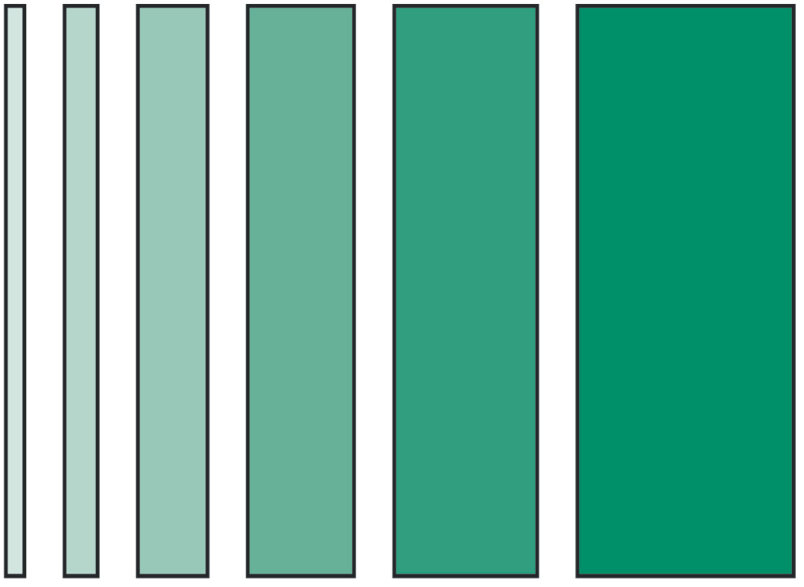

The New
Synthese
Historical
Library
Volume 57

Moral Philosophy on the Threshold of Modernity

edited by
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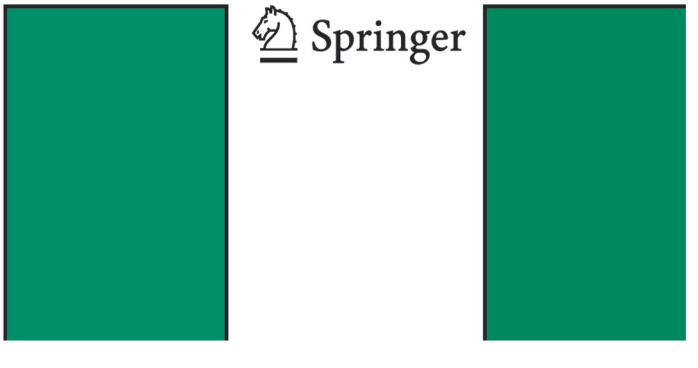
and Risto Saarinen



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their own views, therefore, the Franciscans needed to develop a theory in which a right in the realm of natural law was not automatically also a right in the realm of positive law.[24]

SCOTUS AND AURIOL

If Franciscans appear to have been rather reluctant to take a stance on this issue in the years following the publication of *Exiit*, this situation changed dramatically with Scotus. His account of the origin of political power and property, contained in the fourth book of his *Commentary on the Sentences* (both in the *Ordinatio* and in the *Reportata Parisiensia*), is both original and distinctively Franciscan.[25] In the first place, he does not limit himself to saying that in the pre-lapsarian state 'everything was held in common', but instead specifies that natural law prescribed *common use*.[26] Secondly, he stresses the extent of the change brought about by original sin, not maintaining that natural law was somehow reshaped, nor that some rational rule was added to it, but rather stating that the command of natural law concerning commonality was revoked after the Fall.[27] At first sight, this might seem only a slight terminological modification, since Scotus accepted the traditional belief that after the Fall mankind needed the division of property, since otherwise the strong and the evil would oppress the weak. This impression would be false, however, because Scotus's emphasis on the fact that natural law was revoked in this respect calls for a totally different legal basis for property: before the Fall, in fact, there was no ownership at all, whether private or common, but only commonality of use. The *Doctor Subtilis* argues at length that neither natural law nor divine law can be held responsible for the division of property.[28] This implies that private property in itself (not only in its practical arrangements) is based

[24] Unfortunately, I do not know of any Franciscans who tried to counter Godfrey on this point. My knowledge is limited to two Franciscan works which attacked him because of his criticism of the theory of Franciscan poverty and which focused instead on the issue of perfection: the mysterious *De perfectione statuum* and William of Alnwick's *quaestio*, which should, however, be dated to after Scotus. For both texts see Lambertini (1999), pp. 163–186.

[25] See *Ordinatio*, IV, d. 15, q. 2, in John Duns Scotus (1989), pp. 28–211. For other relevant texts of Scotus, see Lambertini (2000), pp. 111–139. See also Bottin (1997).

[26] John Duns Scotus (1989), IV, d. 15, q. 2, p. 34.

[27] Ibid. p. 36: 'istud praeceptum legis naturae de habendo omnia communia revocatum est post lapsum.'

[28] Ibid.: 'Tertia conclusio est quod revocato isto praecepto legis naturae de habendo omnia communia, et per consequens concessa licentia appropriandi et distinguendi communia, non fiebat actualiter distinctio per legem naturae, nec per divinam'; 'per legem nature non, ut videtur esse probabile, quia non apparet quod illa determinet ad opposita'.

exclusively on positive law.[29] Having stated this, Scotus was compelled to explain how a political authority able to promulgate laws had come into existence, thereby bringing to light the profound connection between the origin of private property and of political power. It is in this context that he developed his famous description of the 'original consent' from which the first form of government originated, whether constituted by only one person or by a group.[30] There is no need here to expand on this point, nor to describe in detail the different ways in which Scotus thought that such a government could come about and, consequently, promulgate the first laws.[31] For my present concern, it is important merely to stress that, according to Scotus, both property and political power began to exist after the Fall, when some principles of natural law were revoked and human initiative was permitted to look for the best solution in the new situation. After the Fall mankind was also provided with prudence; and the exercise of this virtue was not limited to the deduction of natural law from first principles, since some of these applied only to the pre-lapsarian state. Human beings understood that 'they could not be well governed without some form of authority' and solved this problem by means of an agreement.

It is certainly not my intention to suggest that Scotus was a 'forerunner' of modern contract theory. For my purposes, it is sufficient to establish that he conceived of the political order as a purely human sphere, which could not be reduced to either divine or natural law, but was instead dependent on the decisions, agreements and consent of the members of a society.[32]

On the one hand, Scotus's theory leaves open the possibility of a total renunciation of property on the part of a Franciscan friar, who, according to this account, simply renounces an institution created by human initiative,

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[29] Not even the Roman law principle of 'quod nullius iuris est, primo occupanti conceditur' belonged to natural law; see John Duns Scotus (1989), IV, d. 15, q. 2, p. 38, and John Duns Scotus (1639), IV, d. 15, q. 4, n. 12, p. 723. See also the comments by Langholm (1992), pp. 406–407.

[30] John Duns Scotus (1989), IV, d. 15, q. 2, p. 40: 'Utpote si ad civitatem aliquam aedificandam vel inhabitandam concurrerunt extranei aliqui, videntes se non posse bene regi sine aliqua auctoritate, poterant consentire, ut vel uni personae vel communitati committerent illam communitatem: et uni personae vel pro se tantum—et successor eligeretur sicut ipse—vel pro se et tota sua posteritate.'

