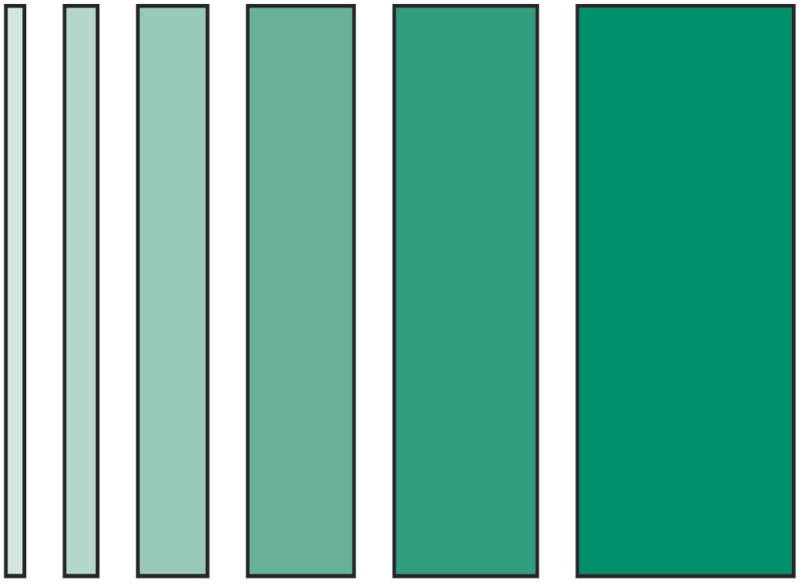

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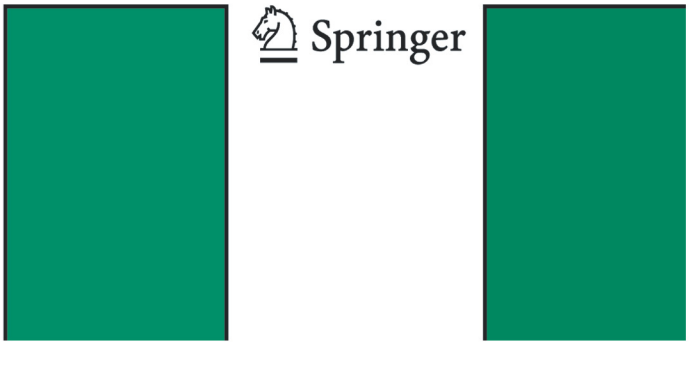
Moral Philosophy on the Threshold of Modernity

edited by
Jill Kraye
and Risto Saarinen



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century, he distinguished between speculative and practical doubt. The gist of this distinction was that it is possible to remain speculatively in doubt, that is, in doubt (which precludes assent) about the truth of a proposition, yet to follow it in one's actions. The scholastics assumed, however, that one could not act licitly without assenting to the truth of a proposition which states the licitness of the action in question. This kind of assent was called the practical judgement of conscience. In other words, Cajetan pointed out that one could satisfy the formal requirements of sound moral reflection by remaining in speculative doubt about the right answer to a question but believing in the licitness of acting as if one answer were true. The whole edifice of Catholic casuistry after Cajetan rests on this possibility.[7]

Now, let us return to the traditional solution to the confessor's case. Medina acknowledges the authority of the four theologians opposing him and admits that their arguments seem 'optimal'. Nevertheless, he prefers a different solution: his formula of probabilism. The reasons which Medina adduces for this step are revealing. He emphasizes the heavy psychological burden placed on people who seek optimal moral knowledge. Medina, in other words, recognizes the costs of information gathering and tries to ensure that the burden of morally necessary information-gathering is bearable. This idea became one of the pillars of probabilism.[8] In general, probabilists regarded it as sufficient to establish the probability of an opinion. To do more might be meritorious, but could not normally be required. Thus, according to a first possible understanding of probabilism, we may follow, after sufficient inspection, any opinion which is probable. It may be possible that, all things considered, the opposite opinion would be more probable. Nobody, however, has a duty to consider all things.

Medina's text also contains a second justification of probabilism. This justification is based on differences between one's own opinion and those of others with relevant knowledge of the issue at stake—authorities, experts, peers and so on. The case of the confessor underlines this point, as does Soto's example of the judge. Soto says that a judge may argue for a less probable juridical opinion in academic debate, but demands that he must prefer the more probable side in court.[9] Medina, on the other hand,

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p. 316, who called this move a 'tournant decisif' in the development of the scholastic theory of moral decision-making under uncertainty.

[7] The understanding and application of Cajetan's distinction has its difficulties, as late scholastics recognized. There is a systematic discussion of these problems and of various scholastic attempts to solve them in Martin Bresser's 'De conscientia libri VI', lib. III, cap. 7.

[8] See Sanchez 'Opus morale', lib. I, cap. 9, fund. 5, n. 14; Suárez 'De bonitate', disp. XII, sec. VI, n. 8; Busenbaum 'Medulla', lib. I, cap. 2, dub. 2.

[9] See Soto 'De iustitia et iure', lib. III, q. 6, a. 5, ad 4.

assumes that a judge may prefer the less probable side even in court, as long as it is probable. But note that he restricts his solution to those cases where probability is not entirely based on objective testimony. It may also be based, for example, on juristic commentaries or on a survey of expert opinion. In these cases, a judge may follow a less probable opinion. There seem to be two possible motivations for such a decision. The judge can prefer a less probable opinion himself, going against a majority of authorities. Or he may be influenced by political, institutional or economic pressures to embrace the less probable side. Both kinds of motivation can be found in probabilistic analyses of cases of conscience. Consequently, probabilism not only diminished the burden of information-gathering costs but also enabled decision-makers to exploit differences between their own opinions and those of others with relevant expertise. In this way, probabilism considerably increased the flexibility of moral choice.

What does this flexibility tell us about the probabilists' attitudes? I do not want to speculate on this question, which can be approached from many angles. It should, however, be emphasized that probabilism did not simply serve the purposes of the mighty over the powerless or the morally frivolous over the virtuous. Like Hegelianism, probabilism had leftist and rightist uses. It not only served the consciences of the rich and mighty but also legitimated claims of the poor and the persecuted.

PROBABLISM BEFORE THE THIRTY YEARS WAR

To the best of my knowledge, the history of the first fifty years of probabilism has been most fully analysed by Albert Schmitt in his *Zur Geschichte des Probabilismus. Historisch-kritische Untersuchung über die ersten 50 Jahre desselben* of 1904. Schmitt's work contains ample evidence that most discussions among probabilists had their roots in the decades before the Thirty Years War. Later theoretical developments were less fundamental and paved the way towards the dissolution of probabilism.

One of the most surprising developments in the career of probabilism was its rapid acceptance among Catholic moral theologians. Probabilism was already widespread in the 1590s. Ironically, during these years it was the opponents of probabilism who were criticized as 'novelty mongers' (*neoterici*).[10] This can be explained by the fact that probabilists often provided new solutions for old cases. In the eyes of his peers, Medina merely spelled out what was implicit in the older tradition.

Another reason for the rapid spread of probabilism was the wide acclaim given to Medina's arguments. Imposing narrow limits on the costs

[10] See Sanchez 'De Sancto matrimonii sacramento', tom.I, lib II, disp. 41, q. 3, n. 31.

of moral information-gathering seemed appropriate to many casuists. Many theologians also approved of the new flexibility brought to traditional rules of conscience. Some theologians, such as Gabriel Vazquez, developed a conservative brand of probabilism.[11] Vazquez used probabilism mainly to justify obedience to authorities, even if the opposite side was acknowledged to be more probable. At the same time, new and radical versions of probabilism arose. These new versions were rooted in principles of human liberty. Over the course of time, these became the most principled and philosophically interesting forms of probabilism. They claimed that agents were free to follow a probable opinion even if the opposing opinion was regarded as more probable by the agent himself. An agent possessed this freedom, not because of the approval of external authorities, but because the human will possessed an inherent right to incline towards any probable alternative. This freedom of decision could be restricted by moral laws. But the proponents of moral restrictions bore the burden of proving that such restrictions existed. If a moral opinion was probable, the existence of a law which prohibited following it had not been sufficiently proved and freedom therefore prevailed. Tomás Sanchez, who had an immense influence on later probabilists, expressed these thoughts in the following words: 'The will is justly said to possess its freedom, and whoever wants to impose an obligation restricting freedom has to bear the burden of proof.' [12]

It is interesting that the notion of dominion (*dominium*) also appears in this context, as in the following, almost 'Hobbesian' sentence by Antonius Terillus: 'The will has natural dominion in everything, if it is not forbidden by law.' [13] Recent research on the historical roots of the idea of subjective rights has centred precisely on the concept of dominion. It should come as no surprise then, that Daniele Concina, one of the staunchest critics of probabilism, accused the probabilists of introducing a *ius libertatis*, a human liberty right: 'The probabilists say that law repeals the right of liberty'. [14]

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[11] See Gabriel Vazquez 'In Primam Secundae', q. 19, disp. 62, cap. 4.

