Ockham's Theory of Natural Rights

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William of Ockham (c. 1287-1347) is a giant in the history of thought. He is also one the most prominent figures in the early development of natural rights theories. Yet despite his immense importance, there are exceedingly few detailed discussions of his contribution to the history of natural rights. Compared to the hundreds of articles and dozens of books devoted to the rights theories of Hobbes and Locke, we have hardly any literature which is specifically devoted to Ockham's hugely influential theory of natural rights.

In a way, this is not surprising. Most of Ockham's political philosophy was for a long time unavailable in English. The *Opus nonaginta dierum* (*OND*), in which he first developed his thought on natural rights, became available in English only in 2001.[1] Moreover, Ockham's corpus is vast—the translation of the *OND* alone spanning about eight hundred pages—and almost all of his political writings are polemical in nature, which in this case means that they do not contain a systematic exposition of Ockham's thought on the subject. The *OND*, for example, is a sentence-by-sentence, almost word-by-word, refutation of a bull of Pope John XXII in which Ockham rehearses almost all the arguments previously put forward by other defenders of the Franciscan way of life. Most of this is written in typically scholastic fashion, with long and sometimes tedious quotations from canon law, scripture and other authorities. Hence discussion of Ockham's political work has remained predominantly the territory of specialists in medieval thought.

Surely Ockham's theory deserves more attention, not only because of its immense influence, but also because its nature and its significance in the history of natural rights doctrines remain highly controversial. Many of the discussions of the Franciscan doctrine of rights in general and Ockham's contribution to this tradition in particular have focused on the strong association between rights and *dominium* (and between rights and *potestas*). The Franciscans often claimed to have no rights in the things they used because having a right for them meant having *dominium* (insofar as a right-holder is, *ipso facto*, on the dominant side of a relationship), and having *dominium* was, for them, incompatible with the life of poverty and humility that they had vowed to observe. Ockham has sometimes been depicted as a radical innovator. His nominalism supposedly led to a "social atomism" in political discourse, while his voluntarism would have led him to exalt God's will and that of human beings. Consequently Ockham would have had no place for a genuine theory of natural law; instead he filled the resulting void with a body of natural rights, marking off domains where human wills prevail (de Lagarde 1934-46, 6:122; Villey 1975, 260). Ockham is thus sometimes regarded as the proponent of a view that sees an intrinsic link between rights and "freedom" or "sovereignty."

[1] We refer to Ockham's writings first by their internal divisions, followed by a reference to the volume and page of the edition by Offler 1956-97. For the *Dialogus*, we have consulted both the in-progress edition of Kilcullen et al. (1995-) and the facsimile reprinting of the 1494-96 Lyons edition (Ockham 1962). All translations are our own, but the Kilcullen and Scott (2001) translation was consulted and is recommended.

This account has been challenged in several different ways. Firstly, as far as his natural rights theory is concerned, Ockham now appears less of a radical innovator, and more of an able defender of the traditional Franciscan doctrine of poverty. Secondly, the supposed connection between Ockham's metaphysical nominalism and his political theory has been questioned. Thirdly, Ockham's voluntarism has come under increased scrutiny, leading in one famous case to the conclusion that Ockham's moral theory is not voluntarist (Kilcullen 1993). Fourthly, some authors have pressed the point that Ockham's association of *ius* and *potestas* has quite different implications than the traditional Franciscan equivalence between *ius* and *dominium* (Tuck 1979, 22-4; Brett 1997, 50-68). And finally, Brian Tierney, in the most sustained discussion of Ockham's thought on natural rights of the last few decades, has stressed over and over again that Ockham "persistently emphasized right reason rather than mere power as the criteria [sic] of just law and as the basis of natural rights" (1997, 118).

Underlying these debates is a concern that pervades much of the historical literature on the development of natural rights theories in general. There is by now a fairly broad consensus among historians that the idea of natural rights can be traced back at least to the high Middle Ages.[2] Yet most authors would also agree that the outlook of many medieval doctrines is in important respects different from those of, say, Hobbes or Locke. They disagree on how to appreciate the difference. On one end of the spectrum are theorists like Strauss (1953), Macpherson (1962) and Shapiro (1986), who have distinguish more or less sharply between natural law and natural rights doctrines, and have regarded them as incompatible. On the other end we find scholars such as Maritain (1947), Finnis (1980) and Tierney (1997), who see the idea of natural rights as a supplement to that of natural law or perhaps even as merely a different way of expressing what is already implied in the latter. Ockham is sometimes identified as the pivotal figure in this development: a fountainhead of the evolution towards the displacement of reason by will and a demolisher of the classical idea of justice. And this evaluation of Ockham's thought may seem to reverberate in the evaluation of natural rights doctrines as such. Those who have discerned a break in the development from natural law to natural rights (libertarians aside) have tended to be critical towards natural rights, whereas the advocates of continuity have been generally appreciative of the whole tradition.[3]

As will become clear, Ockham is certainly not some kind of proto-Hobbes. His most striking contribution to the tradition of natural rights theories was a strong defense of the claim that people have natural rights that do not imply any sovereignty (or *dominium*). Thus his theory of natural rights is essentially different from the seventeenth-century natural rights theories as they were understood by people like Strauss, Macpherson and Shapiro. This matters for our understanding of early modern political thinkers, as the ideas that Ockham defended were still very much a part of the fabric of their intellectual world. It also matters for our evaluation of the natural rights tradition as a whole, as we shall suggest that Ockham presents us with an early version of a theory which will come to full bloom only in the twentieth century. Ockham's theory,

[2] Most specialists nowadays place the origin of natural rights language somewhere in the period from the twelfth to the fourteenth century, but some have argued for the presence of natural rights doctrines in Plato (Vlastos 1995), Aristotle (Miller 1995) or the Stoics (Mitsis 1999).

[3] Tierney, for example, regards Hobbes as an aberration in an otherwise sound tradition. See further Black (1990), Rentto (1994), Fortin (1996), Tuck (1997), Zuckert (1997), and Haakonssen (2002).

moreover, shares—in embryonic form—a fundamental weakness found in the modern form of the theory.

1 The Mendicant Poverty Controversy before Ockham

By the time Ockham was asked (*Epistola ad fratres minores*, 3:6.9-21) to defend his Order's poverty against the criticisms of Pope John XXII (1316-34), the problem of Franciscan poverty was already an old one. The controversy, in fact, continues to generate almost as much ink now as it did then. In order to appreciate Ockham's contribution to this debate it is useful to consider the tradition to which he contributed; however, as it is a story often told, we shall only mention a few of the more salient points.[4]

1.1 Poverty as Religious Ideal

Francis of Assisi's model for living in poverty was based on his understanding of the life of Christ (Robson 2002, 104). In the Middle Ages, it was generally accepted by all that Christ had lived the life of a poor man; yet there was little agreement on the nature and extent of his poverty (Leclercq 1974a and 1974b). As the material conditions of Europe improved during the so-called Commercial Revolution people began to emulate literally Jesus' material poverty (Little 1978; Mollat 1986, 55-86; Pellistrandi 1974a; Violante 1974). Francis belonged to this tradition, but he went further than most in his desire to follow Christ literally.[5] In his own writings, he often echoed or quoted the admonition of 1 Peter 2:21[6] that one should follow in Christ's footsteps (*RegNB* 1.1 and 22:2; *Epistola ad fideles (recensio posterior)* 13; *Epistola ad fratrem Leonem* 3; *Epistola toti ordini missa* 51; *Fragmenta alterius regulae non bullatae* 1.1; *Officium passionis Domini* 7.8; cf. Matura 2004, 132).

For Francis, a significant part of this *sequela Christi*, or following of Christ, manifested in a life of rigorous poverty.[7] A key feature of this type of poverty was that it was voluntary. Medieval authors usually differentiated between meritorious religious poverty and its ignoble, involuntary cousin (Tierney 1959, 11-13; Mollat 1986, 102-13); William of Ockham himself was no exception (*OND* 17.161-168, 2:448). Voluntary poverty meant vowing oneself to a life of austerity in the service of the Lord, which included adhering to the supererogatory counsels given to the "perfect" in addition to the commands Christ gave to all Christians. The Franciscans liked to compare themselves with those perfect men, and drew support for their particular way of life in Jesus's urge to his apostles not to take anything with them when they were sent to preach. "Do

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[4] The bibliography on the controversy is vast; Recommended readings include: Burr 1989 and 2001; Dufeil 1972; Damiata 1978 (vol. 1); Lambert 1998; Lambertini 1990 and 2000; Leff 1967, 51-255; Makinen 2001; Nold 2003; Tabarroni 1990. A succinct overview is Flood 1996. The best histories of the Franciscan Order are Moorman 1968 and Nimmo 1987; Brooke 1959 is crucial for the early history (*pace* Moorman).

[5] One should consult Wolf (2003, esp. 39-90) for a re-evaluation of the "novelty" of Francis's poverty. Garnsey (2007, 59-106) surveys interpretations of Christ's poverty up to the time of Ockham.

[6] For Francis, we have used Esser's edition and division of the texts (1978). *RegNB* refers to the earlier, unofficial Rule (*Regula non bullata*), while *RegB* refers to the offical version, the *Regula bullata.*

[7] In fact, just as the Franciscan interpretation varied over time, so too did other people's views. See Mulhern (1973, 15-17) for Christ's somewhat ambiguous position.

not keep gold, or silver, or money in your girdles, nor wallet for your journey, nor two tunics, nor sandals, nor staff: for the laborer deserves his living" (Mk. 6:8-9). The passage was interpreted as a guidance for a way of living that the friar had made their own—a life of preaching without money and with only the barest material necessities.