[31] John Duns Scotus (1639), IV, d. 15, q. 4, n. 10, p. 723: 'In civitate enim, vel terra, congregabantur primo multae gentes extraneae et diuersae, quarum nulla tenebatur alteri obedire, quia nullus habuit auctoritatem super alium, et tunc ex mutuo consensu omnium propter pacificam conseruationem inter se habendam potuerunt eligere unum ex eis principem, cui in omnibus solum, dum ille viveret, ut subditi obedirent, vel quod sibi et suis succedentibus legitimis subessent, secundum conditiones, quales vellent, sic, vel sic, ut diuersi modo tenent principatum.'

[32] For this reason, I can only agree in part with Parisoli (1991), pp. 134–135.

and not by nature or God.[33] On the other hand, Scotus does not present this radically human origin of property as a defect or as implying a lack of legitimacy. It is important to underline this point, because in the very years during which Scotus was lecturing on the *Sentences* in Paris, Giles of Rome was developing, with a rather different purpose in mind, a theory of the origin of property deriving from an agreement among men. In his *De ecclesiastica potestate*, Giles argued that, immediately after the Fall, 'mine' and 'yours' rested on a covenant and pact made by men. Only afterwards were such pacts fixed in law. According to Giles, however, this account of the origin of private property implied that property rights ultimately rested on the authority of the Church, because it legitimated the *communicatio* among men which was a necessary condition for the existence of agreements concerning property.[34] This complex argument was just one of the many *rationes* put forward by Giles in his attempt to prove that no *dominium* (conceived both as property and as political power*)* could be considered just unless it was legitimated by the authority of the Church.[35] Augustinian authors such as Giles are not my primary concern here; but this comparison reveals how one of the conceptual tools implemented by Scotus could also be embedded in a work which had a very different aim. In a recent book, Luca Parisoli argues that Scotus was, in fact, a papalist.[36] Although this is not impossible,[37] his supposed papalism does not surface in his theory of the origin of property, while Giles's main purpose in his own account of the same phenomenon was precisely to prove papal

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[33] In Lambertini (2000), pp. 111–139, I refer to the quotations of *Exiit* in Scotus's texts concerning property and economic ethics.

[34] Giles of Rome (1929), lib. II, cap. 12, p. 103: 'Sciendum ergo, quod primitus non fuit de iure hec possessio huius et illa illius, quod aliquis posset dicere: hoc est meum, nisi ex convencione et pacto quod habebant ad invicem … sufficit enim scire, quod non poterat aliquis illorum iuste appropriare sibi aliquam partem terre, nisi ex pacto et convencione habitis cum aliis, ita quod prima appropriacio fuit secundum pacta et convenciones vel secundum assensum in divisionibus terrarum … . Sed postea, ut diximus, multiplicatis iam hominibus, oportuit huiusmodi convenciones et pacta multiplicari, ut fieret possessio terrarum et agrorum non solum secundum particionem, prout fit in filiis eiusdem patris, sed secundum empcionem, donacionem, commutacionem vel aliis modis qui sub convencione vel animorum consensu cadere possunt'; ibid., p. 104: 'Leges ergo et iura continent omnia per que potest quis dicere: hoc est meum, quia continent contractus licitos, convenciones et pacta, et continent alia, per que quis iudicatur iustus possessor rerum ...'

[35] See the excellent outline of Giles's position in Miethke (2000), pp. 94–101.

[36] Parisoli (2001), pp. 193–212. His claim rests, however, mainly on *De perfectione statuum*; but, as he is well aware, Scotus's authorship of this work is far from certain: see Parisoli (1999), p 54, pp. 69–73, and Lambertini (2000), pp. 163–186.

[37] After, all, we know nothing about his political opinions, except for the fact that he refused to sign Philip the Fair's appeal against Boniface VIII; see Longpré (1928) and also the reassessment in Courtenay (1996).

superiority.[38] Scotus limits himself to showing that property and political power can be traced back to human initiative. 'Human' does not, however, mean that what men did after the Fall necessarily derived from their nature. On the contrary, it lays emphasis on the fact that men had to use their *prudentia* to find a solution which had not been foreseen in either divine or natural law.

Some of the implications of Scotus's position can be seen in Peter Auriol's treatment of the origin of slavery, as Christoph Flüeler pointed out some years ago, although his position does not entirely coincide with that of the *Doctor Subtilis*.[39] In his *Commentary on the First Book of the Sentences*, Auriol openly criticizes, without mentioning them by name, those Arts Masters who, in commenting on Aristotle's *Politics*, attempt to trace back the phenomenon of *servitus* to purported natural differences existing among individuals. Auriol objects to this position on the grounds that every relationship which is relevant in the political sphere requires a mutual obligation (*mutua obligatio*). He knows that such an obligation can sometimes be wrested through violence; nevertheless, he insists that the political order does not directly mirror nature, but rather consists of a web of more or less spontaneous agreements.[40] In the same spirit, although not in the same terms, Scotus had denied some years before that what he calls *servitus extrema* could be considered a natural law institution, founded on

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[38] William of Sarzano, writing more than a decade later, can be seen as an example of a Franciscan theologian who supported an extreme form of papalism. He, however, devotes little attention to the origin of property in the post-lapsarian state, taking it simply for granted, and bases his case for papal superiority on the thesis that no authority can be just unless it is legitimated by religious authority. See his *Tractatus de potestate Summi Pontificis*, c. VII, in Capitani and Dal Ponte (1971), pp. 1040–1: 'Nam, licet comunis usus omnium que sunt in hoc mundo comunis omnibus esse debuerit, tamen per iniquitatem alius hoc dicit esse suum, et alius istud, et sic inter mortales est divisio facta, XII, questione I, Dilectissimis, et vocat ibi iniquitatem consuetudinem Juris gencium, equitati naturali contrariam, vel ipsam possidendi et habendi proprium sollicitudinem, ut ibi in glosa dicitur, et habetur distinctione VIII, Capitulo Differt. Cum igitur bona ecclesiastica sint bona comunia….satis rationabile est investigare et querere ad quem vel ad quos spectet eorum proprietas et dominium…'; ibid., c. XIII, p. 1071 'Potest ergo patenter monstrari quod a mundi principio potestas eligendi Regem et dominum, aut de jure nulla et damnabilis fuit…aut fuit cum sacerdotis auctoritate'. On William of Sarzano, see now Miethke (2000), pp. 150–151.

[39] Flüeler (1994); on Auriol's political ideas, see de Lagarde (1958), pp. 274–301; Tabarroni (1999), p. 214.

