Reason, Will, Freedom:

Natural Law and Natural Rights in Later Scholastic Thought

Tattay Szilárd

doktori értekezés

Témavezető:

Prof. Dr. Péteri Zoltán
professor emeritus

Társ-témavezető:

Prof. Dr. Philippe Gérard
egyetemi tanár

Pázmány Péter Katolikus Egyetem
Jog- és Államtudományi
Doktori Iskola

Budapest, 2012

Contents

Introduction 5

Chapter I: The Thomist Legacy 15

Part 1: Two Fundamental Notions: Ius and Dominium . . . 15

1.1 The Notion of Ius . . . 15

1.2 The Notion of Dominium . . . 20

1.3 Conceptual Relations I: Ius and Dominium as the Rule of Reason . . 21

1.4 Conceptual Relations II: Ius and Dominium as Property . . . 25

Part 2: Natural Rights? . . . 27

Chapter II: The Nominalist "Revolution": William Ockham 37

Part 1: Philosophical-Theological Grounds . . . 38

1.1 The Philosopher and the Political Thinker . . . 38

1.2 Ockham's Moral Theory . . . 49

Part 2: Natural Law and Natural Rights . . . 64

2.1 Natural Law: God's Will or Human Rationality? . . . 64

2.2 Natural Rights . . . 75

Chapter III: The Harvest of Medieval Legal Philosophy: Francisco Suárez 83

Part 1: Natural Law . . . 83

1.1 The General Concept of Law . . . 84

1.2 The Eternal Law . . . 88

1.3 The Natural Law: Lex Indicativa or Lex Praeceptiva? . . . 94

1.4 The Suárezian Via Media . . . 102

1.5 Permissive Natural Law . . . 110

Part 2: Natural Rights . . . 115

2.1 The Meanings of Ius and Their Interrelations . . . 116

2.2 Property and the Natural Right of Using 125
2.3. Liberty and the Origins of the State 131
2.4. The Right of Self-Defence 142

Conclusion 153

Bibliography 161
Primary Literature 161
Original texts 161
English translations 165
Secondary Literature 168

Introduction

Few would doubt the widespread commonplace in the history of ideas that natural rights were conceived from natural law. Nevertheless, the relationship between natural law and natural rights cannot be taken for granted. Although several competitive theories arose to define this relationship, the debates around it have not come to an end.

It seems that the two most fundamental and most difficult correlating questions are whether

(1) the mutual "encounter" between the concepts of natural law and natural rights in a determinate period of the history of Western political and legal thought was in a certain sense compelling or merely incidental,

(2) there is an organic, accidental or logically contradictory relationship between these two concepts.

The relationship between natural law and natural rights raises further issues besides these two essential questions depending on the answers given and the theory under examination. Is the natural law or natural rights entitled to primacy and is it possible to derive natural rights from natural law or vice versa? If primarily obligations originate from natural law, what and how could establish a relationship between the norms of natural law and the natural rights? Do natural rights only serve to fulfill obligations arising from natural law, or is their scope wider than this, and so and so forth?

The starting point of my thesis is the assumption that among other reasons the problem of the relationship between natural law and natural rights is dividing historians of ideas and provides them with false ambiguities because the thorough examination of the intermediate period between the thirteenth century, commonly regarded as the golden age of scholasticism, and the seventeenth century marking the beginning of modern natural law theory (the period between Saint Thomas Aquinas and Hugo Grotius) has been neglected up to recent times; although these three and a half centuries are essential concerning the evolution of the idea of natural rights.

There are two easily tangible, crystallized and characteristic opinions considering the intellectual historical relationship between natural law and natural rights. According to a widespread view initiated by Leo Strauss and Michel Villey, there is a mutually excluding relationship or at least a fundamental tension and historical discontinuity between the ideas of natural law and natural rights. In Strauss's view, the authentic, classical tradition of natural law declined when (and not to a negligible extent because of the fact that) natural rights arose. Modernity took over temporarily the concept of natural law inherited from antiquity and the Middle Ages, but transformed it according to the axioms of modern philosophy, made it secondary and derivative compared to the concept of rights, and finally exceeded it.[1] Michel Villey is even more categorical. The French legal philosopher, who sees an absolute logical incompatibility between the ideas of natural law and natural rights, claims that while the classical concept of '*ius*' meant the constraint of all power, the modern '*iura*' means the theoretically unrestricted power of the individual.[2]