[12] Sanchez 'Opus morale', lib. I, cap. 10, q. 1, n. 11.: 'voluntas dicitur possidere vere suam libertatem, & volenti obligationem imponere privantem libertate, incumbit eius probandae onus.'(*)

[13] Terillus 'Fundamentum', q. 23, n. 46, p. 425 in margine: 'Voluntas habet naturale dominium in omnia, nisi lege prohibeantur.'

[14] Concina 'Theologia christiana', Tom. I, lib. II, diss. II, cap. 7, §1, 1: 'Lex tollit jus libertatis, inquiunt probabilistae.'

The 'possidentis' principle

Why did theologians such as Tomás Sanchez believe in human freedom within the limits of law? Sanchez founded his probabilism on an old principle of property law: when in doubt, the lot of the owner is better ('in dubiis melior est conditio possidentis'). The 'possidentis' principle, as I call it, was derived from a rule of Roman and medieval law which helped to decide cases involving doubtful ownership of goods.[15] According to it, a bona fide possessor of a thing may not be deprived of it as long as the unlawfulness of his possession is not sufficiently established. Note that the use of the scholastic term 'doubt' in a rule for making decisions signified an equal balance of reasons on both sides. Therefore, not every kind of uncertainty could be used to invoke the 'possidentis' principle.

We need to pay attention to this detail when tracing the astonishing career of the 'possidentis' principle in the sixteenth century. From its beginnings in property law, the 'possidentis' principle was applied to ever wider areas of moral conduct until it served as a general principle of liberty.[16] At the outset it was apparently not used as a rule of conscience. But by the end of the sixteenth century it had become the cornerstone of probabilism. I have written about the career of the 'possidentis' principle in greater detail elsewhere.[17] Hence, a short sketch of its expansion should suffice here. From the early sixteenth century onwards, the 'possidentis' principle was used in the context of war and conquest. Francisco de Vitoria explicitly uses it in his *De iure belli* when dealing with the question of whether Spain could wage a just war with France over the possession of Burgundy.[18] Vitoria assumes that both sides have weighty claims for the possession of Burgundy. But as long as the claims of neither side predominate, France, at that time the possessor of Burgundy, could not legitimately be attacked.

Later members of the School of Salamanca applied the 'possidentis' principle to the conquest of America. They assumed that no prince could legitimately start a war of doubtful legitimacy. Most Spanish intellectuals agreed that the justice of the conquest of America was doubtful at best. The Conquista, however, was not regarded as a premeditated war. The ethical counsellors of the Spanish Crown argued that Spain had initially planned a peaceful colonization of the New World for the mutual profit of Spain and

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[15] See Friedberg 'Corpus iuris canonici', reg. iur. 65 in VI°: 'In pari delicto vel causa potior est conditio possidentis.'

[16] See Sanchez 'De Sancto matrimonii sacramento', tom.I, lib II, disp. 41, q. 3, n. 31: 'Sed verius est in quacumque materia potiorem esse in dubio possidentis conditionem: quia possessio est titulus omnibus virtutibus'.

[17] See Schüssler (2002).

[18] See Vitoria 'De iure belli', q. 4, dub. 3, punctum 8.

the Indians.[19] Yet things had somehow taken a turn for the worse, without the Spanish Crown committing any major fault. In consequence, Spain could not be held liable for the ensuing bloodshed in America. Moreover, it had not willingly started a war in the face of obvious doubts about its legitimacy. The real question, as framed by the Spanish ethics committees, was therefore: whether a prince may continue to wage a war of doubtful legitimacy in which he suddenly finds himself entangled, without any guilt on his own part. Juan Guevara, professor at Salamanca, related this question to doubts about the lawful possession of a thing, and especially a thing like America:

> This was the case of Charles V, who began to doubt his right to own the New World. But if, in examining the case, a doubt remains and equal reasons contend on either side, a prince who took possession in good faith may not be attacked by another and may retain the entire thing which he possesses.[20]

In the sixteenth century, the 'possidentis' principle was applied not only to the possession of countries but also to the that of persons. Domingo de Soto cited the 'possidentis' principle in his argument for the need to obey to orders even if they were of uncertain legitimacy.[21] He argued for military obedience on the assumption that soldiers were possessions of a prince and that, when in doubt, an owner retained the right to use his possessions.[22] For a similar reason, slaves whose lawful enslavement was in doubt could be acquired and sold. A bona fide slave owner retained the right to use his possession until the unlawfulness of enslavement could be proved beyond doubt. But note again that doubt in scholastic usage indicates an equal balance of reasons. If it could be established that any reasonable person must presume the illegitimacy of slavery, the 'possidentis' principle would no longer apply. Bartolomé de Las Casas used this argument in his campaign against the enslavement of American Indians.[23]

The examples of obedience and slavery show that in the sixteenth century the 'possidentis' principle was often used to restrict the freedom of individuals, as we would understand it today. Therefore, the principle was

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[19] See Ramos (1984b); Höffner (1972); Justenhoven (1991: 58ff.); Gillner (1997).

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

[21] See Schüssler (2000).

[22] Soto 'De bello', art. 1, dub. 7, concl. 5: 'Probatur primo quia quando alter coniugum aequale habet dubium tenetur obedire possidenti et reddere debitum illi petenti. Ergo et milites habentes aequale dubium. Consequentia probatur quia quemadmodum coniux possidetur ab alio coniuge dubio, ita etiam milites possidentur a rege.'

23 See Las Casas 'Indiosklaverei', p. 85.

double-edged, but its liberating edge nevertheless became increasingly important. The same Domingo de Soto who regarded princes as owners of their subordinates argued that in cases of doubt as to whether a vow had been made, one should decide in favour of the person who might possibly be obliged.[24] He assumed that a vow of doubtful validity was not binding. As reason for holding this view, Soto postulated the right to retain one's freedom: 'The lot of the owner is better and that a person should remain free, which means in his own possession.' [25] This solution was frequently cited by probabilists. Furthermore, it was generalized so that the freedom to make decisions was treated as part of a person's possessions.

But not all scholastic theologians applauded this development. Critics of probabilism insisted on a restricted understanding of the 'possidentis' principle. They maintained that the principle was valid only within the traditional context of property law, but not in relation to all moral issues. Partly for this reason another principle became prominent: the 'lex dubia' principle ('lex dubia non obligat'). This principle assumes that a law or an obligation of doubtful validity is not binding. In other words, no one has to follow a moral rule or to honour an obligation whose validity or existence remains doubtful. Francisco Suárez made this idea the cornerstone of his probabilism.[26]

The rise of the 'possidentis' principle and its sister principle 'lex dubia non obligat' tell an important story about the anatomy of probabilism. Medina's probabilism can be described as an *information-centred* probabilism. It was concerned with mitigating the costs of information-gathering and with weighing personal against public information. In contrast, the approach of Sanchez and Suárez was based on principles of personal liberty. This kind of probabilism can be labelled *liberty-centred* probabilism. We find both forms during the peak period of probabilism in the seventeenth century.

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[24] Schmitt (1904), p. 41, sees this as an important step in the career of the 'possidentis' principle.

[25] See Soto 'De iustitia et iure', lib. VII, q. 3, a. 2: 'Melior siquidem est possidentis conditio, et hominem manere liberum, censetur manere in sua possessione.' (*)

[26] Suárez 'De bonitate', d. XII, sec. VI, n. 8.: 'praeterea existimo illam rationem sufficientem: quamdiu est judicium probabile, quod nulla sit lex prohibens, vel praecipiens actionem, talis lex non est sufficienter proposita, vel promulgata homini: und cum obligationis legis sit onerosa, et quammodo odiosa, non urget, donec certius de illa constet, neque contra hoc urget aliqua ratio, quia tunc revera non est contraria pars tutior in ordine ad conscientiam, neque ibi est aliquod dubium practicum, nec periculum.'

PROBABILISM AND THE SCEPTICAL CRISIS

The late sixteenth and the early seventeenth centuries were the heyday of scholastic probabilism. It was also the golden era of early modern scepticism. Sextus Empiricus's work was translated and published, Montaigne and Charron formulated their sceptical world views, French libertines came together in influential circles and Descartes was infected with a scepticism which he later struggled to refute. Richard Popkin and Charles Schmitt have coined the phrase 'sceptical crisis' or 'Pyrrhonist crisis' to describe this upsurge of interest in scepticism.[27]

At first sight, it is by no means clear how early modern scepticism and scholastic probabilism could possibly be related. The chronological coincidence of their rise and decline seems surprising, but does not prove that there was any relation between them. But then, second thoughts arise. Probabilism removes moral restrictions. So, too, does Pyrrhonist scepticism. Both doctrines mitigate religious conflicts by loosening the connection between belief and action.[28] It is interesting that both doctrines achieve this result by increasing the epistemological-cum-moral flexibility of decision-making. Apparently, sceptisicm and probabilism served similar functions in a time plagued by dogmatic religious strife.