Two things should be kept in mind regarding the Franciscan doctrine of poverty. The first is that Francis and his followers did not conceive of poverty merely in terms of limited possession and/or use of goods, but always as related to inward poverty or poverty of the spirit. The second is that Francis never showed much interest in legal issues. His world was not that of canon law, but of biblical metaphors, images of the life of Christ, and—above all—of sacrifice and total renunciation of oneself in order to devote oneself completely to God (Lambert 1998, 33-72). Consequently it is rather paradoxical that the Franciscan practice of poverty should have led to a discussion over the juridical status of the use of the goods that the Friars Minor necessarily had. To understand the nature of the subsequent discussion over Franciscan poverty we need to sketch briefly how this primarily religious stance could lead to a legal dispute. As we will see, the "juridification" of the doctrine of poverty was to a large extent an attempt to accommodate the practice of poverty that Francis probably had envisioned to the requirements of a large organisation engaged in a successful preaching mission.

Outward poverty for Francis was more than just abstention from worldly riches; it was the expression of a more important inward poverty (*Admonitiones* 14.1-4; cf. *RegNB* 17.9-15; Eßer 1975, 60; Brett 1997, 13). One of the pivotal constituents of inward poverty was obedience. Once they had rejected the world, Francis said his followers had "nothing else to do, except to follow the will of the Lord and be pleasing to Him" (*RegNB* 22.9). The ultimate form of internal poverty, of "having nothing of one's own," was expressed in the vow, which Francis interpreted as the renunciation of one's will: a friar, except for the "ministers and servants of the other friars" must "remember, that they have renounced their own wills for God's sake" (*RegB* 10.1-2); they should not have authority or mastery (*potestatem vel dominationem*) over others, or even themselves (*RegNB* 5.9); they should, in short, be "lesser and subject to all" (*RegNB* 7.2). One of the dangers that Francis never stopped warning the friars from since he saw it as especially at variance with internal poverty, was that they might exalt themselves internally for their way of living. He begged the friars to be "meek, peaceable and modest and humble" (*RegB* 3.11), and to realize that anything good that they did was worked in them by God. Properly every man is a beggar before God, since all things belong to Him. Francis beseeched the friars to "strive to humble themselves in all things, not to glory nor rejoice in themselves nor to exalt themselves interiorly for the good words and deeds, indeed for no good thing, which God does or says or works at any time in them and through them" and to "…recognize that all good things are His" (*RegNB* 3.5-6, 3.17).

Much of Francis's zeal was directed against the symbols of what has been called "the new profit economy" (for example his total ban on the handling of coins), and there is certainly a great deal of truth in the characterization of the movement as an attempt to retreat from the economic system (Little 1978; cf. Coleman 1988, 629). Appreciating the importance of this context, however, should not prevent us from acknowledging the deep religious concerns that converged in the notion of inward poverty. The increased handling of money brought with it changes in human relations and shifts in power, but also increased attachment—attachment that became a focal point in the preaching of Francis because it brought with it an increased this-worldliness and,

especially, an increased danger of "excessive" preoccupation with goods (Eßer 1975, 69). In order to combat the natural inclination towards possessiveness, the psychological attitude of the friars towards the things they used was probably as important a point of attention as the possible human relations involved in the claims towards these goods. "Let all the friars beware of themselves, so that they avoid completely the receiving of churches, poor dwellings, or anything built for them unless they be appropriate to holy poverty, which they have promised in the Rule—always staying there as pilgrims and guests" (*Testamentum* 24). The target of prohibitions of appropriation was in part its psychological effect, both directly and indirectly through its effect on social relations, such that poverty is closely associated with humility, and both are associated with the service of the Lord and with confidence in Him. "Let the friars appropriate nothing for themselves: neither house nor place—in short, nothing; rather let them go forth confidently for alms as strangers and guests in this world, following the Lord in poverty and humility" (*RegB* 6.1-2).

Again the emphasis on humility and the denunciation of an appropriative stance are both present in Francis' directive not to resist evil (cf. *RegNB* 14.4-6). At the end of his life, large groups of friars were preaching in different parts of Europe, and they were frequently resisted by the local clergy who perceived them as unwelcome competition. The ensuing disputes were often settled by the pope granting the friars permission to preach, sometimes even overruling decisions of local bishops. Francis witnessed this development with dismay, commanding the friars not "to seek any letter in the Roman Curia" not even "on account of a persecution of their bodies" (*Testamentum* 25; cf. *RegNB* 7.14 and 14.4-6). Important for Francis was the absence of social standing, even to the point of being "willing to be despised by others while not despising them in turn" (Matura 2004, 24; *RegB* 2.17). This was what Francis meant by calling it the Order of Lesser Brothers (*Ordo fratrum minorum*): a Franciscan was to practice humility no less than obedience. Francis' insistence on humility and obedience, which could be summed up in the Latin word *minoritas*, had implications for the realm of rights, since it also meant that the friars were to abstain from seeking legally enforceable rights. In a nutshell, and to use a word that Francis himself did not use, but that was to become the focal point in future debates about Franciscan way of life, poverty was a total absence of *dominium* in a very broad sense, meaning lack of social status, lack of control in social relations, lack of control over one's own life, lack of property and lack of enforceable rights (Brett 1997, 12).

1.2 The Early Debates about Mendicant Poverty

What works for a charismatic leader and a few followers does not always work for an international organization. The phenomenal growth of the Franciscan Order—from eleven followers in 1210 to about 17,500 in 1260 (Brooke 1959, 282-83) and still growing—placed increasing pressure on the understanding of the requirements of Franciscan life. The rub of Franciscan poverty was that, unlike the poverty of other major religious orders, the order itself was to own nothing, yet its very mission was that of active ministry among the people.[8] An early conflict the Order

[8] This was a decision made early in the Order's history; see Thomas of Celano, *Vita prima sancti Francisci* 1.14.35 (Menestó et al., eds. 1995 [= FF], 309-10), and Julian of Speyer, *Vita sancti Francisci* 4.23 (FF, 1044). The idea is echoed in Bonaventure, *Legenda maior* 4.2 (FF, 804; Bonaventure 1882-1902 [= *BOO*], 5:513a).

faced, then, was reconciling individual and corporate poverty with the prerequisites of educated preachers, which included some basic economic security, books, shelter and leisure. It also required that the Order became involved in the building of convents and generally doing things indistinguishable from what other religious orders did.[9]

Early interventions by popes were designed in part to solve the problem of Franciscan corporate poverty. In 1230, Gregory IX drew a distinction in his bull *Quo elongati* between property ownership and use: Franciscans were to have only the latter (Grundmann 1961, 22-23). Fifteen years later, Innocent IV clarified this point in *Ordinem vestrum*: while Gregory had been content to omit who owned the things that the Franciscans used, Innocent wrote that the "right, ownership, and lordship" (*ius, proprietas, et dominium*) belong directly to the Church, unless the donors wanted to retain control over the goods they donated to Franciscan use (Sbaralea and Eubel 1759-1904, 1:401b).[10] Innocent's clarification, as he called it, of *Quo elongati* cemented a distinction between *usus* and *dominium* that remained at the heart of the controversy ever after.

If the purpose of these bulls was to solve the problem of how Franciscans "had" things only in a non-proprietary way, it also had the consequence hollowing out Franciscan poverty to what has often seemed to be a "legal fiction." In fact, Innocent's solution did little to impress critics of Franciscan poverty at the University of Paris in the 1250s and 1260s. By then, both the Dominican and Franciscan Orders had entrenched themselves in the university hierarchy, and one way the secular masters expressed their distaste for this state of affairs was to challenge the validity of mendicant poverty.[11] The most pointed criticism for us was made by the secular masters Gerard of Abbeville and William of Saint-Amour. In his *Contra adversarium perfectionis christianae*, finally published in 1268 (Marrone 1972, 97-98), Gerard pointed to the fiction of papal overlordship of goods (Clasen 1938-39, 134-35), and then noted that "according to the laws" (*secundum iura*), it is impossible to distinguish between ownership and use in consumable goods (Clasen 1938-39, 172). William of Saint-Amour added specification to this last point, describing Franciscan use as a form of usufruct, and providing references to passages in Roman law (William of Saint-Amour 1632, 360).[12]

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[9] Evidence of this sort of concern can be seen, e.g., in *Epistola de tribus quaestionibus ad magistrum innominatum* (*BOO* 8:331a-36b), *Epistolae officiales* (*BOO* 8:468a-74b), *Regula novitiorum* (*BOO* 8:475a-90b), and *Epistola continens viginti quinque memoralia* (*BOO* 8:491a-98b). Also revealing are the "general constitutions" that resulted from the general chapter meetings held at Narbonne (1260), Assisi (1279), and Paris (1292) (Bihl 1941; cf. *BOO* 8:449a-67b).

[10] Analysis of these bulls can be found in: Damiata 1978, 1:110-15; Elizondo 1962, esp. 334-61 and 369-75; Lambert 1998, 83-93 and 101-07; and Pásztor 1986, 104-12.

[11] On this conflict, see (in addition those listed in n. 4): Congar 1961; Dawson 1978; Douie 1954 and 1974; Marrone 1972; Traver 1999. For a specifically "Dominican" perspective, see Torrell 2005, 75-95; Weisheipl 1974, 80-92 and 263-72.

[12] William noted that usufruct required the substance of the thing to be preserved according to *Digest* (= Dig.) 7.1 (1:127-34), and quoted from *Institutes* (= Inst.) 2.4.2 (1:13-14) to prove that consumables do not belong to the category of things that can be given in usufruct. References to Roman law are to Krueger et al. (1966).