[40] Peter Auriol (1596), d. 30, p. 671: 'Sed manifestum est, quod non sufficit primum ad fundandum dominium et servitutem; licet enim intellectu pollentes, et corpore deficientes sint apti nati naturaliter dominari hiis, qui e contrario sunt corpore pollentes, et intellectu deficientes, ut Philosophus dicit I Polit., nihilominus ultra hoc requiritur mutua obligatio. Non enim omnes qui tales sunt naturaliter de facto servi et domini sunt. Patet ergo quod dominium mutuam exigit obligationem. Talis autem obligatio vel est voluntaria, vel violenta.'

the natural differences among individuals. This kind of *servitus* belongs only to the sphere of positive law because it contradicts the liberty granted to everyone by the *lex naturae.*[41]

With such examples to hand, we can better appreciate Andrea Tabarroni's suggestion that Franciscan political thought was deeply influenced by the idea that political relationships could be conceived in terms of relations put into place by a promise. Franciscan theologians since the time of Olivi, interpreting such phenomena along the lines of their analysis of the importance of the vow of poverty, tended to understand society as a web of mutual obligations. The fact that social relations depended on decisions taken by human beings did not imply, however, that social bonds rested on the uncertain ground of the will of individuals who could change their minds at their own discretion, in so far as *obligationes* and vows acquired a sort of existence which transcended individuals.[42]

BETWEEN JOHN XXII AND OCKHAM

Some developments in the dispute which arose between the leadership of the Franciscan Order and the Papacy in the 1320s are of special interest for my present purpose, since in this historical context the pope was both an adversary of the Franciscan theory of poverty and a strong defender of papal claims in the temporal sphere, especially in relation to the Empire. In the previous phases of the controversy, papal authority had acted as a sort of last resort to which the opposing parties could appeal and, in most, though not all, cases had intervened in favour of the Friars Minor. This time, the papacy had, from the very beginning, sided with one of the parties, a circumstance which contributed to the blending together of problems related to poverty, issues concerning authority in the Church and political conflicts.

When in 1322 John XXII lifted the ban imposed by *Exiit* and reopened the discussion of Franciscan poverty, many Friars Minor took part in the debate. Bonagratia of Bergamo, procurator of the order, in his treatise *De paupertate Christi et Apostolorum*, defended the Franciscan position, maintaining that original sin was responsible for the passage from the commonality of *usus facti* to the division of property. Property did not belong to the realm of natural law, but rather to that of positive, human regulations. This was why, Bonagratia observed, it was licit to renounce it

[41] Scotus allows as well for a different kind of *servitus*, which he calls *servitus* or *subiectio politica* and which can also reflect natural differences among human beings; see Flüeler (1992), pp. 72–81.
[42] Tabarroni (1999), pp. 220–222.

completely.[43] Although a jurist, and not a theologian, Bonagratia chose to align himself with Scotus by emphasizing the change brought about by original sin. Before the Fall, man had lived in a perfect state according to natural and divine law; after the Fall, he wrote, leaning on Augustine's authority in the canon *Quo iure*: 'Proprietates vero et possessiones et dominia rerum sunt a iure humano.'[44] Francis of Meyronnes also intervened in the debate in order to defend the Franciscan position. In his still unpublished treatise, known as *Determinatio paupertatis*, he argued at length in favour of the radically human origin of positive law. In particular, he maintained that the division of property did not go back to the beginning of mankind, but rather was introduced afterwards, *processu temporis*, in order to keep in check negative human qualities such as negligence, avarice, contentiousness, lack of confidence. Christ, the Apostles and other perfect men, however, were not subject to these laws, but lived instead according to natural justice.[45]

In the years which followed, such substantial agreement with the positions taken by Bonagratia, Michael of Cesena and the others who adhered to their position did not prevent Francis of Meyronnes from adopting a political theory which diverged dramatically from theirs. In his later works he preferred, in fact, to draw on the hierarchical theology of Dionysius the Pseudo-Areopagite to support papal claims of a *plenitudo potestatis* also *in temporalibus*.[46] He admitted that many kingdoms, and even the Roman Empire, originated from the consent of the people. This feature, however, only proved that they possessed a lower degree of dignity than both the Church, whose power was of divine origin, and those kingdoms which depended directly on papal authority.[47]

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[43] Bonagratia of Bergamo, *Tractatus de paupertate Christi et Apostolorum*, in Oliger (1929), p. 503: 'Certum est autem quod omni iuri privato, quod alicui competat ex humano iure, potest quis renuntiare et illud a se penitus abdicare; unde Esau, ex quo semel renuntiaverat iuri primogeniture, ad illud redire numquam potuit…' For this attitude towards the validity of obligations, see Tabarroni (1999), p. 220.

[44] Bonagratia of Bergamo, *Tractatus de paupertate Christi et Apostolorum*, in Oliger (1929), p. 503.

[45] I refer to the copy of Francis of Meyronnes's treatise preserved in MS Florence, Biblioteca Medicea-Laurenziana, S. Croce, Plut. 31 sin., 3, ff. 86ra–93va; see esp. f. 91va: 'divisio rerum non fuit a principio hominibus comunicata sed processu temporis fuit per homines introducta primo ad hominis negligentiam removendam…'; see Langholm (1992), pp. 420–429.

[46] His most important political treatises are published in de Lapparent (1940–2) and Baethgen (1959). For Francis of Meyronnes's use of Pseudo-Dionysius the Areopagite, see Luscombe (1991).

[47] Francis of Meyronnes, *Quaestio de subiectione*, in de Lapparent (1940–2), pp. 75–92, at p. 88: 'Secundum preconium est fundatum in talis principatus origine, quia quicumque aliqui duo principatus ita se habent quod unus est originatus ab inferiori, et alius a superiori, cum nobilitas in politicis attendatur in origine, ille est dignior qui ordinatur a superiori;

The debate over apostolic and Franciscan poverty, which had been opened by the pope, ended with a bitter defeat for the order—a result which John XXII seems to have carefully calculated.[48] In 1328, after some years of uncertainty, during which the leadership of the Franciscan Order still hoped to work out a compromise with John,[49] Michael of Cesena rebelled. The vast majority of Franciscans sided with the pope. Michael and the small group of supporters who fled with him from Avignon invested their energies in a full-scale attack on the pope's position, trying to persuade the whole of Christendom that he had fallen into heresy and that they therefore had to engage in a defence of the Franciscan theory of poverty, drawing on the traditions of the order. As the debate on poverty became more and more embroiled with political issues, they met these new challenges by returning to their Franciscan legacy. At the beginning, Michael and Bonagratia seemed rather reluctant to link their attempt to overthrow John to the ongoing debate between emperor and pope.[50] The connection became unavoidable, however, when John published his response, entitled *Quia vir reprobus*. Certain of the objections to the Franciscan position which John raised in this long bull, which resembles a theological treatise more than a papal document, were immediately relevant to political theory. Leaving aside exegetical technicalities concerning the way Christ and the Apostles had possessed the things which they used, it is possible to highlight two important moves in John's reasoning. First of all, he denied that in the state of innocence man had no *dominium*; on the contrary, before the Fall, Adam was already an owner in the fullest sense of the word. The only change which occurred after original sin was the division of the property which had previously been held in common. The Franciscan idea that by renouncing all forms of *dominium* the friars acquired a status which was similar to the pre-lapsarian condition of humanity was completely discarded as devoid of any reasonable foundation. Moreover, in the same passage, the pope insisted on the divine origin of all *dominium*.[51] His second move was founded on the notion of the universal lordship of Christ.[52] John interpreted this theological doctrine to mean that Christ as a man was the temporal

omnes autem reliqui potestatus [?] principatus qui non sunt violenti et tirannici sunt primo originati a consensu subjecti populi, ut patet de romano Imperio. Iste autem originatur a superiori conferente dignitatem temporalem, scilicet vicario qui in terris tenet locum Dei…'; ibid., p. 90: 'ceteri autem principatus sunt mere politici et fidelibus et infidelibus sunt communes, ut patuit ab initio'.

[48] Tabarroni (1990), pp. 83–87.

[49] Wittneben (2003), pp. 192–279; see also Piron (2002).

[50] See, e.g., Dolcini (1981); Lambertini (2002b).

[51] Töpfer (1999), pp. 433–436.

