of fact, he explicitly connected his discussion of use to the Romanist concepts of servitudes.¹⁰⁵

There are two passages, which may seem to be somewhat at odds with one another. They read as follows:

For, since usufruct, just as it is established as a *ius in re*, which is called a personal servitude, and for which there belong real actions, is nothing other than a right of using and enjoying, so is use, which is a personal servitude, nothing other than only a right of using someone else's things with the substance preserved; that is, a right of receiving the fruits and other utility, in whole or in part in his own name, which can come from the thing in which the usufruct or use is established.¹⁰⁶

Besides, nor can a personal right of using—one which is neither a *ius in re* nor a personal servitude, but is a purely personal right for which there do not belong real actions—be established or had in such things or for such things [sc. consumables], since such a right also demands that some utility can come in such a way from the thing which is conceded to the user, and to remain with the use of the user, with the substance of the thing preserved: which, just as it can be perceived by the senses, can by no means be found in things consumable by use.¹⁰⁷

These two passages are very compressed accounts of *usus* and *ius utendi*. John first points out that use, like usufruct, is a type of personal servitude. Use, as one commentator put it, 'is a fraction of usufruct': it allowed the beneficiary to use a thing, but not enjoy its fruits.¹⁰⁸ Use, as it is meant in this context, does not allow for an impairment of the substance,¹⁰⁹ but any profit or utility deriving from the use could be enjoyed. Such a personal servitude, as both use and usufruct are, are said

105. Cf. the claim at *QVR*, 576, that *Ad conditorem* speaks in the same way as *Exiit*, and the *iura* do.

106. *ACC*² 105–111 (237–38): 'Cum enim usufructus prout est ius in re constitutus, qui seruitus dicitur personalis et pro quo reales competunt acciones, nichil sit aliud quam ius utendi fruendi, nec usus, qui eciam personalis est seruitus, sit aliud quam ius tantum utendi rebus alienis substantia salua rei, id est, ius percipiendi fructus et utilitatem aliam in totum uel pro parte suo nomine qui possunt ex re in qua usufructus seu usus constituitur prouenire.'

107. *ACC*² 120–126 (239): 'Adhuc nec ius utendi, quod nec est ius in re, nec seruitus personalis, sed mere ius personale, pro quo reales acciones non competunt, in rebus talibus uel rebus ipsis utendi potest constitui uel haberi, cum et ius tale exigat quod ex re ipsa quae ad utendum conceditur tali modo ad usuarium peruenire posset utilitas aliqua ac cum usu permanere usuarii substantia salua rei, quod nequaquam potest sicut ad sensum potest percipi in rebus usu consumptilibus reperiri.' Cf. *QVR*, 575.

108. Nicholas, *Introduction* 144.

109. John argued that *abusus* better served the purpose of describing the 'use' of consumables, whose substance was necessarily lost in the process of being used. See *ACC*² 99–105 (237), 144–156 (240–41); *QVR*, 576–78, bases its arguments on specific references to Justinian's *Digest*. For Pope John XXII and the Michaelists on the problem of consumables, see R. Lambertini, 'Usus and usura: Poverty and Usury in the Franciscans' Responses to John XXII's *Quia vir reprobis*', *Franciscan Studies* 54 (1994–1997) 185–210, which can be found in revised form in *Id.*, *La povertà pensata* 227–47.

to be *iura in re (aliena)*, or rights over another person's property. One reason why they are said to be 'in re' is because, as Jesselin's *Apparatus* explains, they require a 'fixed body,' which, if removed, means a loss of the usufruct (or use) as well.¹¹⁰ As personal servitudes, which are so called because they inhere in the person rather than the thing (as do praedial servitudes), and which are inalienable,¹¹¹ the beneficiary also has a remedy if his use (or enjoyment) is obstructed; he has, that is, a 'real action.'¹¹² Real actions are claims *in rem*; that is, one is asserting a claim upon some thing, not upon another person (*actio personalis*). As John said of *usus*, one has a right to use a thing. But, and this is the point of the second quotation, the *ius utendi* he was speaking about was *not* one which could be classed as a personal servitude but merely a personal right. Another *ius utendi* might be counted as a personal servitude, but not so for consumables. If the Latin of *Ad conditorem* was ambiguous on this point, *Quia vir* is clear:

But it is agreed that, according to the laws, neither [1] usufruct nor [2] a right of using that is a servitude, nor [3] even a right of using that is not a servitude but a purely personal right, can be established or had in things consumable by use, as it is proved in Dig. 7.5.1 and 2, Dig. 12.2.11.2, Dig. 13.6.3.6, with many similar passages.¹¹³

It is well known that the pope's ultimate goal in passages like these was to argue that proper "use" of consumables requires ownership, but he was also making a deeper point at the same time. The issue turns on what he meant by *ius personale ... utendi*.¹¹⁴ Michael took it as a synonym for 'one's own right,' (*ius proprium*),¹¹⁵ but he probably meant this right of using was what we might term a *ius in personam*, where the legal bond exists between two people: one person is owed something by

110. *Glos. ord. ad Extrav. Io. XXII* 14.3, s.v. 'In re constitutus' (29rb): 'Et dicitur in re constitutus; id est, in certo corpore: quo sublato et ipsum usumfructum tolli neceese est, ff. de usufru., l. ii [Dig. 7.5.2]; insti. eo. tit. in prin. [Inst. 2.4 pr.], et §. finitur [Inst. 2.4.3]; ff. quibus mo. usufruc. tol. l. repeti., §. rei [Dig. 7.4.5.2].' For Jesselin de Cassagnes's *Apparatus*, I have used Iohannis XXII, *Extravagantes uiginti Johannis uigesimisecondi cum interpretamentis domini Zenzelini et Johannis Francisci de Pauinis* (Basil 1511), URL: <http://www.bsb-muenchen.de/>, digitized by the Bayerische Staatsbibliothek; on his life and works, see J. Tarrant, 'The Life and Works of Jesselin de Cassagnes', *Bulletin of Medieval Canon Law*, NS 9 (1979) 37–64.