And there are even deeper similarities. A pair of evenly balanced scales is the symbol of Pyrrhonism. This symbol represents the refusal of assent and an even balance of reasons on both sides of a question. Withholding assent and accepting doubt are also characteristic features of probabilism. Cajetan's distinction between the speculative and practical level of reflection justifies abstention from assent on the speculative level and action according to a proposition which is not held to be true. Therefore, probabilism seems to be a species of scepticism, and the internecine scholastic battles over probabilism appear as skirmishes in the famous early modern sceptical crisis.

Some early modern critics of probabilism supported this view, explicitly speaking of probabilism as a form of scepticism. Samuel Rachel, for instance, accused probabilism of wavering in the same way as the Academic scepticism of the ancient school of Arcesilaos and Carneades. Vincent Baron referred to the probabilist Juan Caramuel y Lobkowitz as a 'new Carneades'; and Vincent Contenson linked probabilism and

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[27] On the early modern sceptical Crisis see Laursen (1992); Popkin (2003); Copenhaver and Schmitt (1992), pp. 239–260; Schmitt (1972).

[28] Note that Pyrrhonism and probabilism do not necessarily mitigate conflicts in general. They can be used to justifiy Machiavellian strategies in power politics or the primacy of reason of state. Richelieu employed 'spin doctors', some of whom inclined towards Pyrrhonism and probabilism, for this very purpose: see Church (1972). But their arguments tended to disapprove of religious fervor as cause of war.

Academic scepticism on the grounds that both recommended following the probable course in action.[29] Nevertheless, all things considered, probabilism was not a form of scepticism. The probabilist Antonius Terillus found the label of scepticism sufficiently unattractive to attempt an explicit refutation.[30] He pointed out that Academic scepticism negated any possibility of true belief and disapproved of assent altogether. Probabilists, however, did not despair of attaining knowledge in general but only in certain cases, and they called for assent on the practical level of moral reflection. Therefore, probabilists were not Academic sceptics. Their aims were more practical and epistemologically limited.

But what about Pyrrhonism? Pyrrhonism, the second brand of ancient scepticism, was never central to scholastic discussions about probabilism. This comes as a surprise if we consider the prominence of Pyrrhonism in the sixteenth and seventeenth centuries. Apparently, however, the spread of early modern Pyrrhonism did not make a strong impression on contemporary scholastics. When they discussed scepticism, they continued to talk about the Academic variety. They thus remained true to their medieval predecessors, who spoke of Academic scepticism only sparingly, but never even mentioned Pyrrhonism.[31] This silence creates no problem for probabilism. Probabilism is neither a form of Academic nor of Pyrrhonist scepticism. Pyrrhonism assumes that all arguments are equally good or bad. It postulates an equal balance in all questions of reasons relevant to the truth. Probabilism, on the other hand, presupposes the possibility of unequal probabilities and of an unequal balance of reasons on different sides of a question.

This leaves us with the observation that different intellectual traditions produced separate doctrines with similar functions in the second half of the sixteenth century and the first half of the seventeenth. Selective interest in the sceptical side of a more universal crisis of uncertainty, of which the rise of both scepticism and probabilism is a part, uncovers only a fragment of a

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[29] See Rachel 'Examen probabilitatis', cap. 1, p. 5: 'Si quis enim hujus doctrinae [sc.: probabilismi] regulas inspexerit & perusitaverit, de rebus maximi momenti & quibus nixatur vita salusque, plane Academico more disceptant ac fluctuant'. For Baron see Deman (1936), p. 512. Furthermore, see Contenson 'Theologia mentis', Tom II, lib. VI, diss. III, spec 2, p. 835: 'Non potuit. S. Doctor clarius mentem suam aperire, quam lib. 3 contra Academ., cap. 16 ubi Academicorum commune axioma, quod ipsissima est probabilistarum doctrina, refert: "Cum agit", inquiebat, "quisque quod ei probabile videtur, non peccat, nec errat."'

[30] See Terillus 'Regula morum', pars I, q. 30: 'Utrum & in quo probabile benignae sententiae ab Academicorum probabili discrepet'.

[31] See Schmitt (1972); Popkin (2003), and Stadelmann (1929), p. 74, on medieval knowledge of scepticism. In contrast to medieval scholastics, their early modern heirs sometimes at least mentioned Pyrrhonism; but, as far as I can see, it played no role in their discussions of scepticism.

larger historical picture. For a fuller understanding of the picture we need to take probabilism seriously.

LIBERTY-CENTRED PROBABILISM AND MODERN MORAL PHILOSOPHY

After the discussion of the anatomical similarities and differences between scepticism and probabilism, we may return to a closer inspection of liberty-centred probabilism, which is, philosophically, the most promising form of probabilism. The label liberty-centred probabilism underlines the importance of the principles of 'possidentis' and of 'lex dubia'. Both emphasize that moral precepts are restrictions on our freedom of action and that doubtful precepts are not binding. Liberty-centred probabilism also renounces the specific epistemological duty of choosing the most probable moral alternative. Thus, the 'possidentis' and 'lex dubia' principles defend the liberty to act as one thinks fit within the limits of—as the probabilists thought—an adequately conceived morality and theory of epistemological choice. In modern terms one might speak of the negative liberty of an actor, that is, liberty from interference, being strengthened by the basic principles of liberty-centred probabilism. Some philosophers despise any liberty which is merely negative, but their qualms need not concern us here. My task is to elucidate the philosophical structure of probabilism, not to evaluate its moral attractiveness.

The freedom of choice engendered by liberty-centred probabilism should not, after all, be overstated. It does not necessarily coincide with the personal or political freedom postulated by modern human rights doctrines. This was emphasized above, when I said that slave-masters, but not slaves, were favoured by the juristic application of the 'possidentis' principle. One should also take into account that a loosening of epistemological ties can increase the relative force of other duties. Some early modern theologians used this deontic effect to strengthen duties which otherwise would have been overridden by the precept requiring us to choose the more probable alternative. At first glance, this runs counter to the assumption that there is a liberty-centred form of probabilism. But although liberty of choice is not by necessity an intended consequence of this strategy, it employs principles of negative freedom and therefore can legitimately be called liberty-centred. Furthermore, ideas and principles have their own life. By using liberty-centred principles for authoritarian purposes, conservative probabilists opened the door to new developments which they could not control for long.

It should also be recognized that a second, laxist species of probabilists also existed. These laxists, or benevolent counsellors of conscience, as they might have thought of themselves, cared a great deal for the worldly good of their clients. In everyday cases of conscience they tried to alleviate the burden of morality in order to render the good life easier for ordinary people (and to attract them to Catholicism by means of this strategy). The good life, of course, had a religious underpinning even for laxists. But their baroque interpretation of this basis differed considerably from the ideas of Aquinas or Aristotle as far as the virtues were concerned. Thus, a laxist understanding of liberty-centred probabilism comes close to libertinage and modern conceptions of negative liberty.

The 'possidentis' and 'lex dubia' principles not only show that probabilism is liberty-centred but also that it is a late and radical offspring of a quasi-juridical conception of ethics. In this conception, moral claims resemble juridical ones. They are external to the aims and preferences of decision-makers. This view of morality differs both from Aristotelian ethics and from Christian models of the good life. Of course, even the most lawyerly of early modern theologians felt bound to take these models into account. Therefore, they had to look for compromises. The rivalry of ethical paradigms in early modern theology was eased by the traditional distinction between counsel and precept. Decision-makers were counselled to follow ideas of the good life. But they were obliged to follow moral precepts, and thus the quasi-juridical view of morality became the prevalent one for hard-nosed casuists.

Today, theologians quite often lament this early modern trend. They welcome the modern de-juridification of moral theology. It is important to bear in mind, however, that the quasi-juridical conception of ethics did not completely disappear. It became part of contractarian or liberal ethical theories and remains at the core of what is often typified as 'modern moral philosophy'. This is a label which critics have attached to certain paradigms of modern ethics. Elizabeth Anscombe, who is to a great extent responsible for sparking the present attack on modern moral philosophy, subsumed Kantianism and utilitarianism under this label.[32] Her conception of modern moral philosophy emphasizes the so-called 'negative' liberty of moral agents to define arbitrary aims for their lives within the limits of moral restrictions. Therefore, morality is seen merely as a set of law-like constraints on action. Anscombe concludes that this conception of morality produces nonsense if the idea of a divine lawgiver who enforces lawful behaviour is removed from ethics. And she assumes that exactly that has happened in modern secular ethics.