[52] On Christ's kingship, see Leclercq (1959), especially pp. 157–169.

king of the universe; therefore, he could not be considered 'poor' in the proper sense of the word.[53]

The strategy of *Quia vir reprobus* contributed to demonstrating that certain tenets of the Franciscan position concerning poverty could be brought to bear on issues of political theory. The total absence of ownership in the state of innocence and the human origin of the division of property, together with the idea of Christ's absolute poverty, proved to be incompatible with John XXII's views concerning not only the Franciscan Order but also the power of the Church. Confronted with this new challenge, the Franciscan polemists gathered around Michael of Cesena were compelled to come to terms with political issues as well. They chose to corroborate further the main tenets of their position, putting forward new arguments and clarifying their basic assumptions. In this way, however, their polemics with the pope took on the aspect of a clash between two incompatible views as to the nature of power, inside and outside the Church.[54]

The *Improbatio* of Francis of Ascoli (also known as Francis of Marchia) was probably the first refutation of *Quia vir reprobus* composed by the Franciscans who followed Louis the Bavarian in Germany. Francis's aim was, of course, first and foremost to defend absolute poverty; but the new issues introduced into the debate by the pope compelled him to touch on matters which were relevant to political thought.[55] Concerning the origin of *dominium*, Francis adopted the traditional Franciscan position, which had been reiterated by Bonagratia in the Pisan *Appellationes*, reasserting the existence of a profound discontinuity between the pre-lapsarian and post-lapsarian state of mankind. Only after the Fall, on the basis of the *ius positivum* made necessary by sin, did human beings distinguish *diversa dominia*. While conceding to the pope that a sort of *dominium* also existed before the Fall, he nonetheless insisted that it was of a completely different nature. In the state of innocence human beings shared the use of things without excluding anyone. After the Fall, even common property was restricted to a particular group, and 'others' were necessarily prevented from using it. As Francis put it, before the Fall mankind enjoyed a *dominium libertatis*, but afterwards they had to content themselves with a

[53] John XXII, *Quia vir reprobus*, in Gál and Flood (1996), pp. 594–6: 'Quod autem dominium rerum temporalium habuerit, sacra Scriptura tam in Testamento veteri quam in Novo in multis locis testatur … Item, quod Salvator fuerit dominus omnium temporalium, videtur … regnum et universale dominium habuit Iesus in quantum Deus ab aeterno, eo ipso quod Deus genuit eum, et in quantum homo ex tempore, scilicet ab instanti conceptionis suae, ex Dei datione, ut patet ex praedictis.' See Lambertini (2000), pp. 249–268.

[54] Lambertini (2002).

[55] Lambertini (2001).

dominium coactae potestatis.[56] Moreover, repeating what he had already maintained in his *Commentary on the Fourth Book of the Sentences*, he stated that *dominium* after the Fall was exclusively of human origin.[57] I do not need to expand here on his detailed refutation of John's thesis concerning Christ's lordship—his interpretation of Jesus's famous words 'Regnum meum non est de hoc mundo' could be in itself the subject of an entire paper. One argument put forward by Francis does, however, merit our attention: the *Doctor Succintus* argued that Christ could not possibly have been a temporal king, because at the same time in Palestine there was a legitimate, though pagan, ruler, and the Gospels offer evidence that Christ acknowledged the emperor's authority. Francis's main intention was to reaffirm that Christ had no jurisdiction and could be—properly speaking—described as 'poor'. His statement, however, committed him to a specific position in the political debates of his day.[58] Along the same lines, the *Appellatio magna*, signed by Michael of Cesena in Munich on 26 March 1330, argued against the universal temporal kingship of Christ *in quantum homo*, remarking that it would lead to the absurd consequence that the pope had unlimited power over all the kingdoms on earth.[59]

Although until now very few scholars have taken it into consideration, the *Improbatio* is an important source for Ockham's *Opus Nonaginta Dierum*. Many elements of Ockham's later political theory are already present, though in an embryonic stage, in Francis of Ascoli. It is well known, in fact, that in his *Opus Nonaginta Dierum* Ockham presents his own account of the origins of *dominium*, which can to some extent be considered a refined version of the view found in Francis's *Improbatio*. In chapter 14 Ockham distinguishes between *dominium* before the Fall, when

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[56] Francis of Ascoli (1993), pp. 153–154: '…primeuum ius seu dominium nature, institutum ante lapsum, fuit alterius generis et condicionis a quocumque dominio seu iure per iniquitatem introducto, siue proprio siue communi, quia illud fuit dominium … perfectionis naturalis; istud vero est dominum servilis necessitatis et coacte potestatis…'; see Potestà (2002).

[57] Lambertini (2000), pp. 189–212, and (forthcoming b).

[58] Lambertini (2002a).

[59] *Appellatio magna monacensis*, in Gál and Flood (1999), pp. 624–866, at pp. 666–667: ' Item, ex superius dicta adsertione sequitur manifeste quod omnes reges et principes terrae qui sua regna et dominia temporalia non tenent nec recognoscunt a Romano pontifice, Christi vicario, ipsa iniuste detinent et occupant et iniusti possessores sunt censendi, et per consequens quod eis, secundum errorem huiusmodi, non sit oboediendum, quia omnis qui tenet seu possidet aliquod temporale dominium, illud iniuste detinet et possidet nisi ipsum ab universali et principali domino recognoscat. Sequitur etiam quod Romanus pontifex possit libere et absolute pro libito voluntatis suae omnia regna et principatus terrae transferre et dare ac conferre quibus placuerit, et diminuere, augere et dividere certosque terminos eis praefigere secundum suae voluntatis arbitrium.' Although signed by Michael of Cesena, the *Appellatio* was probably a collective work; see Becker (1966); Wittneben (2003), pp. 353–399.

the whole of creation spontaneously submitted to mankind, and post-lapsarian *dominia*. Our first parents had everything at their disposal, but possessed no *potestas appropriandi*, that is, they were not allowed to take possession of anything which they had for their use. Only after the Fall was *potestas appropriandi* granted to mankind; the division among many *dominia propria* was the result of such a *potestas*.[60] Ockham makes a careful distinction between the three main stages by which *dominia* came into existence, instead of the two which were envisaged by Francis. On the other hand, he remains faithful to the principle that this division goes back to human initiative, although it does not seem to contradict God's will, once mankind had lost its original innocence. Relationships among *propria dominia* are regulated by human, positive laws: for Ockham, as for many earlier Franciscan thinkers, this implied that it was possible to abdicate such rights and to regain a condition which was similar, though not identical, to the state of innocence. In such a situation, natural law, which in this respect had been limited by positive laws, would once again prevail, although only in the case of necessity. This idea, too, goes back to the canonistic tradition, according to which necessity had the power to suspend the validity of positive laws, so that, to recall the most famous example, theft in the case of necessity was not theft.[61] As we have seen, Nicholas III in *Exiit* drew on this idea in order to defend the claim that a friar, even though he had renounced all rights, was still entitled to receive the necessities of life. Franciscan apologists repeated this argument time and again, as a means of denying that their choice, if taken seriously, would be equivalent to suicide. Ockham was very careful to point out that the supremacy of natural law in the case of necessity in no way established a right in the positive sense. It belonged to a different sphere, which functioned as a sort of control, preventing human laws from causing, for example, a human being to starve.[62]

With regard to Christ's lordship as well, Ockham followed in Francis's footsteps, but was much more determined to broach the awkward issue of the political implications of this doctrine.[63] He rejected John XXII's theory of Christ's temporal kingship not only on the basis of the legitimacy of

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[60] William of Ockham (1963), *Opus Nonaginta Dierum*, c. 14, p. 439: 'Et ita fuit triplex tempus: scilicet ante peccatum, in quo tempore habuerunt dominium, quale numquam aliqui habuerunt postea. Secundum tempus fuit post peccatum et ante rerum divisionem; et in illo tempore habuerunt potestatem dividendi et appropriandi sibi res, et si talis potestas vocetur dominium, potest concedi quod habuerunt dominium commune rerum. Tertium tempus fuit post divisionem rerum, et tunc inceperunt dominia propria, qualia nunc sunt mundanorum.' See Miethke (1969), p. 470 and ff.; Brett (1997), pp. 50–68; Töpfer (1999), pp. 440–450.