111. Though their fruits are alienable; see *Glos. ord. ad Extrav. Io. XXII* 14.3, s.v. 'Personalis' (29rb–va), for a brief list of features available to the holder of a personal servitude.

112. See *Glos. ord. ad Extrav. Io. XXII* 14.3, s.v. 'Reales competunt actiones' (29va).

113. *QVR*, 575: 'Constat autem quod secundum leges in rebus usu consumptibilibus nec usus fructus nec ius utendi, quod est servitus, nec etiam ius utendi, quod non est servitus sed mere ius personale, potest constitui vel haberi, ut probatur ff. *De usu fructu earum rerum quae usu consumuntur*, l. 1 et 2; ff. *De iureiurando*, l. *Sed etsi possessori*, (§.) *Sed si rerum*; ff. *Commodati*, l. 3, (§.) finali, cum multis similibus.'

114. See p. 22n107, above; the phrase is repeated again at *ACC*² 132–134 (240).

115. *App. minor*, 437; *App. maior*, 325 and 378; *App. mon.*, 759 and 839.

another.¹¹⁶ Thus if a right of using, which is personal, is *in personam*, what is owed by the owner to the right-holder is the use. The point of this distinction is that, unlike a *ius in rem*, the claim afforded by such a personal right is only available against the owner, not obstructing third parties.¹¹⁷

In other words, contrary to a prevalent Franciscan claim, it is evident that there can be no simple equation of *ius utendi* and *ius agendi*: friars do not obtain a generic right to take legal action simply by virtue of being granted a *ius utendi* whenever, as John claimed, something is given for them to use. This, too, should be expected of a jurist steeped in ideas of the *ius commune*. As he baldly stated later on in *Quia vir*, one might have a right of using and yet not have any right to take legal action.¹¹⁸ Modern legal systems are usually framed in terms of rights, but this is not true of classical law, which phrased things in terms of actions. So far, there seems to be little difference between having a right and an action since the *actio* is a means of pursuing one's right, but this is not how classical jurists thought. Instead of rights, they thought of remedies, and instead of causes for action, they thought of forms of action. For Romans, and seemingly for John XXII as well, the idea was that one could pursue his claim in court only if he could express it in an appropriate formula.¹¹⁹ This, then, helps us understand the pope's point that civil laws (*iura ciuiles*) introduced the way of taking action for temporal things, and that this is the point of D. 8 c. 1: *ius ciuile* brought in the formulas of action.¹²⁰ As

116. It would be more appropriate to speak of the corresponding *actiones* (cf. Inst. 4.6.1 [47]), but the analogy holds well enough, and medieval jurists were more inclined to employ *ius* in the way I have. See R. Feenstra, 'Dominium and *ius in re aliena*: The Origins of a Civil Law Distinction', *New Perspectives in the Roman Law of Property. Essays for Barry Nicholas*, ed. P. Birks (Oxford 1989) 111–122, for medieval and early modern developments, and Miller, 'Property' 42–45, for post-classical views.

117. There is also the further point, made clearer by Jesselin, that a *ius utendi* was closer in nature to *superficies* and *emphyteusis* (essentially long-term leases to a building or land); see *Glos. ord. ad Extrav. Io. XXII* 14.3, s.v. 'nec servitus personalis' (29vb). Even so, a *superficarius* or *emphyteuta* still had an *actio in rem*, so Jesselin must not have been speaking of the second kind of *ius utendi*.

118. QVR, 581: 'Ad hoc dicimus quod dicta constitutio aperte et expresse loquitur de usu pro quo competit ius utendi, quod est aliud a iure agendi. Potest enim alicui competere ius utendi cui tamen non competit ius agendi.'

119. On the other hand, it is highly implausible to imagine that John was not aware of the differences between the formulary system of the Romans and the contemporary romano-canonical procedure; on the former, see Nicholas, *Introduction* 19–28, and J. A. Brundage, *The Medieval Origins of the Legal Profession. Canonists, Civilians, and Courts* (Chicago 2008) 151–63 (and *passim*), for the developments in the latter.

120. QVR, 593: 'Verum est tamen quod de iure gentium multi modi acquirendi dominium et nonnulli per iura civilia seu imperialia fuerunt inducti. Item, modus agendi pro istis rebus temporalibus in iudicio, id est certa forma proponendi ius suum in iudicio, fuit per iura civilia introducta. Ex praedictis itaque patet quod non obstat c. *Quo iure* [D. 8 c. 1], in contrarium allegatum. Loquitur enim de iure agendi in iudicio cuius formulas civile ius et non aliud introduxit. Et hoc voluit dicere Augustinus in illo c. *Quo iure*, quando dixit: "Tolle iura imperatoris et quis audeat

a right of using was only held against the owner, it was entirely possible for one to have such a *ius* and yet lack the appropriate *actio*.

The foregoing by no means exhausts the pope's account of property rights in this bull,¹²¹ but it does highlight the technical nature of his thought, which, if more often asserted than analyzed in current scholarship, was by no means lost on the Michaelists. Francis and William, theologians to the end, disliked the overly narrow (they thought) legal perspective of John's bulls.¹²² Michael and Bonagratia expressed similar views, but one suspects that Bonagratia at least understood the deeper implications of what the pope was arguing, even if they, too, avoided getting too deeply embroiled in a discussion of servitudes and the differences between rights *in rem* and *in personam*.¹²³ That is, they did not in fact fight 'on the pope's own ground,' as it is sometimes claimed (disparagingly) of Ockham;¹²⁴ rather, in their view it was the pope's position that was too parochial.¹²⁵

THE MICHAELISTS ON PROPERTY

So how does this all compare with the views of the leading Michaelists?¹²⁶ Although there are points of similarity with what we have seen so far, the picture

dicere "haec villa mea est", "meus est iste servus", "mea est haec domus". Quasi dicat: nullus potest in iudicio proponere nisi per imperatoria iura, quod ius actionum formulas introduxit.'