On the Franciscan side, the task of answering this new attack on mendicancy was largely entrusted to Bonaventure and John Pecham.[13] Bonaventure's *Apologia pauperum* (1269) became the classic exposition of the Franciscan doctrine of poverty.[14] Opinions are divided as to how "faithful" Bonaventure was to the spirit of St Francis on the matter of poverty, and although there is much to be said that he "admired and venerated St Francis ... as an inspiration rather than as a model" (Brooke 1974, 93), even the later progenitor of the so-called Spiritual Franciscans, Peter Olivi, expressed nothing but admiration for him and the *Apologia*.[15] Like Francis, Bonaventure's defence of poverty relied on a concern for intention and motivation (cf. *Apologia* 7.2, 8:272b), in which charity plays an important role. In this connection, Bonaventure explained away those acts of Christ that apparently showed him to own property as an example of condescension for the weak, to show that he did not condemn them (*Apologia* 1.6, 8:236b; 1.10, 8:237a; 7.35, 8:234a; and 7.40, 8:285b-87a; cf. Kinsella 1995).

To counter the legal objections towards the Franciscan way of life, Bonaventure reaffirmed Gregory's and Innocent's conceptual separation of lordship and use: "There are two aspects to the possession of temporal goods: *dominium* and *usus*. Since the use of temporal goods is a necessary condition of the present life, evangelical poverty consists in renouncing the *dominium* and *proprietas* (ownership) of earthly things, but not their use, which must be limited" (*Apologia* 7.4-5, 8:273a-b). Bonaventure distinguished between ownership, possession (*possessio*), usufruct (*ususfructus*) and simple use (*simplex usus*). The first three categories implied some sort of proprietary control, while the last did not. The friars, since their vow implied the renouncement of "*dominium* over anything whatsoever," had to be content with the limited use of things belonging to others (*Apologia* 11.5, 8:312a). Bonaventure also found cases in civil law that admitted separation of use of consumables from *dominium*. According to his fairly faithful quotation of the Digest, "a son under parental control is considered to be unable to retain or recover possession of his *peculium*" (*Apologia* 11.7, 8:312b; cf. Dig. 50.17.93 [1:923] and Inst. 2.9.1 [1:16]).[16] In other words, the son had no rights of lordship over the *peculium*. Yet it was generally admitted that he had a use of the *peculium*. The Franciscans were in a position similar to that of a child, unable to perform legal acts, and therefore under the guardianship of the pope. Whatever would be given to the Friars Minor became the property of the pope. In any case the friars could not be called owner of any object given to them since, "it is stipulated in the law that liberty cannot be acquired for he who does not wish it, and that 'a benefit is not given to an unwilling person'" (*Apologia* 11.8-9, 8:313a-b, quoting Dig. 50.17.69 [1:922]). If an interposed person handles money for the sustaining of the friars, he would act on authority of the donor, and only the donor—not the friars—may

[13] Thomas Aquinas did the same for the Dominicans in a series of disputed questions and three more substantial works: *Contra impugnantes Dei cultum et religionem* (1256), and *Contra doctrinam retrahentium a religione* (1271), and *De perfectione spiritualis vitae* (1270). On dating, see Torrell 2005, 346-47.

[14] We cite the *Apologia pauperum* (*BOO* 1882-1902, 8:233a-330b) by its internal divisions, followed by volume and page numbers; a serviceable translation is de Vinck (1966). Pecham's defence of Franciscan poverty are scattered through multiple articles and books; they are catalogued in Lambertini (1990, 109n2).

[15] See his comments, e.g., in the *Tractatus de usu paupere* (ed. Burr 1992), 138.

[16] In Roman law, a *peculium* was a sum of money given by the head of the household (*paterfamilias*) to a slave or son for their own use, usually in commercial ventures. However, any *obligatio*—that is, rights, duties, or debts (Evans and MacCormack 1998, 171)—arising from the use of the *peculium* is acquired directly by the *paterfamilias*; see Dig. 15.1-2 (1:227-35) and Cod. 4.26 (2:165-66).

claim the money back from the intermediary (*Apologia* 11.12, 8:314a-b). Bonaventure made a similar argument based on Gratian's *Decretum*, namely that any religious state requires that the monk does not own anything individually (*Apologia* 11.8, 8:313a).[17] Certainly if a monk or any religious could make use of things such as clothing, shoes, or any other thing that is consumed in use, without acquiring (individual) ownership, so could the friars. These were compelling replies, but the argument from consumption nevertheless remained a stock-in-trade argument in the anti-Franciscan arsenal during the history of the dispute.

Ten years after the appearance of Bonaventure's *Apologia*, Pope Nicholas III more or less confirmed the Bonaventuran doctrine in the bull *Exiit qui seminat* (= VI 5.12.3, 2:1109-21),[18] which was intended explicitly to put an end to the dispute over the Franciscan way of life. He declared that the rule of the Franciscans was more than simply observable: it was "also meritorious and perfect" (2:1114). Nicholas endorsed Bonaventure's interpretation of Holy scripture—that Christ had a purse out of condescension to the imperfections of the infirm (2:1112-13)—and reiterated some of the clarifications of *Quo elongati*: the friars had only the use of things that either remained property of the donor or became property of the Roman Pontiff. (2:1114) In order to account for the fact that their use of things did not give the friars a right to anything, Nicholas distinguished between ownership, possession, usufruct, the right of using (*ius utendi*), and simple use of fact (*simplex usus facti*) (2:1113). The additions of the term *ius utendi* and the specification "facti" to Bonaventure's "simplex usus" served to make it clear that what the friars had was completely devoid of any legal implication. This fivefold distinction provided the basis for the idea that any form of a property right was one that could be enforced in court. Thus, Nicholas expanded upon ideas of *Quo elongati* and *Ordinem vestrum*: if someone conceded the use of something to the friars but reserved the *dominium* of the thing for himself (meaning that it was not transferred to the pope), the friars could only use it as long as the owner did not change his mind. For example, in the case of the use of a building, the friars had to abandon it immediately as they heard of a change in the will of the owner (2:1114).[19] The friars never acquired any claim-right against the owner (or against anyone else) to let them use the things they were using.

In 1298 Pope Boniface VIII promulgated the *Liber sextus*, one of the official collections of canon law, which included the bull *Exiit qui seminat* in a section entitled "On the meaning of words." Thus, although the Franciscan Order faced some significant internal divisions over the nature of their vow of poverty, it must have seemed to many that there was no room to argue that Franciscans did not lack all property rights to the things they used.

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[17] C. 12 q. 1 c. 11 (Friedberg 1879-81: 1:680): "Do not say that you have something of your own, but let all things be common among you.... Since the brothers of our congregation have renounced not only their goods and properties (*facultatibus*) in their reception by the order, but also their own wills, and have completely subjected themselves through their promise of obedience to the authority and command of others in Christ and for Christ, it is certain that they ought to have, possess, give, or receive nothing without the licence of their superior."

[18] See Maggiani (1912) and Elizondo (1963) for analyses of the reliance of *Exiit* on the *Apologia pauperum*.

[19] St Francis once did this in fact; see Celano, *Vita prima* 1.16.44 (FF, 318-19).

1.3 John XXII

In the beginning of the 1320s, Pope John XXII started to question the basis of Franciscan poverty, and thereby started the last great phase of the debate. Why he did so is still a matter of dispute among historians.[20] Perhaps he became conscious of potentially dangerous consequences of the doctrine of the poverty of Christ for the institution of the church (Kinsella 1995). Whatever the cause, from the Franciscan perspective, the official doctrine on which the Franciscan order was founded now came under attack from the papacy itself.

John's major interventions in the controversy were bookmarked by the publication of two bulls, *Ad conditorem canonum* (1322) and *Quia vir reprobus* (1329).[21] In the first he argued that the provisions of *Exiit* and the privileges granted to the procurators of the brothers to litigate in court in the name of the Church[22] had both occasioned considerable damage to the honor of the Holy Roman Church and not benefited the brothers either. Since Franciscans "were no less solicitous after [*Exiit*] than before in acquiring and preserving those goods, in court and outside of it, nor less solicitous than other mendicant religious who have some things in common," it followed that the reservation of *dominium* for the Roman church did not have the effect intended. With a great sense of humor, John played on the wording of *Exiit* and argued that "in view of the Brothers' manner of using" it was "not the Brothers' use but rather the *dominium* of the Roman Church that should be called simple." After all, the brothers were in fact exchanging and selling the things of which they supposedly only had simple use of fact and no *dominium*. Such lack of such *dominium*, John maintained, did not make anyone poorer in respect of temporal poverty (*ACC* 53-68, 233-34).

John was a jurist of high calibre (he studied both canon and Roman law) and the core of his attack of the arrangements of *Exiit* was a juridical argument. It went along two lines. Firstly, he claimed that in things consumable by use it is impossible to establish use of right, or of fact, separate from ownership or *dominium*. Like Gerard, he thought that to maintain that this is possible was opposed to law and to reason (*ACC* 85-101, 236-37; cf. Dig. 7.5.5.2 [1:138]; cf. Inst. 2.4 [1:13-14]). Any kind of use that can be "had" requires that the user obtain some utility from the use of the thing while the substance of the thing remains unimpaired (*ACC* 108-130, 238-39). And this, John said, is impossible with regard to things consumable by use. Secondly, John argued that use without a right to use couldn't possibly belong to the state of perfection—a state to which the Franciscans thought they belonged—since such an act of using without a right to use would have to be regarded as unjust (*Quia quorundam mentes* 223-36, 276-78; cf. *ACC* 188-192, 245). John thus collapsed two distinctions that were essential for the Franciscan way of life, the distinction between ownership and licit use of consumables and the distinction between licit use (in general) and a right of using.

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[20] See Turley (1989) for an evaluation of the debate; additional comments in Robinson (2009, 350n10).

[21] John's writings are cited according to Tarrant's (1983) critical edition, by line and page number(s), except *Quia vir reprobus* (*QVR*), which is cited according to the text Ockham quoted in the *OND*. We refer to the second version of *Ad conditorem canonum* (*ACC*), as Ockham did. Nold (2003, 149-158) analyzes the first version.

[22] Granted in the bull *Exultantes in Domino* (18 January 1283).