[32] See Anscombe (1997).

My analysis of probabilism shows that modern moral philosophy did not begin with Kant or Bentham. The very properties which Anscombe ascribes to modern moral philosophy were largely present in late scholastic moral thought and especially in probabilism. Moreover, liberty-centred probabilism should be recognized as an ancestor of liberalism. C. B. Macpherson has shown that an early modern conception of possessive individualism lies at the roots of modern liberalism.[33] I have dealt with this subject more fully elsewhere,[34] but from what I have presented so far it should be clear that liberty-centred probabilism captures some of the basic ideas of possessive individualism. The very name of the 'possidentis' principle and its background in property law make this connection obvious. It was the scholastics of the sixteenth century, not the English proto-libertarians of the seventeenth century, who first established the model of an individual as possessor of himself. Moreover, the generation of this model did not require seventeenth-century capitalism. All that was needed was the globalization of trade and politics which began at the end of the fifteenth century.

Taking this into account, we can identify several historical waves of hostility towards the kind of quasi-juridical, liberty-centred ethics which we now refer to as modern moral philosophy. One wave culminated at the end of the seventeenth century and the beginning of the eighteenth. Later on, quasi-juridical ideas regained power in ethics when Kant and Bentham came onto the philosophical stage. The recent resurgence of Neo-Aristotelianism marks another turn of the tide. Much could be gained from a closer look at these historical tides; but at present I want to deal with more systematic questions. Since probabilism is an ancestor of modern moral philosophy, the problems it creates cannot be easily shrugged off. They are not just the problems of an arcane doctrine which, after the demise of scholastic casuistry, has gone for good. Instead, probabilism exemplifies certain deep-rooted problems of modern moral philosophy.

The reigning principles in probabilism are the 'possidentis' and the 'lex dubia'. Both insist that the burden of proof for the legitimacy of moral claims or moral blame rests on the side of the claimant. In the light of this premise, the notorious pluralism of moral opinions, so well known already to the scholastics, renders the legitimation of moral restrictions very difficult. Many opponents of probabilism therefore fear moral anarchy if it is considered licit. This observation may help to redirect the critique of modern moral philosophy. Many of its critics concentrate on the absence of a divine lawgiver. It is, however, not convincing to claim that without a divine law giver the concepts of duty and obligation lose their (semantic)

[33] See Macpherson (1973).
[34] See Schüssler (2002).

meaning. Although traditional definitions of these terms include the notion of a sanctioning actor, a change of meaning may account for their present use. After all, the concept 'atom' as used in chemistry does not become meaningless simply because it meant something different when it first came into use. One may instead claim that the retreat of the divine lawgiver from ethics undermines the force of moral imperatives. Rational egoists will see no reason for moral restraint if no external sanctioning power is present. But then, it is not only modern moral philosophy or quasi-juridical ethics which suffer from this defect. It is hard to see how rational egoists could be convinced by ideas of the moral good or virtue. Thus, the question of a sanctioning or restricting power concerns all ethical theories in the same way.

The promotion of moral anarchy in situations of moral uncertainty, on the other hand, seems to be a problem peculiar to modern moral philosophy. And maybe modern moral philosophy might therefore want to dissociate itself from the quasi-juridical treatment of uncertain moral claims embodied by probabilism. It should be clear, however, that this will prove no easy task. Modern moral philosophy assumes that moral norms are restrictions on the aims and life-plans of individuals, which can otherwise be freely chosen. Modern moral philosophy also maintains that in order to bind, moral restrictions have to be convincingly justified. In uncertainty, therefore, the burden of moral proof rests on the claimant. This was also the central tenet of probabilism. As a result, there seem to exist strong ties between probabilism and modern moral philosophy. To ban probabilism from the range of eligible rational approaches to ethical decision-making implies a break with the core assumptions of modern moral philosophy. After such a step, we would have to face the question of why we did not abandon modern moral philosophy altogether. As indicated, some moral philosophers would happily accept this suggestion. But for those who want to retain modern moral philosophy, probabilism harbours a challenge.[35]

EQUI-PROBABILISM

The argument of the last section points ahead to a programme for further inquiry. But before embarking on this programme, we should look once again at the history of probabilism. The notion of a close connection between probabilism and a quasi-juridical view of morality, which I have

[35] Much more could be said here, and many important details of the relationship between probabilism and modern moral philosophy are absent from my account. This is not, however, the place to raise them.

assumed to exist, seems to be refuted by the historical development of probabilism. After the Thirty Years War a new era of probabilism began. To my mind, the most important features of this new era were the parallel rise of a very radical soft-probabilism and of a very radical doctrine of risk-aversion in decision-making, which soon came to be referred to as tutiorism. Soft-probabilists such as Caramuel, who was called the prince of the laxists (*princeps laxistarum*), assumed that it is only the certain truth of a moral opinion which makes it mandatory to embrace it.[36] Late scholastics distinguished between different degrees of certainty. Its weakest form, moral certainty, represented a certainty which was beyond reasonable doubt, but which did not entail logical necessity.[37] The counter-opinion of a morally certain one cannot by any (moral) possibility be probable. Asking for precepts to have moral certainty thus means that decision-makers are free to follow opinions which may be probable and not only clearly probable ones. It was this relaxation of probability in soft-probabilism which attracted most fire from the opponents of probabilism.[38] And the number of opponents rose sharply in the second half of the seventeenth century. Blaise Pascal was merely the most prominent of these critics but not—at least in relation to probabilism—the most philosophically interesting of them.[39]

Pascal and his Jansenist friends inclined towards a radical doctrine at the other end of the laxism-rigorism scale. This doctrine states that in all cases of uncertainty the safer side is to be preferred. Text-books of Catholic moral theology refer to this doctrine as tutiorism. It is very important to note that Jansenist tutiorism was very different from medieval admonitions to prefer the safer option. In medieval casuistry the safer side had to be

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[36] See Caramuel 'Dialexis', prodromus, n. 194: 'In omni causa alias incerta (quaecumque illa sit: aut ad iustitiam, aut ad aliam quacumque virtutem pertineat) manutenendum est, qui possidet, donec superveniat ratio certa & sufficiens; ob quam a possessione expellatur.' On the extremely interesting Caramuel see Schmutz (2000).

[37] See Lugo 'Disputationes scholasticae', disp. I, sec. XIII, § 4, n. 311: 'Evidentia ergo, seu certitudo moralis tunc invenitur, quando de re aliqua non possumus prudenter non solum dubitare, sed nec etiam formidare.' Usually three forms of certainty were distinguished by early modern scholastics: metaphysical, physical and moral certainty (see Lugo 'Disputationes scholasticae', disp. I, sec. XIII, § 4, n. 311, n. 317; disp. II, sec. I, n. 40–45; Suárez 'De fide theologica', disp. VI, sec. V, n. 6). Note that a triadic distinction of certainty was already present in Buridan 'In Metaphysicen', lib. II, q. 1, fol. 9 but without the expression *certitudo moralis*. This expression was probably first used by Jean Gerson; see Grosse (1994), p. 83, and Knebel (2000), p. 55.

[38] Soft-probabilism is my term. Contemporary sources speak of authors who accept opinions which have weak claims to probability. This development seems to date back to the 1630s but was made prominent by Francesco Bardi and Tomaso Tamburini in the early 1650s and independently by Juan Caramuel y Lobkowitz. For some basic problems in the approach, see the discussion in Cardenas 'Crisis theologica', diss. IV.

[39] See Pascal *Lettres provinciales*.

preferred if the reasons for and against the two sides of a question were on a par. Only then was there proper doubt (*dubium*) in the technical sense of the term in medieval law and in guides for confessors. By contrast, the tutiorism of the later seventeenth century called for risk-aversion in all cases of uncertainty. Therefore, it was far more radical than its medieval predecessor. Indeed, it was so radical that it found very few proponents apart from the Jansenists and their followers.[40]

The distinction between modern tutiorism and its medieval counterpart is important because doctrines of casuistry are commonly classified according to their increasing levels of laxity. The spectrum begins with tutiorism and proceeds via probabiliorism to probabilism and soft-probabilism.[41] This classification scheme reflects the anatomy of probabilism and of other doctrines of moral uncertainty only in the period following the Thirty Years War. In earlier casuistry, strict tutiorism and soft-probabilism were virtually non-existent.