121. I have dealt elsewhere with John's claims about the need for at least a right of using in order for the use to be just, and about his theory of corporate ownership; see J. Robinson, 'William of Ockham on the Right to (Ab-)Use Goods', *Franciscan Studies* 67 (2009) 347–374 (354–60), which is more fully developed in the second and seventh chapters of my forthcoming *William of Ockham's Early Theory of Property Rights*.

122. Cf. *Improbatio* 27 (60), 585 (285), 681 (317); and *OND* 2.80–99 (300). See, e.g., Miethke, 'Dominium, ius und lex' 247–48; and L. Parisoli, 'Come affiorò il concetto di diritto soggettivo inalienabile nella riflessione francescana sulla povertà, sino ai Fraticelli *de opinione* e Giovanni XXII', *Materiali per una storia della cultura giuridica* 28 (1998) 93–137 (126–27).

123. Cf. *App. minor*, 436; *App. maior*, 255–56; and *App. mon.*, 829, 839. Bonagratia does not complain per se, but see his *De paup.*, 503. Michael did, however, suggest that the pope was selectively reliant on Azo's discussion of servitudes at *App. maior*, 261–62; see M. Kriechbaum, *Actio, ius und dominium in den Rechtslehren des 13. und 14. Jahrhunderts* (Ebelsbach 1996) 33–34.

124. Cf. Leff, *Heresy* 1:250.

125. See, e.g., *Improbatio* 897–898 (384–85).

126. Please note the following abbreviations:

<i>Appellatio</i>	Bonagratia of Bergamo, <i>Prima appellatio contra constitutionem domini Ioannis Papae XXII, quae incipit 'Ad conditorem canonum'</i> , in G&F, 89–117
<i>App. maior</i>	Michael of Cesena, <i>Appellatio in forma maiore</i> , in G&F, 227–425
<i>App. minor</i>	Michael of Cesena, <i>Appellatio in forma minore</i> , in G&F, 429–456
<i>App. mon.</i>	Michael of Cesena, <i>Appellatio ... contra libellum papae 'Quia vir reprobus'</i> , or <i>Appellatio monacensis</i> , in G&F, 624–866
<i>De paup.</i>	Bonagratia of Bergamo, <i>Tractatus de Christi et apostolorum paupertate</i> , in Oliger, AFH 22 (1929): 323–335; 487–511

has certainly become far more elaborate. Given the length of the texts involved, it is impossible to provide a full answer. The focus in what follows will be to look at the writings of Bonagratia and Michael, although Francis and William will also be invoked where it seems useful.

Let us start with the acquisition of proprietary lordship.¹²⁷ The first thing to note is that the debate has matured enough that a defence of Franciscan poverty required a fresh examination of the origins of property.¹²⁸ The second point to note is that the acquisition of lordship takes place in the context of human *dominium*, not divine, which is itself grounded in human positive law (*ius*) rather than divine or natural law.¹²⁹ The original acquisition of lordship occurred early on in the

<i>Improbatio</i>	Francis of Marchia, <i>Improbatio</i> , in N. Mariani, ed., <i>Francisci de Esculo, OFM, Improbatio contra libellum domini Iohannis qui incipit 'Quia vir reprobis'</i> (Spicilegium bonaventurianum, 28; Grottaferrata 1993)
<i>OND</i>	William of Ockham, <i>Opus nonaginta dierum</i> , in volumes 1 and 2 of H. S. Offler et al., ed., <i>Guillelmi de Ockham opera politica</i> , 9 (projected) vols. (Manchester & Oxford 1956–)

127. That the Michaelists tended to treat *dominium* and *proprietas* as approximate synonyms is best seen where Ockham explains that, in the legal sciences, *dominium* was the broader term; see *OND* 2.262–292 (304–05) and 14.259–263 (436); in other contexts, the converse can be true: 26.81–85 (485). *App. mon.*, 672, suggests that both *dominium* and *proprietas* might be contained ‘sub nomine possessionis ... ut notatur 16 q. 2, c. *Possessio* [C. 16 q. 2 c. 9]; et ff. *De verborum significatione*, lex *Interdum* [Dig. 50.16.78]’; cf. *Glos. ord.* ad C. 16 q. 2 c. 9, s.v. ‘*Possessio*’ (227rb): ‘id est praedii proprietas; ar. ff. de u. sig. interdum [Dig. 50.16.78].’

128. This topic is well covered in: Lambertini, *La povertà pensata* esp. 189–226; Id., ‘Oltre la proprietà, alle origini del potere: Francesco d’Appignano nel pensiero ecclesiologico-politico del trecento’, *Atti del I Convegno Internazionale su Francesco d’Appignano*, ed. D. Priori (Appignano del Tronto 2001) 51–66; Id., ‘Questioni di Francesco d’Appignano sul IV libro delle Sentenze nel Vat. lat. 943: nuove tracce di tesi politiche di Francesco d’Appignano’, *Atti del IV Convegno internazionale su Francesco d’Appignano*, ed. D. Priori (Appignano del Tronto 2007) 151–167, URL: http://www.francescodappignano.it/IV_Convegno.htm; J. Miethke, ‘Paradiesischer Zustand – Apostolisches Zeitalter – Franziskanische Armut: Religiöses Selbstverständnis, Zeitkritik und Gesellschaftstheorie im 14. Jahrhundert’, *Vita religiosa im Mittelalter. Festschrift für Kaspar Elm zum 70. Geburtstag*, edd. F. J. Felten – N. Jasprert (Berlin 1999) 503–532; G. L. Potestà, ‘The State of Innocence and Private Property in the Polemic on Evangelical Poverty at the Beginning of the Fourteenth Century’, *The Earthly Paradise: The Garden of Eden from Antiquity to Modernity*, edd. F. R. Psaki – C. Hindley (Binghamton 2002) 149–163; B. Tierney, *The Idea of Natural Rights* (Emory University Studies in Law and Religion, 5; Grand Rapids, MI 1997) 131–69; and B. Töpfer, ‘*Status innocentiae* und Staatsentstehung bei Thomas von Aquino und Wilhelm von Ockham’, *Mittelalterliches Jahrbuch* 36.1 (2001) 113–129.