[61] On this issue, see Couvreur (1961).

[62] Tabarroni (2000).

[63] For a detailed discussion of this issue, see Lambertini (2003b).

pagan rulers, but also because it would lead to false consequences. Among these false consequences Ockham explicitly listed the fact that the pope, as Christ's successor, would enjoy a *plenitudo potestatis* in the temporal sphere. He therefore needed to counter a whole series of traditional pro-papal arguments in favour of what he judged an absurdity, but which was one of the main tenets defended by his adversaries.[64] In this way we can see how Ockham, at the beginning of the 1330s, was already developing elements of a political theory out of his defence of the Franciscan position. The milestones of this theory were the human origin of the social and political order and its autonomous legitimacy.

The most coherent and systematic account of Ockham's political thought is probably represented by his *Breviloquium de principatu tyrannico*, composed a decade later. In the third book the *Venerabilis Inceptor* restated his ideas concerning *dominium* before the Fall and the *potestas appropriandi* which mankind possessed in its post-lapsarian state. After the Fall, both the original *dominium* and the *potestas appropriandi* were gifts of God. Together with the *potestas appropriandi*, God also granted to mankind a *potestas instituendi rectores*. With this important addition, arguing along lines which are strongly reminiscent of Scotus, Ockham made clear the close connection in the Franciscan tradition between property and political power, which he here refers to as jurisdiction. In the following chapters he also explained that if God gave to man the faculty of appropriating things and of designating rulers, this implied that he directly intervened in history only in exceptional cases, assigning, for example, the promised Land to his people, or appointing a king. Normally, however, such things happened *ex ordinatione humana*. Pagan and infidel kingdoms were also fully legitimate by the same *potestas instituendi rectores*, which was given not only to believers but, as already mentioned, to all mankind.[65]

Drawing on his Franciscan heritage, Ockham succeeded in defending the autonomy of the temporal order in a way which should not be considered equivalent to analogous attempts, such as those of John of Paris or Marsilius of Padua. For Ockham, the autonomy of the temporal sphere was not based on nature, as it was in *De regia potestate et papali*, where John of Paris argued that the kingdom of France was autonomous using arguments which proved the natural superiority of monarchy as a

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[64] William of Ockham (1963), c. 93, pp. 686–689; see Miethke (1969), pp. 530–533, and (2000), pp. 288–295.

[65] William of Ockham (1997), III, 8, pp. 180–181: 'Duplex potestas praedicta, scilicet appropriandi res temporales et instituendi rectores iurisdictionem habentes, data est a Deo immediate non tantum fidelibus, sed etiam infidelibus, sic quod cadit sub praecepto et inter pure moralia computatur: propter quod omnes obligat tam fideles quam etiam infideles.' On Ockham's political thought, see McGrade (1974) and Miethke (2000), pp. 285–286.

constitutional form.[66] According to Ockham, the autonomy of secular powers was rooted in human initiative, the result of a free gift from God.

On the other hand, Ockham could not concur with his fellow refugee Marsilius, who tried to deny the status of law, in the proper sense, to both divine and natural law, arguing that only positive law was relevant to the issue at stake.[67] Ockham did not share this attitude, because in his opinion human law did not represent the absolute horizon of human action, but could be transcended in some circumstances. I have mentioned many times the example of the free choice of a Franciscan friar, because it represents, in my view, the seminal paradigm of his reasoning. But Ockham's entire political thought was characterized by the opposition between rule and exception. He never tired of pointing out that a certain rule holds unless it must be temporarily suspended, in the case of necessity, for the sake of the common good. So, for example, it was the emperor's duty and right to defend the orthodox faith; but if he failed to do so, other people, even simple Christians, had to take his place for the good of the Church. There cannot be much doubt that Ockham was applying here the same pattern of thought which he used to justify the friars' recourse to natural law, even when it went beyond or against positive law.[68]

CONCLUSION

As I pointed out at the beginning of this paper, from the historian's point of view we are not entitled to say that Ockham's political thought represents *par excellence* the Franciscan contribution to medieval political thought. I prefer to say that, devoting his attention to political theory in particular historical circumstances, Ockham chose to draw on the apologetic tradition of his own order and, by doing so, showed how some basic 'conceptual tools' of the Franciscan position could play a decisive role in shaping a

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[66] John of Paris (1969), c. 1, pp. 75–76: 'Est autem tale regimen a iure naturali et a iure gentium derivatum. Nam, cum homo sit animal naturaliter politicum seu civile ut dicitur I Politicorum, quod ostenditur secundum Philosophum ex victu, vestitu, defensione, in quibus sibi solus non sufficit, et etiam ex sermone qui est ad alterum, qui soli homini debetur, necesse est homini ut in multitudine vivat et tali multitudine, quae sibi sufficiat ad vitam, cuiusmodi non est communitas domus vel vici sed civitatis vel regni, nam in sola domo vel vico non inveniuntur omnia ad victum vel vestitum et defensionem necessaria ad totam vitam sicut in civitate vel regno.' On John of Paris's political thought, see Miethke (2000), pp. 116–126; the debate over whether he was or was not a supporter of a 'mixed' form of monarchy is not relevant here; but see Blythe (1992), pp. 139–157.

[67] Dolcini was the first to study in detail the disagreements between Marsilius and Ockham; see Dolcini (1981) and (1995), pp. 28–29. One should not, however, neglect de Lagarde (1937), especially p. 450.

[68] See Tabarroni (2000).

political theory. He thought of the political order according to the pattern of ownership: this implied that political institutions, as arrangements of property, were not derived from natural law, but instead had their origin in a web of agreements among men, who had received from God the power to shape them. This meant that these human institutions did not, in principle, need any legitimation from outside (in this case, from religious authority). At the same time, precisely because it rested on positive law, the political order did not constitute the ultimate anthropological dimension. Natural law, which in the state of innocence would have regulated human life, in the present state was still in force as a form of control.