If the second half of the seventeenth century saw a radicalization of casuistical doctrines at both ends of the spectrum, a mitigating trend was not missing for long. Tutiorism, soft-probabilism and sometimes probabilism itself were accused of being too radical. This critique was not restricted to academic debate, but culminated in powerful political and ecclesiastical attacks. Jansenists and (later) Jesuits, the standard bearers of probabilism and tutiorism, faced waves of persecution. At the same time, the *via media*, the traditional Catholic way of compromise, was increasingly urged on decision-makers as the correct manner of dealing with uncertainty. But what did *via media* mean in the context of moral uncertainty? A new doctrine, called equi-probabilism, provided an answer.

Equi-probabilism states that an opinion has to be preferred if it is considerably more probable than its counter-opinion. If the probability of two rival opinions is only slightly different, the less probable opinion may also be chosen. Christoph Rassler seems to have invented equi-probabilism in his *Norma recti* of 1713.[42] He was followed by Eusebius Amort and

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[40] As a concept, radical tutiorism is present in some late sixteenth-century classifications (published later) of doctrines for dealing with uncertainty (see Suárez 'De bonitate', d. XII, sec. VI, n. 7.; Azor 'Institutiones morales', lib. II, cap. 16, q. 2). Initially, however, no one seems to have suggested that this extreme position should be applied in practice. A movement towards its application, however, was started by the Jansenists or their supporters. See Arnauld 'Logik', Teil IV, Kap. 16, p. 349, and Rachel 'Examen probabilitatis', cap. 9: 'Prudentia te obligatum esse ostendet, ut tutiorem licet minus probabilem opinionem sequeris'.

[41] See the classical spectrum of doctrines in Döllinger/Reusch (1889: 4). Probabiliorism is a doctrine which demands to follow either the side with the greatest probability or the safest side.

[42] See Rassler *Norma recti*, praefatio: 'Similiter inter ipsos etiam probabilistas aliqui quidem Strictiores sunt, alii vero Remissiores, quoreum scilicet illi in opinione minus tuta, ut fas sit

finally in the mid-eighteenth century by Alfonso de Liguori, who became famous for his equi-probabilism. It seems obvious why equi-probabilism is a candidate for a *via media* solution. The doctrine is an attractive blend between probabilism and probabiliorism. It gives greater probability its due, while safe-guarding a restricted domain of free choice. All the prominent equi-probabilists recognized the attractiveness of this compromise and explicitly advertised the doctrine as a *via media* approach.[43]

It is important to recognize, however, that the equi-probabilistic compromise abandoned the quasi-juridical perspective in ethics and moral theology. The breaking-point can be found in equi-probabilism's way of quantifying probabilities. Early probabilists measured probability by distinguishing between equal probability and greater probability in pairs of propositions. But equi-probabilism presupposed a quantitative measure of differences in probability. Therefore, it is easy to believe that the probabilistic revolution of the seventeenth century, which led to the modern quantitative theory of probability, played some part in the creation of equi-probabilism. Yet I have not been able to detect any textual basis for this assumption. Equi-probabilists measured degrees of difference in probability in terms of psychic inclination towards assent.[44] This inclination was treated like a kind of quantitative physical force which resulted from

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illam sequi, probabilitatem requirunt saltem aequalem, vel quasi aequalem illi, quam obtinet tutior, ita scilicet, ut operans in neutram illarum notabiliter magis se sentiat inclinari'. Eberle (1951) discusses and supports the contention that Rassler was the inventor of equi-probabilism.

[43] The connection between equi-probabilism and the *via media* approach is evident in the titles of early equi-probabilistic treatises. See the full title of Rassler's treatise: *Norma recti, seu Tractatus theologicus, in quo tum de objectiva, tum etiam de formali Regula Honestatis, ac praecipue de Recto Usu Opinionum probabilium magna accuratione ita disseritur, ut & rigore lenitas, & lenitas rigor salubriter temperetur, ostendoso scilicet, Quod in concursu opinionum utrinque probabilium circa honestatem, vel licentiam alicujus actionis partem minus tutam, seu faventem libertati, fas sit in operando sequi non tunc solum, cum eadem operanti magis probabilis apparet; Sed etiam, quando aequalem praesefert probabilitatem cum opposita tutiore, stante pro lege: non tamen etiam, quando habere videtur notabiliter minorem*. Amort's book is called *Theologia moralis inter rigorem et laxitatem media*; and Liguori wrote a *Breve dissertazione dell' uso moderato dell' opinione probabile*. Pressure to follow the *via media* seem to have increased after the Thirty Years War. Note the changes which Alexander VII forced his former friend Caramuel to make in the second edition of his *Theologia moralis fundamentalis* of 1656. The move to a middle position is explicitly mentioned: 'Editio secunda multo auctior. In qua, reiectis plurimis sententiis extremis (laxis), quas merito nec Veritas, nec Theologorum Prudentia admittit: & coire iussi multis Opinionibus Mediis (benignis) Fundamentales Assertiones ponuntur'; cited Lombraña (1989), p. 270.

[44] See the summary of Rassler's position in Eberle (1951), p. 18, and the passage from the preface to Rassler *Norma recti* cited n. 42 above.

weighing the evidence. No aleatoric reasoning was employed to justify the weighing up.

The idea that probabilism could be based on a psychic force towards assent does not fit well with the older juridical approach to probability. Psychic forces tell us something about an individual's dispositions, but nothing about his entitlement to withhold assent or to act accordingly. One may be normatively entitled to withhold assent, while psychically unable to do so. A full-scale incursion of psychology into normative doctrines of moral decision-making in uncertainty therefore destroys their quasi-juridical character. In consequence, equi-probabilism should not be seen as a final step towards a morally balanced and mature probabilism. It did not supersede older forms of probabilism or render them invalid. Equi-probabilism simply abandoned the strictly quasi-juridical approach in ethics. Thus, it proved to be part of the anti-juridical campaign in ethics, which was successful during much of the eighteenth century but was itself superseded by the new ethics of Bentham and Kant, which again possessed important quasi-juridical features.

FINAL REMARKS

We have traced some stages in the historical development of probabilism. Its spectacular early career ended with the Thirty Years War. By then, information- and liberty-centred justifications of probabilism had been worked out. After the Thirty Years War a polarization of casuistical doctrines occurred. New radical doctrines of moral decision-making in uncertainty emerged: soft-probabilism arose on the laxist side, and Jansenist tutiorism on the rigorist side. The battle between their supporters ended with the victory of a third party. Compromising equi-probabilists advertised a *via media* between the extremes. The rise of equi-probabilism in the eighteenth century marks the end of the quasi-juridical scholastic approach to moral decision-making in uncertainty.

Moral theology never returned to this approach. But secular ethics saw a renaissance of quasi-juridical thinking when modern moral philosophy was formed at the end of the eighteenth century. Bentham and Kant, the founders of utilitarianism and Kantianism, incorporated different aspects of the quasi-juridical approach into their theories. But neither of them did justice to probabilism. Kant's caustic remarks on probabilism show that he despised the doctrine and accused it of fostering moral anarchy.[45] He did

[45] See Kant AA 6: 4, 2, §4; AA 8, p. 268; Reflexion 7180 in AA 19 and AA27, p. 171: 'Dieser moralische Probabilismus ist ein Mittel, wodurch sich der Mensch betrügt und überredet recht nach Grundsätzen gehandelt zu haben. Es ist nichts ärger und abscheulicher,

not bother looking for stronger arguments against probabilism. But, in fact, it is not so easy to get rid of probabilism. If we accept a quasi-juridical perspective in ethics and the idea that morality merely imposes restrictions on freedom of action, we are not completely free in dealing with uncertain restrictions. The quasi-juridical approach implies that the burden of proof rests on the side of those who want to restrict freedom of action. As long as it remains probable that no valid restriction exists, agents remain free. One crucial question is whether modern moral philosophy can abandon this assumption without betraying its own foundations. Probabilism could thus come back with a vengeance.

REFERENCES

Anscombe, E. (1997) Modern Moral Philosophy, in: R. Crisp and M. Slote (eds.), *Virtue Ethics*, Oxford: O.U.P, pp. 26–44.

Aristoteles (1997) *Topik*, transl. Hans Günter Zekl, Hamburg: Meiner.

Aristotle (1984) *Topics*, ed. Jonathan Barnes, in: *The Complete Works of Aristotle*, Princeton: Princeton U.P., Vol. I.

Arnauld, Antoine (1972) *Die Logik oder die Kunst des Denkens*, Darmstadt: Wiss. Buchgesellschaft.

Azor, Juan (1602) *Institutiones morales* , Colonia Agrippina: Hierat, 2 Tom.

Baciero, C. (1984) 'Conclusiones definitivas de la segunda generacion', in: Ramos, D. (ed.) *La etica en la conquista de America*, Madrid: C.S.I.C, pp. 413–456.