129. *De paup.*, 503: ‘Proprietates vero et possessiones et dominia rerum sunt a iure humano, VIII dist., *quo iure* [D. 8 c. 1]; usufructus etiam et ius utendi est a iure civili, in Inst. *de rebus corporalibus et incorporalibus*, per totum [Inst. 2.2]. Certum est autem quod omni iuri privato, quod alicui competat ex humano iure, potest quis renunciare et illud a se penitus abdicare; unde Esau ex quo semel renunciaverat iuri primogeniture, ad illud redire nunquam potuit, VII causa, q. 1, c. *quam periculosum* [C. 7 q. 1 c. 8], ff. *de edil. edic.*, l. *queritur*, § *si venditor* [Dig. 21.1.14.9], cum similibus.’ This likely was meant to correspond to John XXII’s reference to a *ius personale*.

postlapsarian world 'through a division of souls,'¹³⁰ or, according to a gloss to the *Decretum*, 'through iniquity,' which, Michael explained, meant through an anxious preoccupation (*sollicitudo*) for temporal things.¹³¹ In other words, property is acquired only where there is the will to acquire it:

No one can regularly acquire ownership, lordship, nay, not even possession over things (consumable or not) unless he has the will or spirit of acquiring or having.¹³²

Yet merely willing to acquire lordship or lesser property rights is not always enough. One must also not be subject to another person in the way that a slave is to a master; that is, one must be *sui iuris* or *in sua potestate*.¹³³ Furthermore, actual possession or occupancy of a thing usually must also be acquired in the case of movables. For instance, one might need to buy or be given lordship of the thing in question. Francis and Ockham would also point out that some *dominia* had been divinely instituted, although this seems to have occurred only in the past.¹³⁴

If the account of how one acquires lordship seems straightforward, the range of powers associated with the possession of lordship is more complicated. One reason for this is that the Michaelists described two forms of lordship, a 'full' version, which most laymen are able to have, and a 'restricted' version, which is appropriate to prelates of the Church. Bonagratia and Michael often used terms like *quasi dominium*, *quasi proprietas*, and even, referring to Innocent IV and Hostiensis, *dominium utile*.¹³⁵

Regular lordship comprises three basic powers, which I shall again designate as *actio in iudicio*, *administratio*, and *usus* (see Fig. 2). The first category comprises

130. *App. mon.*, 753: 'Omnis divisio dominiorum personalis vel collegialis venit causaliter et originaliter ex divisione animorum. Unde quia in statu innocentiae nulla fuisset divisio animorum, nulla fuisset divisio dominiorum.'

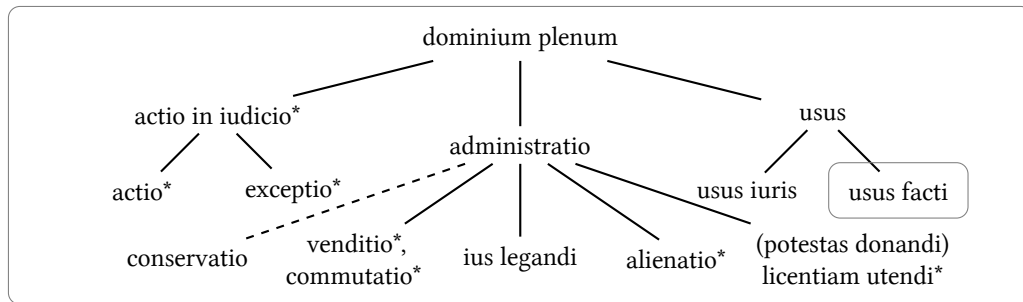
131. *App. maior*, 239–40, citing *Glos. ord.* ad C. 12 q. 1 c. 2, s.v. 'Sed per iniquitatem': 'antequam per iniquitatem introductum esset quod aliquis diceret hoc meum proprium et hoc tuum. Qui status fuit status innocentiae sive legis naturae, statui per iniquitatem introducto contrarius, secundum glossam, quae verbum illud "per iniquitatem" exponens dicit: "Per iniquitatem, id est per consuetudinem iuris gentium, aequitati naturali contrariam [...]; vel "per iniquitatem", id est per sollicitudinem, ut ibi [Lc. 16:10]: Facite vobis amicos de mammona iniquitatis." Haec glossa. Et quod sicut antequam esset peccatum non erat appropriatio rerum temporalium introducta, sed fuisset habitus usus rerum usu consumptibilium et non consumptibilium absque aliqua proprietate, sic fuit in apostolis et apostolicis viris.'

132. *App. maior*, 251: 'regulariter nullus potest proprietatem, dominium, immo nec possessionem in rebus aliquibus usu consumptibilibus vel non consumptibilibus acquirere nisi habeat voluntatem sive animum adquirendi sive habendi, ff. *De acquirenda possessione*, l. *Possideri* [Dig. 41.2.3]; et l. *Quemadmodum* [Dig. 41.2.8]. See also *App. mon.*, 725.

133. *App. mon.*, 702, 811.

134. *Improbatio* 883 (381); *OND* 88.142–222 (657–59) and 91.99–114 (668).

135. *App. maior*, 341, referring to their commentaries ad X 2.12.4 nn. 3–4; see Innocent IV (Sinibaldo dei Fieschi), *Commentaria apparatus in V libros Decretalium* (Frankfurt/Main 1968), 222ra–b, and Hostiensis (Henricus de Segusio), *In Decretalium V libros commentaria*, 2 vols. (Turin

Figure 2: The Michaelists on *dominium*

the ability to defend or claim the owned item. Bonagratia claimed that the holder of *dominium* or *proprietas* has two important legal powers: *exceptio* and *actio*.¹³⁶ Michael added that even holders of lesser property rights have an *actio* if despoiled of their right by the *dominus*.¹³⁷ This was essentially the same point that the pope had made about a personal right of using, but what he did not add is that the *actio* was no good against interfering third parties. Ockham thought this the most common meaning of *dominium*: ‘a principal human power of claiming and defending a temporal thing in court,’ but he was probably unaware of its restricted scope in cases where less than *dominium* was at issue.¹³⁸ As an *exceptio* was a legal defence which rendered the plaintiff’s claim invalid,¹³⁹ and an *actio* was essentially nothing ‘other than the right to go to court to get what one is owed,’¹⁴⁰ it is clear that Ockham was reprising Bonagratia’s own position. (There is certainly an echo of the Romanist idea of *dominium* being the ultimate property right, but one hardly need know Roman law to place lordship in that category.) Whatever

1963), 1:42va.