There was probably no such thing as a Franciscan political theory; but certain distinctively Franciscan features, which could have an impact on political thought, can be identified. On the other hand, these Franciscan roots did not prevent Ockham's ideas from exerting an influence outside his own order. Indeed, in the age of the great 'Reformkonzilien', intellectuals not belonging to Franciscan groups, such as Pierre d'Ailly and Juan de Segovia, are known to have made intensive use of Ockham's political writings.[69] To my surprise, I noticed that even a fierce opponent of Franciscan privileges and of the Franciscan way of life, such as Jean Gerson, had recourse to ideas which retained a Franciscan flavour.[70] These come to light when, in *De vita spirituali anime*, he criticizes Richard FitzRalph's position concerning *dominium* and grace.[71] Against the latter's contention that *dominium* depends on grace, Gerson drew on the idea that *dominium civile* was a purely human institution made necessary by sin, which was common also to infidels and which, unlike original *dominium*, could be renounced. As an example of the legitimacy of such a renunciation, he recalled those who had abdicated every *civile dominium* and *haereditaria appropriatio in proprio et in communi*.[72]

At the very beginning of the fifteenth century, when the struggles which contributed to shaping the conceptual tools of the Friars Minor apparently belonged to the distant past, the Franciscan heritage still exerted a sometimes silent but nevertheless important influence on the *maîtres à penser* of a lacerated Christianity, who were once again confronted with the problems of poverty and power.

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[69] Oakley (1964); Mann (1994).
[70] Tierney (1988), especially p. 96; Posthumus Meyjes (1999), pp. 182, 293–298.
[71] On this issue, see Dawson (1983) and Lambertini (2003a).
[72] On this issue in Gerson, see Lambertini (forthcoming a) and also Brett (1997), pp. 76–87.

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The Franciscan Background of Early Modern Rights Discussion: Rights of Property and Subsistence

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INTRODUCTION

Concerning the assertion of the natural rights of subsistence, John Locke (1632–1704) wrote in the chapter on property in his *Second Treatise of Government*:

> Whether we consider natural Reason, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence: Or Revelation, which gives us an account of those Grants God made of the World to Adam, and to Noah, and his Sons, 'tis very clear, that God, as King David says, Psal. CXV.xvi. has given the Earth to the Children of Men, given it to Mankind in common.[1]

Many surveys of the history of moral philosophy locate the emergence of individual rights in the age of seventeenth-century capitalism and thus focus on such philosophers as Thomas Hobbes (1588–1679) and John Locke.[2] However, a Dominican theologian, Jacques Almain (c. 1480–1515), had already stated that right to the subsistence is a basic human right:

> The natural dominion belonging to man from God's gift cannot be abdicated absolutely with regard to all things or, similarly, with regard (in every eventuality) to a specific kind of food and drink. After Adam's sin it was fitting to add over and above this dominion the civil dominion of property and, similarly, that of jurisdiction, by which those exercising it have execution of the material sword and from which ecclesiastical are not in the last exempt by divine right.

The first part of this conclusion is that a natural dominion pertains to men from God's gift. As proof of this, it is assumed that natural dominion is a faculty or immediate power of taking up inferior things for one's sustenance, according to the dictate of natural law. Now by natural law

[1] Locke (1960), p. 327 (II. 25). For the medieval foundations of Locke's theory of natural rights, see Swanson (1997).
[2] See Tully (1980) and MacIntyre (1966).

J. Kraye and R. Saarinen (eds.), Moral Philosophy on the Threshold of Modernity, 165–180.

everyone is bound to converse himself in existence. From this obligation there arises in everyone a power of taking inferior things to use for their own sustenance; this power is called natural dominion. Its title is necessity. – No human right can derogate from this dominion, since the right of a superior law is not abrogated by an inferior right.[3]

In this passage from his *Question at vespers*, Almain defines the concept of natural dominion (*dominium naturale*) as a faculty (*facultas*) or immediate power (*potestas*) of taking up inferior things for one's sustenance. Furthermore, in defining natural dominion, he describes the basic elements of a subjective concept of right which is understood as a part of the individual and his or her personal power of action.[4]

Thomas Aquinas (1224–1274) had understood the basic account of *dominium naturale* in the same way as Jacques Almain. Aquinas also used the same mode of argument, but framed the issue in different terms. In his *Summa theologiae,* he posed the question of whether it is natural for man to possess material objects, replying that:

> We can consider a material object in two ways. One is with regard to its nature, and that does not lie within human power, but only the divine power, to which all things are obedient. The other is with regard to its use. And here man does have natural dominion (*dominium naturale*) over material things, for though his reason and will can use material objects for his own benefit.[5]

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[3] Almain (1706), II, pp. 961–962: 'Dominium naturale, quod homini convenit ex dono Dei, simpliciter est inabdicabile, quantum ad cuncta; similiter et quantum ad certam speciem cibi et potus in omni eventu: cui dominio, post peccatum, conceniens fuit superaddere dominium civile proprietatis, similiter et Jurisdictionis; quo fugentes, executionem gladii materialis habent, a quo Ecclesiastici, Jure divino, minime eximuntur. Prima hujus Conclusionis Pars est, quod Dominium naturale hominibus competit ex dono Dei. Pro cujus probatione supponitur, quod dominium naturale est facultas, seu potestas propinqua assumendi res inferiores ad sui sustentationem, secundum dictamen Legis naturalis. Lege enim naturali quilibet tenetur se conservare in esse: ex qua obligatione, in quolibet oritur potestas res inferiores sumendi in usum, ad sui conservationem; quae potestas dominium naturale vocatur, cujus titulus est Necessitas; de quo dominio dicitur: In necessitate omnia sunt communia, et istud dominium quoscumque Dominos simul compatitur. Ad istud dominium, apud quosdam, pertinet potestas alterum invadentem occidendi, servato moder animae inculpatae tutelae. Huic dominio, nullun Jus humanum derogare potest, cum Jure inferiore non abrogetur Jus superiorius Ex istis sequuntur aliqua corollaria.' For the translation see Almain (1997), pp. 14–15.

[4] On Almain's ideas on rights as a continuation of the Gersonian tradition, see Brett (1997), pp. 116–122.

[5] See Thomas Aquinas (1888–1906), 2a 2ae q. 66. a. 1, resp., p. 64: 'Utrum naturalis sit homini possessio exteriorum rerum. Respondeo dicendum, quod res exterior potest dupliciter considerari: uno modo quantum ad ejus naturam, quae non subjacet humanae potestati, sed solum divinae, cui omnia ad nutum obediunt. Alio modo quantum ad usum ipsius rei, et sic habet homo naturale dominium exteriorum rerum, quia per rationem et voluntatem potest uti rebus exterioribus ad suam utilitatem.' Although Thomas's argument seems to have been traditional, some scholars have found new ideas in this text: Tuck

As a Dominican, Almain probably knew Aquinas's theory, while his basic mode of argument seems to have been taken from the latter's analysis of *dominium naturale.* Almain's vocabulary is elaborated from his contemporary discussion of natural, individual rights. Aquinas's argument, by contrast, is based on the objectively understood law of nature. According to him, man has no *prima facie* right to property, nor to common possessions or private property.

The citation from Almain in addition shows that his rights language did not differ from that used by Locke. Both scholars employed typical early modern terminology concerning individual rights, which included the idea that everyone has a natural, inalienable and God-given right (*ius*) to his or her own person, sustenance and property. Understood subjectively, these inalienable, individual and God-given rights derived from the duty of self-preservation.