Bardi, Francesco (1653) *Disceptationes et conclusiones morales de conscientia*, Francofurti: Schönwetter.

Blic, J. de (1930) 'Barthelemy de Medina et les origines du probabilisme', *Ephemerides theologicae Lovanienses* 7, pp. 46–83.

Blic, J. de (1925): 'Probabilisme/historique', *Dictionnaire apologétique de la foi catholique* 4, pp. 301-340.

Bresser, Martin (1638) *De conscientia libri VI*, Antverpiae.

Jean Buridan (1518) In Metaphysicen Aristotelis quaestiones, Paris: Badius Ascensius (rpt. Frankfurt a. M.: Minerva, 1964).

Busenbaum, Hermann (1704) *Medulla theologiae moralis*, Colonia Agrippina: Metternich.

Caramuel Lobkowitz, Juan (1675) *Dialexis de non-certitudine humanam libertatem in possessione et bona fide plene conservans*, Lugduni: Anisson.

Cardenas, Juan (1702) *Crisis theologica*, Colonia Agrippina: Widenfeldt.

CHP 6 = Pereña, L. et al. (1981) *Corpus Hispanorum de pace*, Madrid: C.S.I.C, Vol. VI

Church, W. (1972) *Richelieu and Reason of State*, Princeton: Princeton U.P.

Coady, C. (1997) 'Probabilism', *Midwest Studies in Philosophy* 21, pp. 16–33

Concina, Daniele (1762) *Theologia christiana dogmatico-moralis*, Augustae Vindelicorum: Wolff, Tom. I.

Contenson, Vincent (1722) *Theologia mentis et cordis*, Colonia Agrippinae: Metternich, Tom. II.

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als sich ein falsches Gesetz zu erkünsteln, nach welchem man unter dem Schutz des wahren Gesetzes Böses tun kann.'

Copenhaver, B. & Schmitt, C. (1992) *Renaissance Philosophy*, Oxford : O.U.P.
Corpus iuris canonici (1879) ed. Emil Friedberg, Leipzig: Edelmann (rpt. Graz: Akad. Druck- und Verlagsanstalt, 1955)
Deman, T. (1936) 'Probabilisme', in: A. Vacant and E. Mangenot (eds.), *Dictionnaire de théologie catholique*, Vol. 3/1, Paris: Letourey & Ané, pp. 417–619
Döllinger, I. & Reusch, F. (1889): *Geschichte der Moralstreitigkeiten in der römisch-katholischen Kirche seit dem 16. Jahrhundert*, Nördlingen: Beck.
Eberle, A. (1951) *Ist der Dillinger Moralprofessor Christoph Rassler (1654-1723) der Begründer des Äquiprobabilismus?*, Freiburg: Herder.
Franklin, J. (2001) *The Science of Conjecture*, Baltimore: Johns Hopkins U.P.
Gillner, M. (1997) *Bartolomé de Las Casas und die Eroberung des indianischen Kontinents*, Stuttgart: Kohlhammer.
Grosse, S. (1994) *Heilsungewissheit und Scrupulositas im späten Mittelalter: Studien zu Johannes Gerson und Gattungen der Frömmigkeitstheologie seiner Zeit*, Tübingen: Mohr.
Guillaume d'Auvergne (1674) *De fide*, in: *Opera omnia*, Tom. I., Paris: Lacaille.
Guillaume d'Auvergne (1674) *Opera omnia*, 2 Tom., Paris: Lacaille (rpt. Frankfurt a. M.: Minerva, 1963).
Guillaume d'Auxerre (1500) *Summa aurea in quattuor libros sententiarum*, Paris: Pigouchet (rpt. Frankfurt a. M.: Minerva, 1964).
Höffner, J. (1972) *Kolonialismus und Evangelium*, Trier: Paulinus.
Jonsen, A. & Toulmin, S. (1988) *The Abuse of Casuistry*, Berkeley: California U.P.
Justenhoven, H.-G. (1991) *Francisco de Vitoria zu Krieg und Frieden*, Köln: Bachem.
Kant, Immanuel (1902-2000) *Gesammelte Schriften*, Berlin: Akademieausgabe, (= AA, No. = Bandnr.).
Kantola, I. (1994) *Probability and Moral Uncertainty in Late Medieval and Early Modern Times*, Helsinki: Luther Agricola Society.
Knebel, S. (2000) *Wille, Würfel und Wahrscheinlichkeit*, Hamburg: Meiner.
Las Casas, Bartolomè (1997) *Traktat über die Indiosklaverei*, in: *Werkauswahl*, Paderborn: Schöningh, Bd. 3/2.
Laursen, J. (1992) *The Politics of Skepticism in the Ancients, Montaigne, Hume, and Kant*, Leiden: Brill.
Lombraña, J. (1989) *Juan Caramuel – vida y obra*, Oviedo: Pentalfa.
Lottin, O. (1948) Psychologie et morale aux XIIe et XIIIe siècles, Louvain: Abbaye du Mont César, Vol. II/1.
Lugo, Juan de (1656) *Disputationes scholasticae et morales de virtute fidei Divinae*, Lugduni: Prost, Borde & Arnaud.
Macpherson, C. (1973) *Die politische Theorie des Besitzindividualismus*, Frankfurt a. M.: Suhrkamp.
Medina, Bartolomé de (1618) *Scholastica commentaria in D. Thomae Aquinatis Primam Secundae*, Coloniae Agrippinae: Henning.
Pascal, Blaise (1990) *Briefe in die Provinz*, ed. K. Ott, Darmstadt: Wiss. Buchgesellschaft.
Popkin, R. (2003) *The History of Scepticism from Savonarola to Bayle*, New York: Oxford University Press.
Rachel, Samuel (1664) *Examen probabilitatis Iesuiticae novorumque casuistarum*, Helmstadii: Müllerus.
Ramos, D. (ed.) (1984) *La etica en la conquista de America*, Madrid: C.S.I.C.
Sanchez, Tomás (1607) *Disputationum de Sancto matrimonii sacramento tomi tres*, Antverpiae: Balthasar Lippius.
Sanchez, Tomás (1631) *Opus morale in praecepta decalogi*, Antverpiae: Nutius & Meursius.
Schmitt, A. (1904) *Zur Geschichte des Probabilismus*, Innsbruck: Rauch.

Schmitt, C. B. (1972) *Cicero Scepticus*, The Hague: Nijhoff.
Schmutz, J. (2000) 'Juan Caramuel y Lobkowitz', in: *Biographisch-Bibliographisches Kirchenlexikon* 17, 224–232.
Schüssler, R. (2000) 'Hadrian VI. und das Recht auf Verweigerung zweifelhaft rechtmäßiger Befehle', in: Norbert Brieskorn and Markus Riedenauer (eds.), *Suche nach Frieden: Politische Ethik in der frühen Neuzeit*, Stuttgart: Kohlhammer, pp. 41–62.
Schüssler, R. (2002) 'Zur Geschichte des Besitzindividualismus', in: V. Arnold (ed.), *Wirtschaftsethische Perspektiven* VI, Schriften des Vereins für Socialpolitik.
Schüssler, R. (2003) *Moral im Zweifel*, Band 1, Paderborn: mentis.
Soto, Domingo de (1596) *De iustitia et iure*, Lugduni: Honoratus.
Soto, Domingo de (1981) 'Quaestio 40 de bello', in: *CHP* 6, pp. 299–322.
Soto, Domingo de (1930): 'Tractatus de conscientia', in: Ternus, J., *Zur Vorgeschichte der Moralsysteme von Vitoria bis Medina*, Paderborn: Schöningh.
Stadelmann, R. (1929) *Vom Geist des ausgehenden Mittelalters*, Halle: Niemeyer.
Stone, M. (2000) 'The Origins of Probabilism in Late Scholastic Moral Thought', *Recherches de théologie et philosophie médiévales* 67, pp. 114–157.
Suárez, Francisco (1856) *De bonitate et malitia humanorum actuum* in: *Opera omnia*, Tom. IV, Paris: Vivés.
Suárez, Francisco (1858) *De fide theologica,* in: *Opera omnia*, Tom. XII, Paris: Vivés.
Suárez, Francisco (1856) *De legibus ac Deo legislatore*, in: *Opera omnia*, Tom. V/VI, Paris: Vivés.
Tamburini, Tommaso (1659) *Explicatio decalogi*, Monachii: Wagner.
Terillus, Antonius (1669) *Fundamentum totius theologiae moralis seu tractatus de conscientia probabili*, Leodii: Hovius.
Terillus, Antonius (1678): *Regula morum*, Leodii: Hovius.
Ternus, J. (1930) *Zur Vorgeschichte der Moralsysteme von Vitoria bis Medina*, Paderborn: Schöningh.
Vazquez, Gabriel (1606) *Disputationum in Primam Secundae S. Thomae*, Tom. I, Ingolstadii: Hertsroy.
Vitoria, Francisco de (1997) *De indis*, in: Francisco de Vitoria, *Vorlesungen*, Bd. 2, Stuttgart: Kohlhammer, 370–541.
Vitoria, Francisco de (1997) *De iure belli*, in: Francisco de Vitoria, *Vorlesungen*, Bd. 2, Stuttgart: Kohlhammer, 543–605.
Vitoria, Francisco de (1995/1997) *Vorlesungen*, 2 Bde. Stuttgart: Kohlhammer.