136. *De paup.*, 324, citing Dig. 4.1.1.52 (696): ‘Rem in bonis nostris habere intellegimur, quotiens possidentes exceptionem aut amittentes ad recipendam eam actionem habemus.’ Bonaventure had already used this terminology; see *Apologia pauperum* 11.7, in Bonaventure, *Opera omnia edita studio et cura PP. Collegii a S. Bonaventura*, 10 vols. (Quaracchi 1882–1902) 8:312b.

137. *App. mon.*, 759: ‘Unde et actio datur in iudicio hominibus sui iuris spoliatis rebus suis quantum ad usum vel alium modum habendi licitum et non solum spoliatis rebus suis quoad proprietatem et dominium. Sicut patet in eo qui emit a domino rei usum rei, si dominus rei postea surripiat ab eo rem illam, datur eidem actio furti contra dominum ratione usus, ff. *De furtis*, l. *Cum aes*, [§] 1 [Dig. 47.2.20.1].’ Cf. *Improbatio* 486–489 (250–51), 863–864 (374).

138. *OND* 2.320–321 (306): ‘potestas humana principalis vendicandi et defendendi in humano iudicio rem aliquam temporalem.’ Although this power is not always *principalissima* (20.54–55 [460]), the adjective ‘principal’ is meant to distinguish the power from lesser property rights, which also entail the right to take action in court; see *OND* 2.322–227 (306).

139. See the account in *Inst.* 4.13 (52–53); see further Berger, ‘Encyclopedic Dictionary’ 458

140. *Inst.* 4.1 pr. (47); see p. 10n42, above, for the quotation. Here, Bonagratia was speaking of real actions.

the precise terminology, the point was that lordship ensured one could take action in court to protect his interests.

These legal powers are also characteristic of restricted lordship, as are some of the ones that fall under the second major category (*administratio*), which covers what we might call the powers to dispose and manage the thing. There is a difference between full and restricted lordship here. Full, or regular, lordship allows for a great deal of latitude. As Ockham explained, the *dominus* can treat his possession in any way not forbidden by natural law.¹⁴¹ One can sell, transfer, bequeath, alienate, transfer or give away what one owns, and can do so with various conditions attached. Notice that Ockham has named actions which involve divesting oneself of the lordship. It is important to the Franciscans that this is not the only thing one can do. One can also permit someone a licence to use the item (*licentia utendi*) while retaining lordship of the item.¹⁴²

It is different with restricted lordship. The difference is that one cannot do what one wishes with the goods over which restricted lordship is exercised: one may not act *ad libitum*. Thus, while someone who had restricted lordship could sell or transfer an item, this could only be done for the sustenance of one or another of the members of the community (i.e., *congregatio fidelium*).¹⁴³ This type of ownership gives the owner the power to claim the thing in court, but does not include the power of freely managing, selling, giving, bequeathing, alienating, or using the thing.¹⁴⁴ It is for this reason that Bonagratia referred to them as *dispensatores et amministratoros pauperum*, for they only 'have' things in this sense.¹⁴⁵

One final point is particularly important to the Franciscan point of view. This restricted form of lordship still possesses enough of the incidents of lordship for us to consider the papal *retentio dominii* a valid form of lordship.¹⁴⁶ Ecclesiastical lordship is, in all cases, limited in comparison with regular, lay, lordship. But the characteristic that remains unaltered in both forms is the ability to litigate for it in court. Ockham's insistence on one being able to defend the things one owns in court as the principal feature of lordship takes on new importance when considered in connection with the things Franciscans use but do not own.

141. *OND* 2.389–397 (308); cf. 4.295–306 (336) and 77.407–438 (633–34).

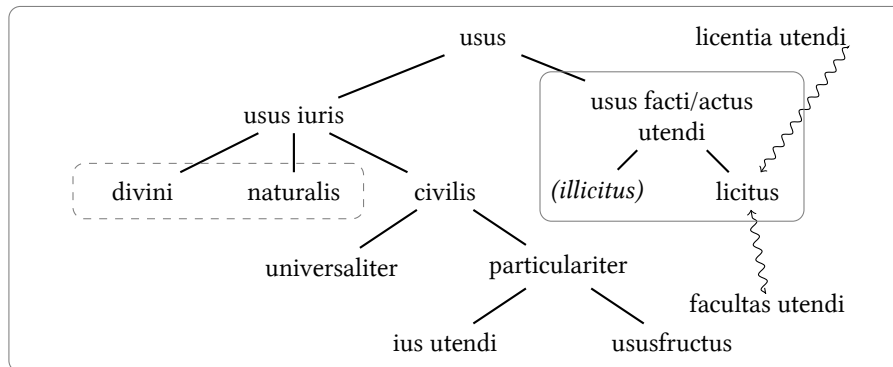
142. See Robinson, 'Right to (Ab-)Use', and, more recently, Miethke, '*Dominium, ius und lex*' 247–48.

143. *OND* 4.243–384 (337–38).

144. *OND* 4.545–574 (342–43). This is the ownership the early community had in common, for there were several restrictions upon how they could use these common goods.

145. *De paup.*, 487; see also his threefold breakdown of 'habere aliquid' (325). Classic analysis may be found in Miethke, *Ockhams Weg* 371–72, and Tarello, 'Profili giuridici' 423–24, to which we should add Kriechbaum, *Actio, ius und dominium* 27–28.

146. *OND* 77.87–102 (626); cf. 2.399–402 (308). This differs from the position taken by Bertrand de la Tour; see Tocco, 72: 'Praeterea nota secundo: quod potestas dispensandi nullam dat proprietatem vel dominium dispensanti.'