The first line of critique, if valid, would make it impossible for the Franciscans to claim that the perfection of poverty consisted in complete lack of ownership, since nobody could licitly renounce use of consumables. If the licit use of these was impossible without having ownership of them, nobody could licitly renounce ownership of all things. This argument had already been dealt with by Bonaventure in his reply to Gerard of Abbeville, but John was clearly unconvinced.

John's second argument was even wider in scope and perhaps even more damaging to the Franciscan aspiration to withdraw from legal relations and to renounce all forms of legal authority. Apart from the things that were consumed in use, the Franciscans used a great many things of which they claimed to have factual use but no right of using. For John there was no such thing as licit use that is not a right to use, and since something is used either licitly, or illicitly, either one has a right to use it (which for John meant a legal right) or one's use of it is illicit (*QVR* 65.1-9, 2:573; cf. 64.1-3, 2:571). Consequently the Franciscans must have a right to use the books they are using, and the buildings they are sleeping in, all the way down to the "crust of bread" the friars eat (*ACC* 90-93, 236). John applied the same logic when, in his bull *Cum inter nonnullos* (1323), he condemned the proposition that Christ and the apostles had no right of using, giving, selling, and exchanging the goods they held, for the Bible clearly witnessed that they did, and to claim that they had no (civil) right to do what they did would imply that they acted unjustly (14-23, 255-57).[23] If John was right, nobody could renounce all legal rights since any act is either right or wrong, and doing something requires that one has a right to do it.

In *QVR*, John had a number of new objections to deal with arising from Michael of Cesena's (d. 1342) appeals made on behalf of the Franciscan Order.[24] In this new bull, inspired by the "reprobate," Michael, John's hierocratic leanings are made truly explicit for the first time.[25] When he came to discuss the origin of property, he argued that Genesis made it clear that lordship had been given to humankind by God in the state of innocence. In other words, the Franciscan claim to return to this state was not necessarily predicated on a complete renunciation of property rights. For he read in Genesis (1:28), that the Lord said to our first parents, "Increase and multiply, and fill the earth and subject it." He then noted that Augustine's quotation of this verse had *dominamini ei* for *subiicite eam*, that is, "exercise lordship over it [the earth]" for "subject it." Moreover, the passage read, "And exercise lordship over the fish of the sea and the birds of the heavens, and all living things that move upon the earth." From this John concluded that "after the blessing our first parents had lordship in the state of innocence of the earth, the fish of the sea, the birds of the heavens, and all living things that move upon the earth" (*QVR* 26.1-12, 2:483; Miethke 1999, 523). But this was not all: John used his discovery to build a complete theory of the origin of property, not just common property but private property as well. He continued to inquire whether this first *dominium* was exclusive or common, and answered that it must have been exclusive, for at the time of the blessing, Eve was not yet formed. So he concluded that before Eve was formed the *dominium* of temporal things was exclusive to Adam, not common.

[23] It is perhaps not a coincidence that John canonized Thomas Aquinas a few months earlier (Lambert 1998: 258-59; cf. Torrell 2005, 322), for there is evidence that John read him carefully (Maier 1967, 2:89; Dondaine 1975), and approved of his "instrumentalist" position (Tarello 1964, 418). On the complicated history of *Cum inter nonnullos*, see Duval-Arnould (1984; 1990), and Tabarroni (1990, 83-87).

[24] These are edited in Gál and Flood 1996, 227-425 (*Appellatio in forma maiore*), and 429-456 (*Appellatio in forma minori*). *QVR* was based on the shorter appeal.

[25] Cf. his earlier bull of 1316, *Si fratrum* (ed. in Tarrant 1983, 156-62).

"Indeed it could not have been common, since he was alone during that time, and nothing can be called 'common' with respect to one who has never had any companions" (*QVR* 27.7-8, 2:486; cf. 88.10-11, 2:654). Against the idea common among theologians and canonists—and some civilians—that property was introduced by human law (Tierney 1997, 135-48; Töpfer 2001; Weigand 1967, esp. 307-60), John said that this was not possible. For no one can give a thing unless it belongs to him, so the ownership of temporal things must have been given by God, since originally it belonged to God (*QVR* 88.24-60, 2:654-55).

2 Ockham's Theory

The English friar William of Ockham provided the most sustained response to John's bull.[26] Ockham was certainly among the most brilliant men of his age and the Friars Minor could not have dreamt of a more capable defender than him. He was not satisfied to attack John's argument on one or two points. In his answer to the bull he decisively undermined John's theory on every front. Not only did he manage to consistently reinterpret the biblical passages that John had used, he also responded with remarkable skill to John's legal arguments. Ockham was so efficient a polemicist that at one point John XXII threatened to burn the whole city of Tournai to the ground if it would not arrest him and deliver him to the papacy (Wood 1997, 6).

For a modern reader Ockham's arguments may sometimes seem appallingly fastidious, but the study of them is nevertheless rewarding because he did not just argue by means of authoritative references but also by way of a sharp insight in common intuitions on property. Moreover, all his arguments were framed in an overall theory on the origin of property and rights that proved to be very influential (Kilcullen 2000). For our purpose, it is useful to focus on Ockham's answers on the three main challenges posed by John XXII, namely whether the friars could licitly consume things that they did not own; whether they could licitly use things without having a (legal) right to use them, and whether it was possible to avoid ownership at all (whether there had ever existed a state without individual property).

2.1 Is licit consumption possible without dominium*?*

John's defence of the thesis that it was impossible to licitly use consumables consisted of mixture of strictly legal arguments and a more general point, namely that one can only have use of something over which one has no *dominium* on condition that the thing is preserved in the use. Since this was not the fact in the case of consumption, it could not be called "use" and a right of using things that are consumed in the use could not be had. Ockham replied to both arguments.

The main legal argument in support of John's claim that a right of using cannot be had in things consumable by use came from civil law:

> usufruct, as it is established as a right to another's property (*ius in re*), which is called a personal servitude and for which there exist real actions (*competent*), is nothing other than a right of using, and the use that is also a personal servitude is nothing else than only a right of using another's things saving the substance of the thing (*ACC* 105-09, 237-38).

[26] Beckmann (1992) covers the pre-1990 scholarship on Ockham; Lohr 2005, 249-69, is a useful supplement.

Both the definitions of "use" and "usufruct" required that the substance of a thing remained unimpaired (e.g., Inst. 2.4 pr., 1:13; and 2.5 pr., 1:14), which meant that the holder of only a right of using did not have the right of consuming the thing. Ockham answered by drawing a distinction between "use of right" and a "right of using" (*OND* 3.466-480, 1:323). The former encompassed the civil law categories of "use" and "usufruct," while the latter was much broader (*OND* 2.127-154, 1:301-2; 2.181-184, 1:302-03). Because a right of using is broader than use (or usufruct, or both), Ockham argued, it cannot be established from the definition of use that one cannot have a right of using in things consumable by use (*OND* 2.176-178, 1:302). For example, an owner, according to civil law, could not have use or usufruct in his estate. But surely he could licitly use its products. And since he does not need anyone's permission to use the products, the owner must have the right to use his own property (*OND* 3.123-138, 1:314). This right is neither "use" nor "usufruct," nor, for that matter, "use of right." Similarly, use of right did not exist in the proper sense in things consumable by use, but nevertheless a right of using things consumed in the use was often attached to cases of use of right, as it was in the case of the use of a farm (*OND* 3.466-480, 1:323).

Ockham then argued that a right of using consumables did not require ownership. Here he relied on biblical evidence to establish that God did grant rights to use things that are consumed in the use to people other than the owners. In Deuteronomy (23:24-25) the Lord allowed the Jews to go into their neighbour's vineyard, and eat their fill of grapes, as many as they wished, but they were forbidden to put any in their vessel. Similarly in their neighbour's standing grain, they could pluck the ears with their hands, but they were not allowed to use a sickle. Clearly the Lord gave them a right to eat from the grapes and the grain that nevertheless did not become their property (*OND* 3.371-387, 1:320-21). Another example of a right of using things that are consumed in the use was the standard case of the right of subsistence. Anyone placed in a situation of extreme necessity had the right to use the things that he needed to sustain his life. For example, when starving a poor man could, even without the owner's consent, licitly take food from a rich man. But this did not mean that the poor man for that reason acquired ownership of the thing. The owner of the thing did not lose his lordship before the thing was consumed, and if the extreme necessity ceased before the thing was consumed, it would not be permissible for the poor man to retain the thing. Similarly, if someone would die unless he covered himself with someone else's garment (also a "consumable," but one that deteriorated only over time), he had a right to the use, but this right only lasted as long as the situation of extreme necessity continued (*OND* 3.417-438, 1:322).

Against John's claim that "in things consumable by use, … neither a right of using, nor a use of fact, separate from ownership of the thing or lordship can be established or had" (*ACC* 96-98, 237), Ockham replied in two steps: Since he was concerned to show that use of fact can be separated from ownership, he began to raise the question whether it can be separated from either individual or common ownership or lordship. Separation of use and individual lordship was obvious in the case of the early Christians described in Acts (2:44-45; 4:32-35), who had no individual lordship but nevertheless used things. But it was also obvious, according to Ockham, that use of fact did not more essentially require common lordship than it does individual lordship. And thus it followed that use of fact can in fact be separated form common lordship, as was obvious from the fact that many people used things without having common ownership of them.