Recent studies have demonstrated that the emergence of individual rights was the continuation of a centuries-old tradition. Indeed, the discussion of the basic rights every human being has in his or her life started long before both Locke and Almain. There are, in fact, several historical contexts concerning the early history of individual rights in Western European thought. As Brian Tierney has shown, one important context is the revival of jurisprudence at the end of the eleventh and the early twelfth century, especially in the commentaries on Gratian's *Decretum* by the twelfth-century decretists.[6] Another significant context is the discovery of the New World.[7] In between these were the long-lasting controversies over Franciscan poverty, which went on from the 1250s to the 1340s and which can be divided into three independent debates.[8]

The first was the so-called secular-mendicant controversy in the Faculty of Theology at the University of Paris from the 1250s to the 1270s. This controversy had its origin in university policy but soon expanded to have an impact on the issue of Franciscan poverty.[9] During this controversy the secular masters, especially William of Saint-Amour (d. 1272) and Gerard of Abbeville (d. 1270), questioned the theological, moral, and legal foundations of the Franciscan ideal of poverty. The most significant

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(1979), pp. 19–20, sees the notion of *dominium utile*; Feenstra (1971), p. 215, highlights the importance of the two notions, *dominium* and *potestas*, in discussing Thomas's teaching in this connection.

[6] For the decretists' contribution to the development in the history of individual rights, see Tierney (1997).

[7] See Tierney (1997), especially chapter XI 'Aristotle and the American Indians' and chapter XII 'Rights, Community, and Sovereignty'.

[8] For the Franciscan contribution to the subject, see Mäkinen (2001).

[9] The main source for the conflict is *Chartularium Universitatis Parisiensis* (1889–97). The conflict has been studied extensively; see Rashdall (1936); Leff (1967); Lambertini (1990) and (1993); and Traver (1995).

Franciscan figure during this controversy was Bonaventure of Bagnoregio (1217–1274), a professor in the Faculty of Theology and later General Minister of the Order (1257–1274).[10]

The second controversy concerning Franciscan poverty centred around the annual quodlibetal disputations held in the Faculty of Theology at the University of Paris from the 1270s to the 1290s,[11] which gave rise to an interesting group of texts. The importance of the quodlibetal disputations for our subject is beyond question, since the discussion could centre on any problem proposed by any listener whatsoever; and quodlibetal questions often covered contemporary topics untouched in any other work of the Parisian masters—in our case, several subjects concerning the problems of Franciscan poverty. The quodlibetal questions of Henry of Ghent and Godfrey of Fontaines can be seen as the aftermath of the secular-mendicant controversy in the Faculty of Theology at Paris.[12]

The debate between Pope John XXII (1316–1334) and the Franciscan Order from the 1320s to the 1340s was the third controversy which touched on the issue of Franciscan poverty issue.[13] The controversy had its historical roots in the so-called *usus-pauper* controversy in the late thirteenth century, a matter too complicated to go into here. The debate was triggered by the Franciscans' claim that 'Christ and his apostles possessed nothing, either individually or in common.'[14] In 1321 the Inquisition in Provence took this claim into careful consideration; and in 1322 John XXII condemned it and declared the entire Franciscan Order to be heretics.

The voluntarist concepts and rationalistic ideas on natural rights theories which arose within these specific historical settings also had a certain influence on the development of individual rights theories.[15] Each of these historical and philosophical contexts demanded renewed consideration of fundamental questions about rights.

There are many studies which maintain that individual rights did not exist before the seventeenth century. Yet, despite these views, recent scholarly research has shown that if we wish to find the beginning of the concept of individual rights, we have to turn to the Middle Ages—how far and to what extent remains a matter of debate calling for further legal,

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[10] For William of Saint Amour and Gerard of Abbeville's role in the conflict, see Lambertini (1990), pp. 10–24, 64–78; Traver (1995), pp. 163–240; Mäkinen (2001), pp. 34–53.
[11] For the quodlibetal disputations as a practice at the universities, see Weijers (1995).
[12] On the significance of quodlibetal disputations for the issue of Franciscan poverty, see Mäkinen (2001), pp. 105–139.
[13] For general studies on the controversy over Franciscan poverty in the early fourteenth century, see Lambert (1961); Leff (1968); Tabarroni (1990); Miethke (1969); and Mäkinen (2001).
[14] For the so-called *usus-pauper* controversy, see Burr (1989).
[15] See Brett (1997).

historical and philosophical investigation. Questions concerning the difference between 'active' and 'passive' rights, and between 'objective' and 'subjective' rights, are likewise the subject of much scholarly discussion.[16]

My main aim in this paper is to show that the controversies concerning Franciscan poverty in the late thirteenth and early fourteenth centuries contributed to the emergence of early modern ideas on individual rights. I shall do this by considering the legal and philosophical arguments advanced for and against the Franciscan ideal of poverty. I shall defend my thesis by considering two crucial questions which were posed during this discussion: (1) is it possible to use a thing without having dominion, ownership, possession or usufruct of it; and (2) is it possible for a human being to give up rights in this life? These two questions lead us to the emergence of individual rights: the development of subjectively understood property rights and the right of subsistence, the two basic human rights everyone should have in this life.

IS IT POSSIBLE TO USE A THING WITHOUT HAVING DOMINION, OWNERSHIP, POSSESSION OR USUFRUCT OF IT?

The most fundamental idea of Franciscan poverty relevant to our subject was their claim to give up all property rights. The Franciscan Rule of 1223 states this determination regarding the material means of Franciscan life as follows: 'Let the friars not appropriate anything for themselves, neither a house, a place, nor anything else.'[17] This passage in the Rule, originally put forward as a religious ideal of evangelical poverty, produced a variety of legal interpretations, formulated both by popes and by the Franciscans themselves.[18] Commentary on the question of poverty inevitably involved discussion of property rights. It all started with Pope Gregory IX's doctrine of Franciscan poverty as a use (*usus*) of things without ownership (*proprietas*) or dominion (*dominium*). According to Pope Innocent IV, ownership or dominion of the goods used by the Franciscans either

[16] In her study, Brett (1997) analyses various views concerning the understanding of objective and subjective rights from the Middle Ages to Hobbes.

[17] Francis of Assisi (1993), c. 6: 'Fratres nihil sibi appriopriant nec domum nec locum nec aliquam rem.'

[18] The main papal interpretations concerning the *Regula Bullata* are Gregory IX's *Quo elongati* (1230), Innocent IV's *Ordinem vestrum* (1245) and Nicholas III's *Exiit qui seminat* (1279).

remained with the Church in general and in the hands of the pope in particular, or else remained with the grantor or the donor.[19]

In the mid-thirteenth century, when Franciscan friars started to employ the *usus-dominium* distinction, they took it to mean that they had to live without all rights to property and in the absence of any legal standing. The idea of using things without any right to do so was considered philosophically and legally problematic and led to the formulation of definitions, in texts on law, theology and philosophy, of what was meant by 'the use of things'. It was characteristic of these discussions that the question of what kinds of thing were capable of being owned was considered important. The distinction between *usus* and *dominium* weighed in heavily, especially in the case of consumables such as food, oil or wine.[20]

The question concerning the distinction between use and dominion in relation to consumables was first posed by the secular masters William of Saint-Amour and Gerard of Abbeville, as part of discussions of the legal basis of Franciscan poverty which were carried on during the secular-mendicant controversy. In his *Contra adversarium*, Gerard used the following argument against the Franciscan ideal of use:

> To say that you have only the use of them [i.e., utensils], and that the dominion pertains to those who have given them until they are consumed by age, or until the food is taken into the stomach, will appear ridiculous to everyone, especially since, among human beings, use is not distinguished from dominion in things which are utterly consumed by use.[21]

Gerard thus maintained that it was not possible to establish *usus* in things consumed by use (*res quae usu consumuntur*) without having *dominium* over them.[22] This was also a recognized civil law notion. The reasons were based on the law of *ususfructus* and of *usus*, which included the principle that the substance of a thing should remain untouched.