Figure 3: Michael of Cesena on *usus*

The third major category must be use, for anyone with *dominium* clearly has the power, or right, to use the thing. Figure 3 represents the breakdown of *usus* (considered absolutely, or independently from the use a lord has) as it can be determined from Michael's appeals.¹⁴⁷ Under the title of *dominium*, one also has, in the Michaelist view, a use of right or right of using (the Michaelists were not always clear about the distinction), which was very different from simple use of fact. To say that a *dominus* has a right of using or use of fact is evidently different from the technical, legal meaning of *ius utendi*, which as the Michaelists point out, referred only to using goods that one did not own.¹⁴⁸ Possession of *dominium* entitles one to use, deteriorate or impair, and consume a thing. One who possesses only the right of using, however, is subject to certain restrictions. While consumption is the natural and expected result of using *res usu consumptibiles*, the same is not true of more permanent objects. One gets the sense that holders of a *ius utendi* may not misuse the things they have a right to use. In Roman law using a thing in a way other than how it had been agreed was known as a 'theft of the use' (*furtum usus*),¹⁴⁹ but this term does not make an appearance in the Michaelists texts—perhaps because they had already insisted that, contrary to what the pope thought, *abusus* referred to the misuse of things.

In these debates, use was never limited to a power claimed only by owners. A right of use could also be a self-standing type of lesser property right. The challenge John XXII posed was whether it was possible to use things licitly and

147. There are differences on the breakdown of *usus* among the different Michaelists; I explore this topic in the fifth chapter of *Ockham's Early Theory*.

148. E.g., *App. maior*, 261–62, referring to Azo's comments in *Glos. ord. ad Dig. 7.8.1.1*, s.v. 'etiam nudus usus' (1:912).

149. *Dig. 47.2.1.3* (814): 'Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus eius possessionisve. quod lege naturali prohibitum est admittere.' Cf. *Inst. 4.1.1* (43).

justly without having at least such a *ius utendi*.¹⁵⁰ Although the Michaelists were united in the belief that one could so use things, even consumables, without such a right, each Michaelist provided a slightly different answer as to why the right was unnecessary.¹⁵¹

From the point of continuity with the previous decade, the texts of Bonagratia and Michael are the most interesting. Michael relied on the jurist Azo to separate the act of using from the pope's right of using: although use which is a right or servitude cannot exist in consumables, 'use which is a deed (*factum*), or consists in the deed (*in facto*), such as drinking and eating, can well exist.'¹⁵² In the later appeal, he explained that the pope was in fact referring to a 'use of civil right' rather than the universal definition of the term,¹⁵³ and that this use of right, as the pope even said, was a right for using someone else's things.¹⁵⁴

Michael envisaged three different uses of right: civil, natural, and divine. The use of civil right could be further subdivided into more and less universal types.¹⁵⁵ Elsewhere, the use of right was described as an 'exclusive right of using' (*ius proprium utendi*),¹⁵⁶ the possession of which inherently includes an *actio* in court.¹⁵⁷

150. Wittneben, *Bonagratia von Bergamo* 322, described this as 'the focal point of the whole controversy.'

151. I address this issue in the sixth chapter of *Ockham's Early Theory*.

152. *App. maior*, 256–57: 'Usus qui est ius vel servitus non potest esse in rebus quae usu consumuntur, cum in eis non possit esse salva rei substantia; sed usus qui est factum vel in facto consistit, ut in bibendo et comedendo bene potest esse.' Cf. *App. mon.*, 832–33.

153. *App. mon.*, 829: 'Sed definitio usus a dicto haeretico allegata non est definitio usus universaliter, id est in omni significatione usus sumpti, sed tantum particulariter sumpti, scilicet usus iuris civilis, qui non est usus universaliter sed solum particulariter sumptus.'

154. *App. mon.*, 830: 'Item, quod definitio usus ab ipso allegata non sit definitio usus universaliter sed tantum particulariter sumpti, patet etiam ex eo quod usu proprie dicto convenit uti rebus propriis sicut alienis, nec minus proprie utitur quis rebus propriis alienis. Praedicta autem definitio extendit se solum ad usum rei alienae et non ad usum rei propriae, quia ut dicit ipsa definitio, usus est ius utendi rebus alienis, ergo dicta definitio non est definitio usus universaliter sed tantum particulariter sumpti.'

155. *App. mon.*, 830, on John's strict definition of use: 'Ergo dicta definitio non est definitio usus universaliter sed tantum particulariter sumpti, scilicet usus iuris civilis, qui non est usus facti, nec usus iuris naturalis, nec iuris divini, nec iuris civilis universaliter et omni modo sumpti....'. This represents a development of Bonagratia's earlier attempt to withdraw the source of *usus facti* being (necessarily) connected to positive law; see *De paup.*, 503, and *Appellatio*, 103. For Bonagratia's appeal, see Mäkinen, *Property Rights* 174–90; Tarello, 'Profili giuridici' esp. 426–32 is suspect on a few points.

156. *App. maior*, 263 explains that a *ius proprium* comes from positive, rather than natural *ius*.

157. *App. maior*, 378: 'Habere autem usum iuris in communi est habere proprietatem in communi, quia usus, prout est iuris, est ius proprium utendi aliqua re pro qua datur actio in iudicio habenti tale ius, sicut ex obligatione, ut in dicto 1 in I. [2.2] *De rebus incorporalibus*.' The reference should probably be emended to Inst. 2.2.2. Cf. *App. maior*, 401: 'Et talis usus iuris ex quo competit ius agendi in iudicio, dicitur usus proprius.' Also, *App. minor*, 437; *App. mon.*, 759, 784–85.

This is as true for an individual as it is for a corporate body,¹⁵⁸ whose members, moreover, all have the power to take legal action to recover the goods of the church, or allege an exception to defend them.¹⁵⁹

A right of using falls under the category of *usus iuris*, and it was a ‘personal’ and ‘exclusive’ right. Michael described it as a personal servitude, which is much like a right of inheritance, usufruct, obligations, or rights to legal action.¹⁶⁰ In keeping with Roman law ideas of property, Michael pointed out that usufruct was a *pars dominii*,¹⁶¹ thus implying that *usus iuris* was too. They are what we might term lesser property rights.