But of course, not all use of fact—that is, use without a (legal) right of using—was licit, as was obvious from the case of a thief using the things he had stolen without owning them. So it remained to explain in which cases use of fact was in fact licit. Here Ockham posited the existence of a general licit power of using things, granted by God to Adam and Eve. Actually, what made the use of something licit was not common or individual *dominium*, but this power, which had never ceased to exist.[27] For example, if some garment is regarded as abandoned and no one has lordship over it, the most general power of using allows someone to licitly use that garment (*OND* 4.208-217, 1:333-34).[28] However, the application of this power could be restrained by either laws prohibiting the use of something, or by the fact that something was owned by someone else. Thus, even though a thief does have the most general licit power of using with respect to the stolen thing, the fact that the thing has been appropriated by someone else, who has not given the thief a "specific power" to use it, "blocks" the thief from employing his general power of using (*OND* 4.247-250, 1:334-35). But even if a thing is owed by someone else, a permission of the person who can grant it is enough to make licit use of consumables possible (*OND* 4.182-191, 1:333; cf. 41.45-72, 2:534-34). There are, then, two conditions which must be fulfilled for any use to be considered licit: first, that the use is not somehow prohibited to the person who wishes to use, and, second, that the would-be user has at least a licence of using granted by someone who has the authority to grant such a licence.

One example of licit use was particularly pertinent to the situation in which the Franciscans took themselves to be in. John had granted that during the time described in Acts 4, the apostles and the first believers held things in common (according to John: common *dominium*). But this meant both that the apostles did not own anything individually, and that the college of apostles did not own anything in common (even if they held things in common with other believers). Just like the use of the Friar Minor, their use was separated from both individual ownership and the common ownership of the body, because neither an individual friar, nor the order as a whole had anything to the exclusion of other believers. John's substantive argument for maintaining that it was impossible to separate licit use of consumables from *dominium* was that with the consumption the *dominium* of someone else would cease to be. But this also happens in the above cases, and, above all, it happens in every act of consumption, since God is Lord of everything and when something is consumed or perishes, God's lordship of the thing also ceases to be (*OND* 41.102-136, 2:525). Other examples of licit use of consumables separate from *dominium* were the use of a farm, the use of guests who licitly use food and drink without individual or common lordship, the use of slaves or even a son in the family and the use of the appearance of bread and wine by a mass celebrant. In all those cases, it was plain that the use was licit, since the owner had given the requisite permission, but such permission did not imply a transfer of ownership.

2.2 Is licit use possible without a right of using?

Having proven that the friars could licitly consume goods without ownership of them, neither individually or in common, Ockham now turned to the second point: that it was possible to have

[27] Ockham believed "use of fact" could refer to either the actual act of using or to the licit power (granted to humankind by God) of eliciting such an act; see *OND* 6.181-183, 1:359.

[28] Ockham adds here "at least in a case of extreme necessity," but this does not seem a necessary requirement.

licit use of things without having a right to use them. In order to establish that the friars did not need a right (at least not the kind of right that John claimed they had) to licitly use the things they used, Ockham distinguished between two kinds of right. The word "right," he said, is sometimes taken for a right of the forum (*ius fori*) and sometimes for a right of heaven (*ius poli*), which was a distinction he traced back to Augustine via Gratian's Decretum (*OND* 65.34-55, 2:573-74, citing C. 17 q. 4 c. 43; Parisoli 1998, 48-49). The right of the forum was established by human or divine positive law or, broadly speaking, custom (*OND* 65.40-42, 2:573-74). The right of heaven embraced natural right—right that is in harmony either with purely natural right reason—and divine right—right that is not in harmony with purely natural reason but is in harmony with right reason taken from things revealed to us by God (*OND* 65.76-89, 2:574-75). Since rights established by divine law—separate from natural rights—do not play a distinctive role in the argument, the main distinction was between positive human rights (legal rights) and natural rights. In Ockham's words, "every right is either divine or human, and, if human, is either natural and of heaven, or it is positive and of the forum" (*OND* 65.228-30, 2:578). It is important to realize, however, that Ockham's distinction between rights of the forum and natural rights is different from the contemporary distinction between moral rights and legal rights in at least two respects: first, for Ockham there is a moral duty to respect every legal right (*OND* 65.56-75, 2:574), and in this sense every legal right (we would say) was also a moral right (but not a natural right, since a natural right is explicitly defined as independent of human ordinance). Second, many rights that today count as natural right, were legal rights for Ockham. The right to property, for example, was not a natural right (even though there was a moral duty to respect somebody's property rights), but a legal right.[29]

Ockham subsequently showed that both John and Michael of Cesena were arguing about legal rights (rights of the forum), when they disagreed whether or not the friars did have a right to use things (*OND* 62.28-47, 2:564-65, and 65.90-114, 2:575). Similarly, he insisted that Nicholas in *Exiit* also had a legal or positive right in mind when he declared that the friars did not have a right to the things they used (*OND* 60.89-118, 2:556). Consequently the task Ockham set for himself was to prove that the friars did not have a legal right to use the things they used, but that their use was nevertheless not illicit either because they had a natural right to use the goods they used or because they had a permission to use them by somebody who had the authority to grant such a permission. The most important distinguishing feature of any (legal) right to use something, for Ockham, was that it was legally enforceable. It allowed the person who had it to litigate in court for the use of the thing should the use be obstructed by someone else (*OND* 2.155-184, 1:302; and 6.145-180, 1:358-59). More generally it was the distinctive feature of any positive right that it allowed the holder to litigate in court for the thing to which he had a right (*OND* 61.61-62, 2:560; and 111.13-29, 2:793). A right in this sense was sharply distinguished from the licit power that is acquired by a mere (revocable) permission or "grace." For example if a rich man were to invite poor people and put food and drink before them, the poor would have the licit power to eat and drink, but they have not, for that reason, acquired a right, since the host could, if he pleased, take the food away and the invited guests could not take him to court for having

[29] The power to acquire *dominium*, however, is natural (in the sense of given by God after the fall), but human law is responsible for the institution of property, as are the legal remedies to defend it. See *Breviloquium de principatu tyrannico* (= *Brev.*) 3.7.19-39, 4:179; cf. *OND* 14.258-367, 2:439.

taken the food from them (*OND* 2.155-174, 1:302; 6.168-171, 1:359; and 6.272-276, 1:361). If somebody would grant a permission that cannot be revoked, this would establish a right in the person to whom the permission is granted, but unless the permission is irrevocable, no right is acquired (*OND* 61.89-94, 2:560; 64.18-41, 2:571-72; and 65.56-75, 2:574).[30]

In this sense, the friars did not have any right to the things they used, because they used them only by permission or grace of the granter, without any human (i.e., humanly ordained, as opposed to natural) right by which they could litigate in court for the thing or for its use (*OND* 3.70-93, 1:313; and 111.13-29, 2:793). Such use was not "just" in the sense of legal justice, but it is nevertheless licit—or just in another sense—as long as it is morally good and in harmony with true reason (*OND* 60.119-160, 2:556-57; and 65.115-183, 2:575-77; Robinson 2009, 370-72). Ockham explained that God gave the human race a licit power of using, which allowed people to use things (without necessarily having lordship of them), as long as nothing else stands in the way (*OND* 4.192-207, 1:333). Elsewhere, the same is expressed in terms of natural rights: "Anyone can use by right of heaven any temporal thing that he is not prohibited from using either by the law of nature, by human law, by divine law, or by his own act" (*OND* 65.211-217, 2:577-78). However, even if the most general power or natural right of using can be restricted by laws, it cannot be emptied totally. Ockham, again following what was the common belief of the day, thought that in times of extreme necessity—in case someone would face certain death because of lack of access to some good—all things were common, so that anyone in such a condition could licitly use whatever he needed to avoid death (Roumy 2006). Outside cases of extreme necessity, however, if someone is prevented from using some determinate temporal thing only by the fact that it is another's, "the permission alone of the person whose thing it is, which is expressed through a licence, suffices for this: that he may use that thing by right of heaven" (*OND* 65.221-223, 2:578). Permission of an owner is thus sufficient, according to this reasoning, to "untie" the natural right of using things that anyone has at all times regarding all things (*OND* 65.218-227). It is this kind of use, licit use by right of heaven, that the Friars Minor, according to Ockham, have in the things they use (*OND* 65.239-242, 2:578).

In another context, Ockham seems to have been willing to limit the exercise of natural rights to cases of extreme necessity. He writes: "…although every man has such a right of using at every time, he does not have the right of using things for every time." That is, at any moment one might be in the position where the natural right is necessary, but one is not always in this position. Thus, people who have nothing, individually or in common, do have a right of using others' things, but only for a time of extreme necessity. "In such a time they can licitly, by virtue of the right of nature, use every present thing without which they could not preserve their life, but at another time they cannot use others' things by the authority of that right" (*OND* 61.37-44, 2:559). The distinction is used here to explain that the friars, who have also nothing proper, although they have a permission (of the owner) to use the things they use, do not have any right to these things outside the special case of extreme necessity, not even a natural right:

[30] When somebody is granted a privilege, this can be called a right from the perspective of others who cannot divest the privilege. But if it can be licitly revoked, it is properly called a grace from the perspective of the one granting the privilege; see *OND* 3.395-416, 1:321-22; and 61.70-88, 2:560.

From which words it is gathered that, by this, the Brothers use things only in common, nothing of right is attributed to them; with which, nevertheless, it is agreed that they have some right from elsewhere, namely a natural right. But they do not have this right except for the time of extreme necessity alone. From this it is clear that a licence of using is not a right of using. Since the Brothers have a licence of using things for a time other than for the time of extreme necessity, but do not have any right of using whatsoever except for the time of extreme necessity, a licence of using is not, therefore, a right of using (*OND* 61.130-137, 2:561-62).

This may seem contradictory with the first line of reasoning. Perhaps the appearance of inconsistency can be reduced if we focus on the different manifestations of natural right in Ockham (cf. Kilcullen and Scott 2001, 419n56). The natural right to use seems to refer both to the right of using that everyone had in the state of nature (and still has), which allows them to licitly use any thing which it is not forbidden to use, and to the special case of the right of subsistence, where this right overrules existing property rights. The crucial difference between the two is that the first is licitly restricted by anyone who appropriates something, while the second cannot. In Hohfeld's (1919) terminology, it is a bundle of privileges which anyone at all times, apart from the special case of extreme necessity, has a power to abridge. The other manifestation of natural right—the right to the goods needed for subsistence in times of necessity—cannot be abridged.