Casuistry and the Early Modern Paradigm Shift in the Notion of Charity

Sven K. Knebel
(Freie Universität Berlin, Germany)

The question of how to behave under the torture so as not to incur moral censure is an intriguing test case of moral reasoning. Consider that from the sixteenth to the eighteenth century European penal codes held torture to be an indispensable means of criminal investigation. As for the inquisitor, his only reason to query an extorted confession was its lack of circumstantiality.[1] Thus, the defendant's behaviour under the torture was a point of major concern. Not surprisingly, this posed no trifling problem for Christian casuistry. The crucial circumstance was, of course, the person's supposed innocence. What a confessor should advise the defendant in this case became a topic of dispute in the sixteenth and seventeenth centuries. While a sceptic like Pierre Charron (d. 1603) took it for granted that Seneca was right to assume that torture made the innocent lie,[2] the majority of moral theologians expected the confessor to prevail on the person to persist in telling the truth. If she did not protest her innocence, she sinned *mortally* and, consequently, had to face eternal damnation. This dogma clearly supported the credibility of torture—and there are reports that it did have a tremendous effect on the behaviour of individuals accused in witch trials.[3] A minority of theologians, however, allowed the innocent person to escape further trials by falsely charging herself—'Yes, I am Satan's confederate'—on the grounds that accepting one's own capital punishment would not be followed by eternal damnation as well. In what follows, I shall survey the reasons why the majority held that perseverance in telling the truth was an obligation. Then, I shall inquire into the shift of premises which was the requisite condition for making the minority position possible and thus undermining the credibility of torture. I conclude that something critically important to understanding the development of moral reasoning, as well as criminal law theory,[4] happened in Salamanca during the

[1] See articles 53–56 of the German penal code of 1532 (Carolina). The twelve articles, which make up the 19th title (*Des Jugemens et Procez verbaux de Question et Torture*) of the French penal code of 1677, do not even mention this reason. See Bornier (1725), pp. 313–27.
[2] Charron (1646), p. 24: '... etenim innocentes mentiri cogit dolor'. See already Aristotle, *Rhet*. 1377A2-7.
[3] Spee (1632), pp. 132–33.
[4] See Seelmann (2001), with further literature.

J. Kraye and R. Saarinen (eds.), Moral Philosophy on the Threshold of Modernity, 115–139.

sixteenth century. The great American historian of philosophy John P. Doyle, after having finished a historical survey on this topic, recently concluded: 'The often despised casuistry of late Scholastic moral treatises may deserve another look.'[5] Casuistry was not *just* casuistry, but very often a stage for the clash of principles.

I

To begin with, then, what was the reason for regarding the innocent person's self-incrimination as a mortal sin worthy of punishment by eternal damnation? There were different arguments, which need to be carefully distinguished, since many theologians endorsed one, while rejecting the other.

The first argument was advanced by the Dominican Cardinal Cajetan in 1517: no one is allowed to act in a way detrimental to her reputation, for detracting from one's own reputation is equivalent to suicide. Why is this so? There are two reasons. Firstly, self-incrimination is contrary to charity. One is obliged by charity not to make worse use of oneself than of another person. With respect to another person, however, it would constitute murdering her reputation. Secondly, self-incrimination is contrary to justice, since everyone bears an obligation towards the community to which she belongs. Thus, a person who commits suicide is denied an honest burial on the grounds that she injured her political community. In the same way, the spiritual community of the Church is injured if one of its members detracts from it. Once it is acknowledged that self-incrimination is a mortal sin, the particular circumstance, that is, torture, cannot make a difference, since if it did, any breach of the Ten Commandments might prove to be a venial sin.[6]

Although Cajetan's communitarianism must have had the strongest possible appeal for Thomists,[7] it was precisely this part of his argument which was bluntly rejected by another Dominican in 1554. This was, indeed, a revolution. Domingo de Soto (d. 1560) was the leader of the famous School of Salamanca; and forty years later we are told by the Jesuit Luis Molina (d. 1600) that the principle behind Soto's rejection had

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[5] Doyle (1997), p. 111. The two Thomists referred to are Cardinal Cajetan and Francisco de Vitoria.

[6] Vio (1897), p. 135: In Iiam–IIae q. 73 art. 2; Vio (1537), s.v. 'restitutionis casus'. Similarly Mair (1509), f. 91ra.

[7] See Thomas Aquinas: *Summa theologica* II–II q. 64 a. 5; Ioannes Capreolus (1906), p. 499b (quoting Pierre de la Palu, O.P.).

become a commonplace among theologians.[8] This principle was that every person is the master or proprietor of her own reputation: 'Homo est dominus suae famae.' In other words, as Soto and his followers put it: my reputation does not belong to the same order as my life, so that self-incrimination is not equivalent to suicide; instead, my reputation is simply part of my property. It is something external. Therefore, every person may rightly dispose of her reputation in the same way that she disposes of her money.[9] Soto and the Jesuit Leonard Lessius (d. 1623) did not fail to apply this principle to the issue at stake: if I incriminate myself in order to shorten the duration of my pains, I do not commit a mortal sin. Lessius even dropped a qualification, found in Soto, Diego de Covarruvias (d. 1577) and Pedro de Aragón (d. 1592), regarding accusations of so-called 'enormous' crimes such heresy.[10] According to the great Jesuit moralists—Lessius, Molina, Juan de Lugo (d. 1660)[11]—there is no exception to the rule that one may dispose of one's own reputation without running the risk of mortal sin. An interesting corollary to this principle can be observed in the Jesuit Lessius as well as in several Thomists. It states that if a family's daughter has consented to the loss of her virginity, the seducer is not liable, since the girl had the right to dispose of her own body: 'Puella est domina sui corporis.'[12] It was not the Spaniards who found this tenet shocking. Rather, it was left to the French philosopher Pascal to be upset by it and to

[8] Molina (1733), p. 373a: 'Communis ... sententia... affirmat, hominem dominum esse sui honoris ac famae, quae omnino est amplectenda.' In which sense somebody is said to be the master of her reputation, is spelled out by Suárez (1856-78) 11, 557b/58a (*De justitia Dei* 3.21).

[9] Soto (1573), ff. 83va–84ra: 'Homo dominium obtinet honoris sui et famae, nempe ut possit illis veluti pecuniis uti... Scio equidem multos, etiam ex nostris, ut Caietanus, diversam... sequi sententiam, semper mihi tamen haec gratius arrisit... Hunc articulum... adhibere operaepretium duximus, qui esset plurium aliorum locorum huius nostri operis fundamentum.'; ibid., f. 83va: 'Opinio ergo nostrae contraria [i.e. Caietani] collocat honorem et famam in ordine vitae, nos autem in ordine bonorum exteriorum. Fundamentum opinionis huius [sc. Caietani] est, quod perinde censet de hominis fama atque de eius vita...'; ibid., f. 140va: 'At quamvis non sim nescius hanc vulgo opinionem veridicam existimari, eius tamen fundamenti demonstratio adhuc semper desideratur, quia nusquam probatur.' Covarruvias (1588), II, p. 13a (*Variarum resolutionum* 1.2.8): 'Ita liberum arbitrium habet homo super famam, ac super pecuniam, aliasque res exteriores... Nec par ratio est vitae et famae, nam propriae vitae nemo dominus est....' Landau (2001), pp. 409ff., has highlighted how important and influential an author Covarruvias was.

[10] Soto (1573), f. 140^{vb}; Aragón (1590), p. 143b. As for the latter, see Barrientos García (1978), pp. 247ff.

[11] Lugo (1642), pp. 393b–394a (14.10.169–70).