The other half of *usus* is the act itself, or *usus facti*. The adjective ‘simple’ was used to distinguish it from a civil use of right and fuller property rights like *dominium*.¹⁶² What underlies the act of using is a faculty of using (*facultas utendi*), which is only the bare personal and subjective ability to act; at one point he described it as a ‘licit faculty and power of using’ (*licita facultas et potestas utendi*).¹⁶³

Although the faculty is enough to act, it is not enough to ensure that one’s actions are licit and just: it is only licit by default in the absence of other property rights (e.g., using an unowned object). Property rights such as lordship, usufruct, or even a right of using suffice for this (although certain restrictions on what constitutes acceptable use may be in place), but one can also make do with a licence of using. In a friar’s day-to-day activities, this is the means by which he makes “factual” use of things. Michael relied on two main legal ideas to make his case. One was the Roman law *peculium*.¹⁶⁴ What was appealing about the *peculium* was that any *obligationes*, that is, any rights, duties, or debts, arising from any use of the *peculium* was acquired by the *paterfamilias* rather than the

158. *App. maior*, 341, referring to Dig. 41.1.52 (696). This was one of the references Bonagratia used at *De paup.*, 325, to describe the mode of having ‘iure dominii vel quasi dominii seu proprietatis.’

159. *App. maior*, 342: ‘Unde etiam talis communitas est temporalis, quia licet in ea excludatur personalis proprietas, includitur tamen in ea quasi quaedam collegialis proprietas cuius quilibet de collegio quodammodo particeps esse dignoscitur, dum unusquisque clericus ecclesiae collegiatae habet actionem ad res ecclesiae suae recuperandas et exceptionem ad defendendas.’

160. *App. maior*, 263, referring to Inst. 2.2.

161. *App. maior*, 262; cf. *Appellatio*, 106–07.

162. *App. mon.*, 839: ‘simplex usus facti dicitur ex eo quod separatus est a proprietate et dominio et usu iuris civilis particulariter sumpti, qui est proprium ius utendi rebus alienis, salva earum substantia, pro quo usu competit proprium ius agendi in iudicio, non ex eo quod separatus sit a licentia et concessione utendi, tunc non esset ius iustum [*read*: usus iustus] sed potius abusus illicitus.’

163. *App. mon.*, 808, 812.

164. See Dig. 15.1–2 (227–35) and *Cod.* 4.26 (165–66) for the legal background. Bonaventure, referring to Dig. 50.17.93, made a *peculium* argument in his *Apologia pauperum* 11.7; see Bonaventure, *Opera omnia* 8:312b. See also Miethke, *Ockhams Weg* 381.

(factual) user.¹⁶⁵ Michael read a gloss about *peculium* (which I have been unable to trace), which apparently connects the situation of a secular lord's servants and that of a religious: both use by licence, but without any right of using. (He connected the alleged gloss [ad Dig. 15.1.25] to a passage of the *Decretum* [C. 19 q. 3 c. 9]).¹⁶⁶ Another example also came from the *Decretum*, where he read that passing through another's field is *fas*, not *ius*, and then argued that divine *ius* allowed an action that civil *ius* might prohibit.¹⁶⁷

Taken together, Michael thought these formed the legal background of what goes on when a rich host invites a man to eat at his table. In this scenario all that is given is a licence to 'use' the food in a specific way; that is, the guests cannot use the food to start a food fight, or sell it later on—unless that is how the host wants the guests to use the food.¹⁶⁸ Use by licence is licit and just, but only so long as the licence endures; if the owner revokes the licence, the use must stop, and there can be no appeal to the courts for the use.

165. R. Evans-Jones – G. D. MacCormack, 'Obligations', *A Companion to Justinian's Institutes*, ed. E. Metzger (Ithaca 1998) 127–207 (171); cf. Inst. 3.28 pr. (42)

166. *App. maior*, 264: 'Nam servus habet licentiam a domino utendi rebus domini sui et tamen non habet in eis ius utendi, sicut patet ff. *De peculio*, l. *Id vestimentum* [Dig. 15.1.25], ubi glossa dicit idem esse in famulis dominorum qui utuntur rebus dominorum de eorum licentia et idem est in religiosis qui habent licentiam a dantibus vel a praelatis suis rebus, et tamen constat quod non habent ius utendi in eis, ut notatur in praeallegato, c. *Si qua mulier*, 19 q. 3 [C. 19 q. 3 c. 9].' The gloss Michael refers to cannot be found in the Lyons edition (1627, coll. 1500–01), which I have relied on elsewhere in this paper, nor in editions of the *Digestum vetus* printed in Perugia (1476, fol. 309vb) Venice (1484, fol. 237vb). I would hazard a guess that Michael stretched the meaning of the gloss to *Peculii*, which speaks of *dapiferi* and *pedissequae*, but not of *religiosi*. The gloss 'Non' to *Si qua mulier* (243vb) concludes any right—including a *ius utendi*—that an individual might still have will become the monastery's when he or she joins the monastery. A more concise argument is made in *De paup.*, 325, which suggests *Glos. ord. ad Cod. 1.3(6).54(44).4*, s.v. 'legitime' (4:141): 'Item notatur hic renunciantem seculo haberi pro mortuo.'

167. *App. maior*, 264–65: 'Sic etiam dicitur quod quis habet licentiam transeundi per agrum alienum, et tamen non habet ius civile transuendi, 1 D. c. *Omnes* [D. 1 c. 1]. Item, de iure divino fas est, id est licentia conceditur alicui, comedere uvas in vinea proximi sui de Deuteronomii 23, 24, et tamen habens talem licentiam non habet ius utendi huiusmodi, nam si ius haberet, actionem haberet per consequens ut in eodem c. *Omnes* [D. 1 c. 1] notatur in glossa.' The reference is to *Glos. ord. ad D. 1 c. 1*, s.v. 'fas est' (2rb): 'Sed licet sit aequum iure diuino: tamen non est ius, id est ius non dat civilem actionem.'