When Ockham is contrasting the use of the friars by permission of the owner with the natural right to use in cases of extreme necessity, he likely had in mind the passage of *Exiit* where Nicholas seems to reserve the application of use by the law of heaven to such cases (*Exiit* 2:1113; cf. *OND* 6.145-180, 1:358-59). In such cases the right is something that can be claimed (unlike the more general power to licitly use something). But when Ockham insists that the friars do not have any right of using at all, except for the time of extreme necessity, he clearly means to convey that they have no claim to any of the things they used (except for the time of extreme necessity). This is obvious from the context in which the statement occurs, where Ockham draws a distinction between revocable and irrevocable permissions. If the permissions by which the friars used the things were irrevocable by the owners, this would in effect give the friars a claim to these things, but since the owner can arbitrarily revoke them at any time, they do not have such claims. Thus they cannot (except in times of extreme necessity) invoke a "right of nature" by which they can lay claim to the things they use. Once this distinction between the operation of the right of nature in cases of extreme necessity and the "most general power of licitly using" things is taken into account, it becomes clear that the disagreement between different parts of the texts is only about words—the application of the phrase "use by right of heaven"—and not substantive. Moreover, neither of the two uses of the phrase seem to discredit the validity of Ockham's response to John's claim that the Franciscans cannot use licitly without having right or *dominium* in the things they use.

2.3 Did Adam have dominium *over the earth?*

John's claim that God had given *dominium* to Adam was beyond any dispute. Scripture clearly said that He had. But was it really the same kind of *dominium* that men have today (after the fall) and that is equivalent to ownership? Ockham claimed that it was not. After all, words such as *dominium*, *dominus*, *dominator*, *dominari* are taken in different disciplines equivocally and in different ways. Since he had not found any authoritative writing that contained a definition or proper descrip-

tion of *dominium*, Ockham introduced some distinctions of his own. *Dominium*, he said, has various senses, some of them spoken of in the law and some of them outside. In the law *dominium* over temporal things is either human or divine, and human *dominium* is again twofold. The first is the *dominium* that belonged to men in the state of innocence by natural or divine law, and this was the lordship that was spoken of in Genesis. The second was the lordship that is spoken of in civil and canon law, and this belonged to men by positive or human establishment. These two types of lordship can be mapped onto the categories of *ius poli* and *ius fori*. Lordship in the second sense was again twofold. Broadly it was a principal human power of laying claim to a temporal thing in court. The term "principal" distinguished this power from other powers to lay claim to something in court such as the power of somebody who has usufruct of something to claim his usufruct in court, or from other powers that a principle owner has. This broad sense of *dominium* is distinguished from *dominium* in the strictest sense (i.e., the sense equivalent to ownership) in that the latter also permits the owner to treat the thing in any way not forbidden by natural law.[31] Ecclesiastics do not have lordship in a strict sense over Church property because their *dominium* over ecclesiastical goods does not permit them to treat these things in any way not forbidden by natural law (*OND* 2.262-441, 1:304-09).

Ockham now argued that the *dominium* that belonged to our first parents was not the lordship that is spoken of in canon law or in civil law, but "a natural power of the body and natural wisdom, whereby they could govern all things without their violent resistance" (*OND* 14.158-160, 2:434). It was a non-moral sense of *dominium*, like "the 'lordship' by which it is said of a boy or a servant that he is said to 'dominate' his lord's horse, because he can rule it as he pleases." Conceptually, this sense of lordship was closer to an irresistible "forcible power" (abstracted from ethical considerations) than it was to property (*OND* 14.148-153, 2:434). It meant that "in the things of which our first parents had the governance, nothing would have happened contrary to their will" (*OND* 14.84-86, 2:432). Accordingly it was said in Sirach 17:1-4 that God, after he had created man, had given him power over things upon the earth and had put fear of him upon all flesh. In addition to this *dominium*, our first parents were given a power to use temporal things, but this power (of using things) was not the lordship conferred to them by God, for animals also had the power to use some things (for example to eat), and they had not been given any *dominium*. After sin, however, our first parents lost this power to manage temporal things at will, "for, when our first parents were disobedient to God, all things became disobedient to them" (*OND* 14.236-240, 2:436).[32]

It is in the course of arguing that Adam and Eve before sin did not have ownership of things, that Ockham develops his account of ownership and especially of a right of using that is different from either individual or common ownership. The distinguishing feature of ownership, as against rights of use, was its exclusivity:

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[31] We would probably say, "full liberal ownership", but Ockham was not a liberal.

[32] Ockham's explanation of *dominium naturale* is similar to the accounts of Bonaventure and Aquinas. However, for Bonaventure, *Commentarius in II librum Sententiarum* d. 44 a. 2 q. 2 resp. (2:1008a-b), *dominium naturale* did not cease after the fall, although it was "more perfect" in the state of nature (Mäkinen 2001, 85). For Aquinas, *Summa theologiae* 2a2ae.66.1 co. (1882-, 9:84), there was no distinction between *dominium naturale* and the right to use.

> The lordship that is called "ownership" (*proprietas*) in the legal sciences (and in Scriptures that preserve the manner of speaking of the legal sciences) is exclusive (*proprium*) to some single person or particular group (*collegio*) in virtue of which one [person or group] can litigate in court against some other person or group if the other [person or group] should claim the thing of which it has lordship (*OND* 26.31-36, 2:484).

Ownership is so called because it belongs exclusively to an individual or a college and not to others (*OND* 26.38-45, 2:484; cf. 27.147-158, 2:489). However, Ockham also stressed that it cannot be concluded from the fact that something happens to belong to one person that it is exclusive to him. For then a monk, if all the other monks of the abbey were to die, would by himself have exclusive lordship of all the goods of the abbey and would then have to be regarded as its owner, which is false. Rather, something is called exclusive when it is appropriated by an individual (or a group) in such a way that it cannot belong to anyone else without a gift, sale, bequest, or some other human contract by which lordship of a thing is transferred. In the case of our monk, his lordship of the goods of the abbey is not exclusive to himself because if someone else would enter the monastery as monk, he would have some kind of lordship of the same goods, in the same manner as the first. The case of Adam and Eve was similar to the case of our monk: when Eve was created, she immediately had the same kind of *dominium* as Adam, without any gift, sale or other human grant by which lordship of a thing is transferred to another. For in the state of innocence one person would never have transferred lordship of anything from himself to another, but anyone, whenever he found something suitable to his use would have taken it without any grant by another. Nor could Adam and Eve together say that things belonged to them in common to the exclusion of others. So whatever kind of *dominium* our first parents had, it was certainly not *dominium* in the sense of property (*OND* 14.188-215, 2:435; 26.22-65, 2:483-84; 27.52-96, 2:488-9; 28.37-67, 2:492-93; 88.331-335, 2:661-62; cf. *Brev.* 3.15.45-66, 4.191-92; and Miethke 1969, 513–15).

Ockham divided the history of human property in three periods. In the state of innocence, Adam and Eve had lordship of a kind—i.e., they had an ability to dominate all temporal things—but there was no "worldly and civil" lordship or ownership because no temporal thing was called "one's own" (*proprium*) in such a way that it was not another's in respect of lordship. Our first parents also had a licit power of using things, but this was separate from the dominium they had. The second period began after sin, when our first parents had lost this *dominium* (but not the licit power of using things). In that time, they did not have lordship of temporal things "in the proper sense of lordship" but they had the power of appropriating things to themselves, and also of acquiring common lordship (but they had not yet done so). This power was not properly speaking common *dominium* "because if it were no one should appropriate any of those things without the consent of the community." All things were "common" in the same sense as things which are among no one's goods are still common to all men in that they are granted to whoever takes them. The third period in the human history of property began with the introduction of the first exclusive properties (dominia propria). Individual property was introduced by human (not by divine) law (*OND* 14.188-215, 2:435; 14.230-247, 2:436; 88.97-160, 2:656-57; and 14.340-367, 2:438-39). Ockham liked to refer to Aquinas whenever he could find incongruence between his teaching and John's bulls, as he both admired and canonized Aquinas. "Let those who hold the doctrine of Thomas take note of what he says," Ockham taunted, for in the *Summa theologiae* Thomas wrote that: "the division of possessions does not exist according to

natural law, but rather according to human agreement, which belongs to positive law." And further: "Hence the ownership of possessions is not contrary to the natural law, but it is added to it through an invention of human reason" (*OND* 88.281-286, 2:660, citing *Summa theologiae* 2a2ae.66.2 ad 1 [9:85]).

To summarize: For Ockham, property was not natural to man, but conventional—i.e., introduced by human law (necessitated by the sin of our first parents). Before the introduction of property, things were common—not in the sense of being common property, but in the sense of belonging to nobody—and everybody freely used the things he or she needed (*OND* 92.17-45, 2:669; cf. 27.38-96, 2:487-88; *Brev.* 3.7.7-77, 4:178-80; and 3.15.37-93, 4:191-92). The Friars Minor had, in a sense, returned to this propertyless "state of nature," since they vowed not to own anything exclusively and used things not as their own. The natural right of using things that was granted to our first parents, unlike the *dominium* that our first parents had, was not lost after sin. The friars used things by this natural right of using, which meant that they could use only either those things that belonged to no one, or things which the owner had given them (through a revocable permission) to use. Such a permission gave the friars nothing "of right" since they were unable to claim the use of these things in court.

3 Agency as a Ground of Human Rights: Ockham to the 21st Century

The foregoing should suffice to reveal that Ockham presents an entirely different account of natural rights than those of Hobbes and Locke as they were interpreted by people like Strauss and Macpherson (but see Swanson [1997] for a corrective to such interpretations). Unlike Herbert Hart and contemporary Will Theorists, Ockham did not think that having a right entails being in a position of authority or control over anyone's duty. For him, this was a characteristic of legal rights only—not of natural rights.