In his *Apologia pauperum contra calumniator* (1269), Bonaventure defends the Franciscan rule of poverty against Gerard's criticism:

> In order to silence these and other malicious, deceitful and captious objections, we should understand that since four things are to be considered in relation to temporal goods—ownership, possession, usufruct and simple

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[19] See Gregorius IX (1964), pp. 20–25; and Innocent IV (1759), pp. 400–402.

[20] For the historical origins of the basic legal concepts used in the Franciscan poverty discourse—*ius*, *dominium*, *proprietas*, *possessio*, *ususfructus* and *usus*—in Roman law, see Thomas (1976); Buckland (1966); Kaser (1955–9).

[21] Gerard of Abbeville (1938–9), liber II, pars 4, 133: 'Dicere vero, quod usus tantum vester est, dominium eorum, qui dederint, quousque vestustate consumantur, aut ciborum, quousque in ventrem reconditi fuerint, omnibus ridiculum videbitur, maxime cum eorum, quae per ipsum usum penitus consumuntur, ab usu dominium nullatenus inter homines distinguatur.'

[22] For Gerard of Abbeville's criticism of the Franciscan ideal, see Mäkinen (2001), pp. 34–53.

> use—and since the life of mortals is possible without the first three but necessarily requires the fourth, no profession may ever be made which renounces entirely the use of all kinds of temporal goods. But that profession, which implies a wilful vow to follow Christ to the extremities of poverty, most fittingly calls for renunciation of dominion over anything whatsoever and must be content with the limited use of things belonging to others and conceded to it.[23]

This is perhaps the most precise statement which Bonaventure makes in his writings concerning the distinction between *dominium* and *usus*. The friars must renounce '*dominium* over anything (*res*) whatsoever (*universaliter*)' and were only allowed the simple use of goods (*simplex usus*). He employs the concept of *dominium* here to mean all alternative property rights over things (*iura in re*): *proprietas*, *possessio*, *ususfructus* and *usus iuris*. The concept of *dominium* thus covered all property rights over things: *proprietas*, *possessio*, *ususfructus,* and *usus iuris*.[24] Bonaventure seems to have appropriated the contemporary lawyers' notion of *dominium*, which meant any right over a thing (*ius in re*). Since *dominium* was now such a broad concept, it was important to specify that *proprietas* meant ownership, that is, the right of property.[25]

In the above citation, Bonaventure skilfully demolishes Gerard's criticism by describing the Franciscan ideal of using goods as *simplex usus*, simple use. He does not discuss the distinction between *dominium* and *usus iuris* in any detail (as Gerard had done), speaking instead about *simplex usus,* which, as distinct from the concept of *dominium*, was a non-technical legal term. Accordingly, friars did not even have the right to use goods; they had only non-legal permission to make simple use of them. His distinction between *dominium* and *simplex usus* also indicates that Bonaventure took account of the precise legal situation.[26]

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[23] Bonaventure (1898), c. 11 n. 5 (VIII, 312a): 'Ut igitur praefatis et his similibus cavillationibus malignis et subdolis imponatur silentium, intelligendum est, quod cum circa res temporales quatuor sit considerare, scilicet proprietatem, possessionem, usumfructum et simplicem usum; et primis quidem tribus vita mortalium posit carere, ultimo vero tanquam necessario egeat: nulla prorsus potest esse professio omnino temporalium rerum abdicans usum. Verum ei professioni, quae sponte devovit Christum in extrema paupertate sectari, condecens fuit universaliter rerum abdicare dominium arctoque rerum alienarum et sibi concessarum usu esse contentam.' For the translation see Bonaventure (1966), p. 241; however, I have modified it in various places, in particular by translating *cavillationes* as 'captious objections' rather than 'sophisms'.

[24] This type of terminology also regularly occurs in philosophical and theological texts of the thirteenth century; see Coleman (1991).

[25] Cf. Lambertini (1990), p. 97.

[26] The distinction between *dominium* and *simplex usus* was not, however, an innovation of Bonaventure. Hugh of Digne had explicitly employed the notion of *simplex usus*, as distinct from *proprietas* and *dominium*, in his commentary on the Rule: see Hugh of Digne (1979), c. 6, pp. 146, 148–149.

In Bonaventure's view, simple use was necessary for life, implying a deliberate vow to follow Christ. Simple use concerned consumables such as clothing, shoes, food, dwellings, victuals and various types of utensils such as books. Since this was a non-legal use of goods, a mendicant was only permitted to take goods such as books into his hands; but he could not take them possessively into his hands, for instance, by carrying them with him and using them over a period of days. According to Bonaventure's interpretation, the simple use of goods granted to Franciscans did not allow them, for example, to buy, exchange or lend anything since they had no rights over anything. They only consumed things whose ownership belonged to another, the Roman Church in general and the pope in particular.

Bonaventure also defended the distinction between use and dominion by drawing on legal principles derived from Roman law. In his *Apologia pauperum*, he first gives support to the distinction by comparing friars to little children or even lunatics who were *alieni iuris*, under the control of a superior and guardian—in the case of Franciscans, the superior was, of course, the pope.[27] As a little child, a Franciscan friar was also incapable of owning or even possessing property. Second, Bonaventure maintains that since, in a legal sense, friars lacked the intention (*animus*) of possessing or owning anything, they could not make any legal contracts or alienate or exchange the property which they simply used.[28] Third, he refers to the law of personal fund (*peculium*). This states that a son of the household can use his father's goods as a personal fund, *peculium*, without being their proprietor or legal possessor.[29] Similarly, friars used property which belonged to the pope and to the Roman Church. Therefore, Bonaventure reasons that since it was possible to establish a *peculium* in things consumed by use, the Franciscans' case was also admissible in law.

Bonaventure's notion of *simplex usus*, as distinct from the concept of *dominium*, was later elaborated by Pope Nicholas III (1277–1280) in his bull *Exiit qui seminat* of 1279 into the notion of *usus facti*, factual use. It

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[27] Bonaventure (1898), XI, 9 (VIII 313a): 'Furiosus et pupillus sine tutoris auctoritate non possunt incipere possidere, quia affectionem tenendi non habent, licet res suo sorpore contingant, sicut si dormienti aliquid in amnu ponatur.' See also *Digest* 41.2.1.

[28] Bonaventure (1898), XI, 9 (VIII 313 a-b): 'Patet igitur per haec verba legis expressa, neminem posse proprietatem sive dominium, immo nec possessionem acquirer, nisi vere, vel interpretative animum acquirendi habeat. Cum igitur Fratres Minores animum acquirendi non habeant, quin potius voluntatem contrariam, etiam si res corpore contingant; nec dominium nec possessionem acquirunt nec rerum huiusmodi possessors vel domini dici possunt.' See also *Digest* 38.2.49; 29.2.20; and 41.2.1.

[29] Bonaventure (1898), XI, 7 (VIII 312b): 'Nec obstat quod adversaries obiicit de rebus, quae usu consumuntur, quod in eis proprietas non separatur ab usu. Hoc enim fallit in peculio profectitio filiifamilias, ubi filiusfamilias usum habeat, et tamen proprietas nec ad momentum residet penes ipsum.'