168. The best account is *App. mon.*, 828–29; but see also *App. maior*, 264, and *App. mon.*, 837. The so-called *Impugnatio constitutionum Papae Iohannis*, § 14, possibly written by William of Ockham, also contains a simplified account; see G. Knysh, 'Ockham's First Political Treatise? The *Impugnatio constitutionum Papae Iohannis* [April/May 1328]', *Franciscan Studies* 58 (2000) 237–259 (248). For doubts concerning the authorship, see R. Lambertini, 'Natural Law, Religious Poverty and Ecclesiology According to Francis of Marchia', *Intellect et imagination dans la philosophie médiévale / Intellect and Imagination in Medieval Philosophy / Intelecto e imaginação na filosofia medieval. Actes du XI^e Congrès Internationale de philosophie médiévale de la Société Internationale pour l'Étude de la Philosophie Médiévale (S.I.E.P.M.)* Edd. M. C. Pacheco – J. F.

CONCLUSION

On the whole, the way Franciscan poverty was described underwent some significant changes. There were similarities, certainly, but the differences are more striking. The similarities are what one would expect, deriving entirely from the position established in *Exiit qui seminat*: Franciscans possess nothing but a simple use of fact, with all other rights vested in some other body, be it the Church or the original donors. In other words, that a separation of use and all types of property rights was possible. The most notable argument that the leaders of the order made during the pontificate of Clement V was that it was entirely possible for a Franciscan to happen to control access to the things they certainly did not own without thereby having any sort of proprietary interest or stake in the things. This, as we have seen, was achieved by an argument for the primacy of intention in determining whether one stood in a proprietary relationship with the goods in question.

The emphasis on intentionality was not to last. Ubertino ridiculed the idea when he criticized contemporary practice,¹⁶⁹ and Pope John XXII ended up adopting a similar line or argumentation when he came to explain the nature of religious poverty.¹⁷⁰ The Michaelists, unsurprisingly, downplayed the importance of one's interior disposition in their account of poverty. Bonagratia's treatise on the poverty of Christ and the apostles, which was written before John's bulls, represents a sort of middle ground, where the internal disposition still plays a pivotal role.¹⁷¹ Among the later texts, Francis put it best when he insisted that just as virtue must 'burst forth' (*prorumpat*) into real activity at times, so too must evangelical poverty must shine forth in an exterior expression (*habitu exteriori*) in proportion to the interior disposition (*habitus interioris*).¹⁷² Needless to say, all discussion of Franciscans carrying about the keys to strong-boxes was quietly left unsaid.

With the exception of *accessus* and *usus*, the list of powers associated with property ownership remained mostly the same. But use presented its own special problems for Franciscans. Prior to *Ad conditorem*, most discussions about use were more practical than theoretical. The issue then was what degree of use was appropriate to a person who had no rights to the use; the pope took the debate to a more fundamental level: was *any* use possible without any rights?

Meirinhos, 3 vols. (Turnhout 2006) 3:1625–1635 (3:1626n3).

169. *Reducendo* 60–75 (45–46).

170. Cf. Brunner, 'Pope John XXII' 183

171. *De paup.*, 333, 489; see, e.g., Grossi, 'Usus facti' 320–22, who places him, however, too close to Olivi on this point. Grossi's analysis of Ubertino, while still overly metaphysical, is more persuasive (346–48).

172. *Improbatio* 436 (228). *Reducendo* 76–84 (46), makes a similar point, but reverses it: the internal

There was no short answer from the Michaelist camp, but they did all answer 'yes' based on similar but still unique analyses of *usus* into two constituent parts: the act of using and the legal use (*ius utendi*, and *usus iuris*). Michael's appeals rose to the challenge posed by the pope's discussion of servitudes. I have highlighted some of the legal arguments made in Michael's appeals, and I do not mean to suggest that that is all there is to them, but there is no denying that his analysis of use and the possibility of using without any positive law derived rights is heavily indebted to Roman ideas about ownership and use. As I have tried to show elsewhere, Ockham's account of use eschewed Roman law for the most part in favour of canon law, and Francis relied entirely on philosophical and theological arguments, and where even the briefest citations of the *Institutes* were prone to errors one might expect of one who had only heard them second-hand.¹⁷³

For Michael, the foundation of any licit, but extra-legal, act of using was comprised of two parts: the faculty and the licence. Human beings have, *de iure naturali*, a faculty to use, and in a world free of property rights, one may thereby use things licitly and without acquiring any rights or property from such an act. (The diminished role of intentionality remains important here.) Yet fourteenth-century Europe, especially in the cities where the friars lived and worked, was not such a world. The business of poverty, as one chronicler once wrote,¹⁷⁴ required negotiation in a world where there were few *res nullius*. This is why the licence to use was so important. It made a friar's use licit, assuming all the other conditions were met: that the item was not prohibited; it was not being mis-used (*abusus*); that the use only took place while the licensor wanted; and that the friar did not have the wrong intentions regarding his use. The other important feature of the licence was that, according to the Michaelists, an arbitrary revocation of the licence, even one *sine causa*, could take place at any time, and there was nothing a friar could do about it since a licence was not a *ius*. (The inviolability of one's *ius* without cause would form one of the most important features of Ockham's mature political thought.) Yet there is, by way of conclusion, something of a disconnect here, for it is well known that Franciscans did litigate for many things, albeit not in the name of their order but of the Church instead. This was one of the problems Pope John XXII and Ubertino da Casale (to name only two critics) had with the existing arrangement of Franciscan poverty.¹⁷⁵ An interesting essay remains to be written regarding Michaelist views about litigation and the Franciscan presence in various courts.

disposition must be judged by external actions.

173. See especially the concluding chapter and third appendix in *Ockham's Early Theory*.

174. See *Chronica XXIV generalium*, in AF 3:283; cited by L. K. Little, *Religious Poverty and the Profit Economy in Medieval Europe* (London 1978) 200.

175. Cf. Davis, 'Jean XXII et les Spirituels' 280–81.