Realizing how different Ockham's conception of natural rights is from the 'strong' conceptions in some early modern rights theories may have us wonder whether his theory is actually a theory of subjective rights. If we contrast Ockham's conception of natural rights with the one at the basis of John XXII's theory, we may find that the latter is more obviously subjective—for the simple reason that *dominium* conceptually requires an agent (a *dominus*) who holds it. By the same token, it may also seem that Ockham's theory has little relevance for us today other than that of an illustration of how distant medieval rights thinking is from ours. Isn't our understanding of natural rights primarily indebted to the great seventeenth century rights theorists? If Ockham's conception of natural rights is distinctly different from theirs, isn't it equally different from ours?

Yet, despite the fact that Ockham categorically separates natural rights from *dominium*, his conception is misunderstood if taken as anything less than fully subjective. Ockham famously associated *ius* with *potestas* and in doing so he placed these rights firmly in the agent. He construed natural rights as abilities of the people who have them—as 'subjective powers of action' (Brett 1997, 63). What is more, *pace* recent interpretations, his theory is not adequately understood as a theory of rights derived from natural law. Michel Villey—Ockham's most prominent critic—had already sensed this, and although his account has been corrected on many points, his critique contained an important insight which can be more fully appreciated if it is placed in the wider context of Ockham's moral philosophy. Once the significance of this context is fully grasped, his

natural rights theory will appear as strikingly modern. As such it also contains, although in embryonic form, one of the main problems of its descendants (more about this later).

3.1 A Natural Right to do Wrong?

Villey argued that the "modern" language of natural rights, which he thought Ockham had brought into being, could not be harmonized with an objective conception of justice (1964, 125-6). Ockham had inaugurated an evolution which would lead to the contemporary state where subjective rights are nothing but labels attached to preferences (1961, 42-7). So even if he cannot be blamed for having a "possessive individualistic" conception of rights, the notion that he did endorse has been held responsible for some of the evils that are nowadays frequently associated with rights language. To make matters perhaps even worse, Ockham seems to have had a very copious view of the extent of our natural rights. Despite the initial focus of the Work of Ninety Days on the limited use of the Franciscans, he ends up claiming that "everything done rightly (recte) without a right of the forum is done by right of heaven" (*OND* 65.180-181, 2:577; cf. McGrade 2006). Since "right of heaven" is to all intents and purposes equivalent to 'natural right', one may be tempted to read Ockham as saying that we have a natural right to do anything that is not illegal or a violation of someone's right. And this would further corroborate the view that Ockham's conception of rights constitutes one of principal the sources of the derailment of contemporary rights language.

In response to this assessment of his natural rights theory, recent discussions (Tierney, Brett and McGrade) have emphasized that Ockham firmly grounded these rights in "right reason." Far from advocating a natural right to do whatever we can do without violating the natural rights of others, Ockham actually laid the faculty to be guided by reason at the foundation of our rights. This can be seen, for example, from the context from which the phrase *ius poli* was derived. It was used by Augustine in *Quicumque vult* (C. 17 q. 4 c. 43)[33] where he claimed that it was within the bishop's rights to not, if he wanted, give back an earlier endowment. However, he could do so only by civil law, not by the law of heaven (*iure fori, non iure poli*). According to a gloss to "*non iure poli*," we should understand this phrase to mean "by a kind of natural equity."[34] Another passage from the Decretum (D. 1 c. 7), which Ockham also cited in this context, links natural equity and natural law. Ockham himself links the right of heaven to both natural and divine *ius* through the concepts of natural equity and right reason (*OND* 65.76-83, 2:575). The thought that any whim or passion could give rise to a rights claim was probably as far from Ockham's mind as it was for any late medieval thinker.

However, to conclude from this that Ockham held that we only have a natural right to do "what is reasonable," or what is morally good, would be to misunderstand the workings of "right reason." For Ockham, *ratio recta* signified either the correct knowledge of one's obligations, or the act of judging which obligations one has (Clark 1973). It is closely associated with *synderesis* and conscience. Despite the fact that one of its connotations is correct knowledge of one's obligations, its function as a ground of subjective natural rights is tied to the meaning of an act of

[33] Friedberg 1879-81: 1:827; the text ultimately derives from Augustine, *Sermones* 355.4.5 (Migne 1857-66, 39:1572).

[34] *Glossa ordinaria* ad C. 17 q. 4 c. 43, s.v., "non iure poli"; cited from the Paris, 1561, printing.

judgment or assent to directive propositions. Essential, however, is that Ockham does not take moral truth as such to have any obligatory force. It acquires such force only after it has been apprehended as true by the agent. Even divine commands become imperatives for the individual only when right reason has affirmed them to be truly issued divine commands. When this happens, the individual is morally bound to conform to such dictates. Hence, when Ockham ties natural rights to right reason, he is in effect tying it to what he takes to be a distinctively human ability to discern the morally right from wrong. We could translate him as saying that we have a right to do what we are morally required to do. The crucial element, however, is that we only are morally required to do something when we have apprehended the requirement as such.

The result of this for Ockham's construal of the relation between morality and rights may seem rather paradoxical at first. Despite worries about his views on divine omnipotence and natural law "positivism" being a source for moral volatility or, possibly, arbitrariness, Ockham certainly considers the vast majority of moral truths to be at least as constant as God's ordinate will (cf. Freppert 1988, 81-82). In this sense there is nothing "subjective" or unstable about morality. He also firmly ties our natural rights to our moral obligations so that it is not unfair to say that we only have natural right to do what we are morally permitted to do. Nevertheless, since the content of our moral obligation is tied to our subjective understanding of moral truths, the substance of the rights we have is correspondingly subjective.

Though seemingly paradoxical, this is a perfectly consistent position. It may help to consider an analogous example taken from Ockham's views on the obligation people have to amend their erroneous views about matters of faith. Ockham in fact devoted a lot of energy to the problem of heresy and erroneous belief due to his conviction that John XXII had fallen into heresy. A key texts in this case is the *Tractatus contra Ioannem* (= *CI*; c. 1335).[35]

Ockham distinguished between beliefs—that is, "catholic truths"—one must hold explicitly and those that need not be so believed (*CI* 30, 3:122-23).[36] Regarding those truths that we must believe explicitly, any errors must be revoked simply and unconditionally (*CI* 31, 3:123.21-23; and 32, 3:127.21-30). When the belief in question is not one that must be believed explicitly, there is no need to revoke the error absolutely unless the person has become publicly notorious for it. The rationale derives from the idea that one cannot be compelled to lie, and revoking an error that one does not believe to be an error is exactly that (*CI* 33, 3:127.31-128.37). Elsewhere, he even insisted that when the will elicits an act that conforms to an erroneous reason, it still acts virtuously and meritoriously. In other words a "correct act of the will and an error of the intellect can co-exist with respect to the same object" (*Quaestiones variae* 8.2.324-326, in Gál et al. 1967-88, 8:423; Shogimen 2007, 133). It is for this reason that he insists that such people are

[35] The text is analyzed in Baudry 1950, 176-85. One should also consult 1 *Dialogus* 4.15-17 where the Master and Student discuss what constitutes legitimate correction, and who is responsible for administering it. (The Lyons edition of the *Dialogus* numbers these as chapters 13-15 [foll. 26rb-27rb].) Even the pope must exercise "legitimate" correction: 1 *Dialogus* 4.23 (Lyons: c. 20; foll. 28vb-29rb); see also McGrade 1999, 134, and Shogimen 2007, 119-22.

[36] See 1 *Dialogus* 4.18-22 (Lyons: cc. 15-19; foll. 27rb-28vb) for a discussion of "explicit" versus "implicit" heresy. Cf. the discussion in McGrade 1974, 49-50. At 1 *Dialogus* 4.21 (Lyons: c. 18; fol. 28rb): the Master provides examples of things that everyone "raised among Christians" must believe: that the Christian faith is true, and that Christ was crucified. The criteria for the truths one must believe are that they are easy to understand and widely published among Christians.

bound, as we all are, to reject any error conditionally (*CI* 36, 3:132.20-134.19), saying, for example, "If I have erred, I revoke [my erroneous belief]" (*CI* 33, 3:128.33-37).

Ockham's position is fairly even-handed. Although he had no doubt that there were "catholic truths," he recognized that it was possible for people to be mistaken about them. The problem was not that people might make mistakes or get something wrong, but that people might not correct their beliefs when they were shown to be wrong. This is where the obligation lies: to believe rightly what one must believe, and to correct one's mistaken beliefs when it has been clearly proven that one must do so; this obligation exists, in fact, regardless of who the corrector is, from pope to layman (1 *Dialogus* 4.24 [Lyons: c. 21; fol. 29va]). At the same time, one must not lie against one's conscience but follow one's own subjective—and perhaps erroneous—beliefs (cf. Shogimen 2007, 134).[37]

We can now see how Ockham can speak about a right to religious dissent (or "religious freedom" if you will) while holding that we are morally held to worship the true god (McGrade 1994-97, 161-65). This pattern characterizes the relation between morality and natural rights in general as well. Ockham is certainly not a moral subjectivist. Yet apart from certain moral norms of which one cannot be excusably oblivious, there is plenty of room for genuine moral disagreement. Within this area, we are morally obliged to obey our conscience. Unlike many liberals, Ockham does not think we have a right to knowingly act immorally. But given the fact that people may sincerely disagree about what is morally permissible, we may have a right to do something that is considered morally wrong by others. In those cases where we are genuinely and excusably misguided about what we can morally do, we even have a natural right to do what is—objectively speaking—morally wrong.