[12] Lessius (1617), 87a/b (2.10.1.9). Similarly, Covarruvias (1588), I, p. 509b (*In Regulam Peccatum* de reg. iur. lib. 6 relectio). See also Thomas Aquinas: *IV Sent*. dist. 28 q. 1 art. 3 ad 1.

adduce it as evidence of what he taught his contemporaries to abhor as 'Jesuit morals'.[13]

Back to torture. Even thinkers who readily granted Soto's premise, however, objected to his conclusion for different reasons. In order to see why this was so, we must distinguish between two cases: in one case, the person's false self-incrimination might save her life; in the other, capital punishment, that is, death, would result. Soto and Lessius explicitly discussed the second case.[14]

Cajetan's point with regard to the first case was restated in the following way by Gregory of Valencia (d. 1603). Every person, to be sure, enjoys property rights in her own reputation. Self-detraction, however, remains morally bad. The idea is that our reputation in the minds of other people is to be regarded as one of the main external motives for the exercise of virtue. To rob oneself of this stimulus is, therefore, blameworthy, since this contradicts the charity which one owes to oneself.

Molina, in turn, thought that Cajetan was mistaken when he described self-detraction as a sin against charity. This would be true, and hence the preservation of my own reputation would be a duty towards myself, if I were obliged not to use myself in a worse manner than I use another person, that is, if charity were centred on the obligation which I bear towards myself. This, however, is not true. Since I must not care primarily about myself, self-detraction cannot be considered a sin against charity.[15] This is a major point which needs some further comment and to which I shall return shortly.

With regard to the first case, Molina was almost alone in his day in rejecting the conclusion of Soto and Lessius. In his view, I am, in a very strict sense, not allowed to lie. Molina showed himself to be a tough critic of ethical consequentialism. In his unqualified rejection of lying, he was a strong Augustinian and a forerunner of Kant, whose famous rejection of all

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[13] See Knebel (1991), p. 163. Pascal's attack was rejected by an anonymus Jesuit: 'Adversus anonymum opusculum, in quo LIII oppositionum capita contra Theologiam moralem Iesuitarum exponuntur et refutantur', containted in Fabri (1672), p. 427b; B. Stubrock: 'Notae in notas Wilhelmi Wendrockii ad Ludovici Montaltii litteras', in ibid., pp. 529b–30a.

[14] Lessius (1617), p. 95b (2.11.7.41): 'Dico Quinto, Ad vitanda tormenta valde gravia, quibus merito possis celerem mortem praeoptare, non peccas mortifere, si crimen falsum tibi imponas, quamvis certo ob id sis morte plectendus...; favet enim multis miseris, qui alioquin non solum corpore, sed etiam animâ perirent...' Spee (1632), pp. 198–99: '... inprimis negant optimi Theologi mortale esse, si quis ad evitanda gravia tormenta sibi ipsi falsum crimen imponat, propter quod morte plectendus sit. Ratio: quia dominus suae famae est, nec mentitur perniciose, cum non teneatur tantis tormentis, quae ipsi sunt morte graviora, vitam conservare: unde nec postea tenetur revocare, cum non retractando nemini faciat iniuriam. Vide Lessium, et quos citat lib. 2 *de Iust. et Iur.* cap. 11 dub. 7 n. 41.'

[15] Molina (1733), p. 467b.

casuistry would lead him to infer that I may not lie, even if I were questioned by a killer.[16]

With regard to the second case, Molina combined his Augustinian move with another consideration: I am not allowed to kill myself, since suicide is a mortal sin. The result was, as he himself stated in so many words, that I am not allowed to give in. Even the cruellest torture does not provide any justification for false self-incrimination. I am obliged to revoke every act of confession, even repeatedly, thus making myself a martyr to my own innocence. The confessor's business is to prevail on the defendant to act accordingly.

Molina's harsh position shows that, quite apart from the issue of reputation, the crucial taboo in the reasoning of the Christian natural law tradition around 1600 was not to be guilty of one's own death, either directly or indirectly. According to Molina, this taboo would be violated if I, as an innocent person, were not ready to suffer *all* the pains which a defendant who persists in denying her guilt can expect. Not only Molina, but also Soto and Lessius, explicitly stated that, whether or not I am the master of my own reputation, I am certainly *not* the master of my own life: 'Homo non est dominus suae vitae.' If I am not the master of my life, but rather God is, then I am obliged to preserve my life. I am the custodian of my life.[17] Indeed, the hostile reaction to Cajetan was partly due to the fact that his arguments against self-incrimination seemed to be prejudicial to self-preservation. Even if I, argued Lessius, were *not* the master of my reputation, I would be obliged to subordinate the preservation of my reputation to the preservation of my life, since I may possibly regain the former, but not the latter.

If my autonomy is limited by the duty to preserve my life, the question arises: to what extent exactly is it limited? As a means of clarifying this point, a favourite topic of moralists since Thomas Aquinas was the casuistry of what somebody facing capital punishment is expected to do.[18] Godfrey of Fontaines (d. 1306) stated that, not only must a murderer *not* be expected to accuse himself, he is not even allowed to accuse himself.[19] Granted, however, that there is a difference between the guilty and the innocent, an effort was made to preserve this difference by saying that the guilty *may* say the truth, while the innocent *must* say it.[20] A related question

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[16] For Kant on the background of the Protestant tradition, see Kittsteiner (1988).

[17] Soto (1573), f. 83$^{ra–b}$: 'Homo non est suae vitae dominus... Nullam ob causam, quovis colore censeatur iusta, potest se vitâ privare... Constitutus ergo iure naturali ac divino homo est suae vitae custos, porro quam sustentare tenetur, non autem dominus.'

[18] Thomas Aquinas, *Summa theologica* IIa–IIae q. 69.

[19] Godefridus de Fontibus (1932), V, pp. 132–134 (*Quodl*. XII q. 16): 'Utrum homicida interrogatus a iudice debeat veritatem confiteri dato quod sit ignotus.'

[20] Lugo (1642), pp. 395a–397a (14.10.176–81).

was: do prisoners, especially those sentenced to death, have a moral right to escape? Indeed, did they have an obligation to do so?[21] From the thirteenth to the sixteenth century, both questions were for the most part answered in the affirmative. Some members of the School of Salamanca went so far as not only to permit a jailbreak, but to worry about how to excuse a prisoner who, after having escaped, returned to jail.[22] If even convicted murderers were in some way placed under an obligation to save their lives, one can imagine that the most indulgent teachers of natural law were not inclined to discharge an innocent person from this obligation easily. According to Lessius, I am therefore obliged to try hard to protect my life when under torture. The taboo would be violated if I chose death over *light* pains, that is, it would be a mortal sin to give up my life without sufficient reason to do so.

There *might*, after all, be sufficient reason to do so.[23] This was the revolutionary message of Soto, Lessius, Gregory of Valencia, Adam Tanner, the famous Friedrich von Spee, Tommaso Tamburini and a great many more professors of casuistry up to the eighteenth century, who would become notorious on account of their 'Jesuit morals'.[24] I say 'revolutionary' since the credibility of evidence produced by torture would be undermined and could not be upheld if the pains of the tortured person were accepted as a valid excuse for their false self-incrimination. While the divide between life and reputation, though interesting enough, proved to be insufficient to discredit torture—as is shown by the example of Molina—the crucial idea for achieving this goal was that the heterogeneity of life and reputation had to be subordinated to a superior consideration which would make it possible for me to give up my life in order to avoid severe pain. If torture is to be discredited, I must not only be allowed to place my

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[21] Doyle (1997), p. 113.

[22] Covarruvias (1588), II, pp. 12a–14a (*Variarum resolutionum* 1.2.7–8).

[23] Soto (1573), f. 140^{vb}: 'Etiam si mortis periculum immineat, non tenetur homo tanto cruciatu vitam servare, sed potest breviorem sibi permittere mortem, ut tam acerbam effugiat.' Lessius (1617), p. 96a (2.11.7.42): '.... crimen fatendo, brevi morte longam mortem redimit, vel potius multas mortes unica simplici commutat: talia enim tormenta pati, est longa quadam et multiplici morte mori'. This opinion was eventually endorsed by the Roman Inquisition: 'Ad evitanda gravia tormenta reus potest sibi imponere falsum crimen, sine noxa mortalis culpae, etsi inde morte plectendus sit. *Ita Theologi passim*': 'Instructio circa Iudicia Sagarum Iudicibus eorumque Consiliariis accommodata, Romae primum 1657, iterum pro bono publico Cracoviae 1670 permissu Superiorum edita', f.20^{v}. This instruction originated from 1625. See Decker (2002), pp. 463–64, 471–73.

[24] See, e.g., Gonet (1681), p. 282b: 'Haec assertio [sc. ad tormenta damnaque gravia vitanda posse quemlibet sibi ipsum falsum crimen imponere, etiamsi mors sit sibi secutura] manifestum errorem continet, et humanae menti incutit horrorem.' The proposition 'Quod liceat ad evitandam mortem vel gravia damna falsum sibi crimen imponere, ac se ipsum gladio linguae perimere' was one of the subjects under discussion in the quarrels about morality which went on in the mid-eighteenth century. See Mannhart (1759), pp. 240–41.