The radical implications of this position should be obvious. Though Ockham is certainly not a liberal, his theory will yield practical guidelines quite similar to those of modern-day liberals. It allows virtually complete freedom of action (within the boundaries of what is legally permissible), provided that people are not violating moral laws which should be obvious to anyone, and provided they are not manifestly acting against their conscience. The difference between Ockham and some liberals lies in the fact that he would vigorously deny that one can have a natural right to do something while one is acting against one's conscience. In this sense there is nothing whimsical or arbitrary about the freedom that is granted by natural rights in Ockham's theory. Yet people nevertheless may have a natural right to do something that is (considered by others) morally wrong.

3.2 From Inclusive to Positive Rights

The centrality of agency for Ockham makes his theory in yet another sense a genuine predecessor of contemporary natural rights theories. In claiming that people have a natural right to take anything necessary to save their lives, he was merely affirming the *communis opinio* among canon and civil lawyers as well theologians—a view that was to remain virtually uncontested until the second half of the seventeenth century (Couvreur 1961; Swanson 1997; Roumy 2006; Mäkinen

[37] One's role in the *societas christiana* determined how much one had to know and believe explicitly; compare 1 *Dialogus* 4.16-17 (Lyons: cc. 14-15; foll. 26vb-27va) with 1 *Dialogus* 4.17 (Lyons c. 14; fol. 26va-27ra).

2005; 2010). However, by aligning the right of necessity with the far more general right to follow one's conscience, Ockham places it in a theoretical context pregnant with formidable implications.

Despite its long history, the nature of the right of necessity remains somewhat elusive. Though it was a legal right—it could be employed as a defense in a legal suit—there is little evidence of it actually being enforced. The principle of extreme necessity is perhaps best conceived as marking the boundary of legitimacy for the institution of private property. In the narrow legal sense, the right of necessity could be conceived as a permission—to take what one needs to save one's life. Yet it certainly was not a mere permission: though Ockham does not explicitly say so, we can safely assume that he would have agreed that it entailed a duty to provide on behalf of those who were able to do so (Langholm 1998, 452). Hence the right was not merely a right to do something (*in casu*, to take what one needs), but also a right to have access to a part of nature's bounty—a right *to have something*, of you will. Call this an inclusive right.

Thus it seems that Ockham posits two very different natural rights: an inclusive right to necessities which is only activated in extreme circumstances, and another—a general right to act according to right reason—which we seem to exercise almost continuously. Yet despite the fact that these two rights seem as different as two rights can possibly be, they are in fact closely connected. To see this, consider why Christians since Augustine have almost unanimously denounced suicide (or euthanasia, for that matter) as a mortal sin. To commit suicide is to usurp a power (to take one's life) that properly only belongs to God, but—more importantly—it is also to resign a duty that one has to God. In contemporary Christian theology, this duty is often singled out as the basis of our human rights. Jürgen Moltmann (1984, 23), for example, writes:

> Human beings … are destined to live "before the face of God," to respond to the Word of God, and responsibly to carry out their task in the world implied in their being created in the image of God. They are persons before God and as such capable of acting on God's behalf and responsible to him. As a consequence of this, a person's rights and duties as a human being are inalienable and indivisible.

It is easy to appreciate that the duty to respond to God's commands would ground a permission to do what one's conscience dictates, as it did for Ockham. In most circumstances this duty would also ground a right not to be interfered with in the exercise of one's duty. Moreover, the very same duty also grounded a right to access to basic necessities. It did so because it was assumed that human beings ought to have the capability (to use a fashionable term) to do what God requires of them. In Ockham's theory, under normal conditions the right of necessity functioned to protect the ability to act according to right reason.

The qualification "normal conditions" is important here. It includes two assumptions. The first is that adult human beings simply have this ability, unless they are prevented from sustaining themselves. The idea was that God had given the earth and its produce for human beings to sustain themselves. After the fall, however, greed would tempt some to take more than their share and leave others deprived even of basic necessities. The right of necessity served to prevent people from dying as a result of the greed of others. This meant, surprisingly, that the duty correlative to the inclusive right to access to basic necessities was not a positive but a negative one—a duty to refrain from holding on to more than one needs in case one's superfluities can save another person's live.

The second assumption in effect prevented the right to be able to fulfill one's duty to God from generating positive duties on behalf of others. It was the distinction (implicit in all Christian theology) between natural calamities and evil. The latter is committed only by human beings. Someone dying from lack of access to food is an injustice when he or she could have been saved by the superfluities of someone else, but not when the cause is a general shortage of food. Strangely enough (for times when famines were quite common) many medieval schoolmen actually taught that nature provided enough for everyone if people would only take what they needed (Halteman 2004, 30). But even if it turned out that God had in fact provided less than needed for every human being to survive, this would not count as a violation of a natural right.

For medieval and early modern theologians and lawyers, the right of necessity remained extremely limited: it came into play only for people on the brink of demise. Yet the assumptions which supported this limitation were not as secure as this long-lasting consensus would suggest. There was, for example, the idea that God works in his creation through human beings as second order causes (Barrera 2005). This could easily be translated in the thought that some people might only be able to fulfill their role in God's plan if they are aided by other people. And this could in turn could be thought to entail standards of economic justice that would exceed far beyond the right of necessity. Alternatively, the natural ability of human beings to perceive and understand God's will for them could be doubted. Again, if people have a natural right to what they need to carry out their duties toward God, it would seem that this entails that they have a natural right to education necessary for them to fully understand God's will. In other words, a relatively small change in the background assumptions would suffice for the idea of an inclusive natural right to ground positive duties.

As we now know, the idea that anything beyond mere necessity was due to every human being as a matter of justice remained marginal for many centuries to come. Even in Europe the thought that human rights entail positive duties to provide education and such things as basic healthcare gained stronghold only in the twentieth century. This momentous change in what is considered due to people as a matter of their human rights may be a reason to see Ockham's work as of little relevance to contemporary philosophy of human rights. Yet, strikingly, the basic idea which grounded natural rights for Ockham is still current in modern-day secular theories which derive a much more copious set of rights from ostensibly similar premises. So it is worthwhile to ask what facilitated the shift towards positive human rights in these theories.

3.3 Shifting Grounds in Natural Rights Theory

Contemporary theories of human rights like those of Gewirth (1978) or Griffin (2008) share Ockham's conception that human agency provides a special kind of justificatory ground. Many things may be due to human beings as a matter of morality, justice, or political expediency, but some things have a special status in that they are due to us merely because of the fact that we are human agents, and it is only these that properly speaking deserve the label of "human rights." However, since the fourteenth century a great deal has changed in the intellectual assumptions which make up context in which this agent is supposed to function.

Central to Christianity is a belief that everything is created for a purpose—a purpose which human beings have an ability to (partially) grasp. And since our primary duty to God is to fulfill our

role in God's plan with His creation, each human being ought to have the ability to respond to God's will. Through the ages, different expressions of this general idea gradually get secularized in complex ways. The theory that human beings have a conscience which allows them to perceive the moral law is transformed into the idea that we are able to form (and thus have a right to follow) our own conception of the good (Van Duffel 2004). The notion that people ought to be able to pursue *beatitudo*, gets watered down into the (quite different) notion that we have a right to the pursuit of happiness (Korkman 2006). And the idea that each of us has a role to fulfill in God's plan and that we are able to discern God's will for us as an individual becomes secularized in the notion that every human being has (the ability to develop) a plan for his or her life, and consequently that we have a right to (attempt to) realize whatever plan we develop for our own life.

The upshot of this evolution (which was of course much more complex in its historical detail than this extremely schematic summary suggest) is an added layer of subjectivity to the original idea. In Ockham's theory, the subjectivity of our natural rights is due to the fact that we are bound by our fallible apprehension of (objective) right reason. Ockham holds that we are obligated (and therefore have a right) to follow our conscience, even if we may be misguided about God's will. In contemporary liberal thought, however, natural rights are often construed as consequent upon our ability to choose goals and aims and follow our own conception of the good. The lack of objectivity here is due not to an inadequate access to our true end but to the fact that our ends are not given prior to our choosing them. This, together with other changes in the background assumptions, generates two major difficulties for these theories.

For Ockham, it would have been imminently plausible (though, as we have seen, not necessary) to assume that God has generated the conditions which—barring evil committed by other human beings—should allow each of us to fulfill our role in His plan for us. Consequently an inability of a human being to function due to natural calamities can be explained (by the religious theory) as part of God's will. When the idea of a life-plan gets transferred to a secular context, however, the relevance of the distinction between natural calamities and evil committed by human beings becomes much more problematic. Since the right was always thought of as a right to an ability, it is simply hard to see why it should only be protected by negative duties not to interfere with existing abilities and not also by positive duties to actually enable people should they lack the requisite abilities. But natural rights which entail positive duties are notoriously problematic (e.g. Wellman 1982, 35–39 and 159–63; O'Neill 2000, 97–111).

Another major difficulty for secular descendants of Ockham's theory has to do with their scope. In the religious version, the rights of people protect their ability to fulfill their role in God's plan. The closest secular variant of this idea would be that people have a right to the ability to fulfill their own life plan. But this is absurd. Hence contemporary theories have maintained that our natural rights only protect the ability either to develop or to pursue a life plan. Yet despite these assertions, the theories support a set of rights far beyond what is minimally necessary for the mere ability to either develop or pursue a life plan. In fact, upon scrutiny it turns out that they have simply failed to non-arbitrarily limit the proliferation of rights claims. (reference omitted) Hence there is a huge disparity in these theories between the stringent criterion for something to be a natural right and the very copious set of rights that the theories supposedly derive from this criterion. The most plausible explanation for this glaring inconsistency is that the original intui-

tion—that rights protect the ability to execute a plan—is still the driving force inspiring these theories, despite claims to the contrary.

These difficulties do not plague Ockham's theory, but they almost naturally crop up when the theory is transferred to a modern context. This is one important reason why studying the pre-modern origin of natural rights theories remains important. They help us see the roots of contemporary theoretical difficulties.

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