The other general opinion, opposed to the previous one, regards the seventeenth-eighteenth-century modern variant of natural law rather than its classical version as a point of departure and ideal-typical.[3] According to this approach, there is a close relationship and codependence between the ideas of natural law and natural rights. In this view, the most remarkable and imperishable merit of natural law theories is the elaboration of the idea of natural rights.[4] If we pursue this reasoning further, we can even arrive at the conclusion that nowadays, when natural law is considered to be a minoritarian view in jurisprudence, besides its official advocates this approach endures latently – as a subterranean river – in the works of such human rights theoreticians as Ronald Dworkin, who cannot or are not willing to come to common grounds with natural law due to their dedication to analytic philosophy.[5]

1 See esp. L. Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

2 M. Villey, *La formation de la pensée juridique moderne: Cours d'histoire de la philosophie du droit*, 4. ed. (Paris: Montchrestien, 1975), 227-30.

3 See e.g. K. Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: University Press, 1996); T. J. Hochstrasser, *Natural Law Theories in the Early Enlightenment* (Cambridge: University Press, 2000).

4 See e.g. Z. Péteri, 'Az emberi jogok a történelemben', in M. Katonáné Soltész (ed.), *Emberi jogok hazánkban* (Budapest, ELTE Jogi Továbbképző Intézet, 1988), 21-49; P. Gérard, *L'esprit des droits: Philosophie des droits de l'homme* (Brussels: Facultés universitaires Saint-Louis, 2007).

5 Dworkin was even "labelled" as a natural lawyer; he wrote as a response his article '"Natural" Law Revisited', *University of Florida Law Review* 34 (1982), 165-88.

In order to give justice to one of these opposite views, we have to examine at least the major historical stages of the idea of natural law through centuries from the perspective of natural rights. The ancient theories of natural law are not taken into account, since neither Greek philosophers nor Roman lawyers knew the concept of natural rights; or at least we do not have indisputable evidence that they did.[6] The concept of subjective rights founded on the immanent value of the individual could have been compatible only with great difficulty with Aristotle's metaphysical realism, specifically with his holistic approach strictly subordinating the part to the whole.[7]

Aquinas, who offered a paradigmatic formulation of medieval natural law theories, never – or only occasionally – used the word '*ius*' in a subjective meaning either. For him *ius* is above all an objective concept, a synonym for '*iustum*', the object of justice, the primary meaning of which is the just thing or action.

The works that deal with natural law or the history of legal philosophy in general, after discussing Aquinas's doctrine of natural law usually skip over or only briefly outline the legal thought of late medieval and Renaissance scholasticism and only pick up the threads of the theory of natural law in the seventeenth century, with Thomas Hobbes (maybe Hugo Grotius). It is exactly where the books on the history of natural rights usually start.[8]

Thus I continue my brief historical sketch with the author of the *Leviathan*. According to Strauss's influential, widely accepted thesis, Hobbes deduces the laws of nature from natural rights.[9] It seems to be unquestionable that in Hobbes's political philosophy natural rights have priority over natural laws. But it does not follow necessarily from this that laws of nature are derivative of natural rights. Moreover, on the contrary, it seems that Hobbes

[6] According to Richard Tuck, in late Roman Empire the words '*ius*' and '*dominium*' were often used in a meaning that resembles in many ways the modern concept of 'right'. — R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: University Press, 1979), 10-13. Even if we were to accept this claim, it would not change the basic fact that Roman jurisprudence was considerably far from the idea of universal natural rights inhering in all persons by virtue of their humanity. — B. Tierney, 'Natural Law and Natural Rights: Old Problems and Recent Approaches', *The Review of Politics* 64 (2002), 389-406 at 392.

[7] F. D. Miller argues in his monograph on Aristotle's *Politics* that the Greek philosopher had already used the language of subjective natural rights. — F. D. Miller, *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: University Press, 1995), ch. 4. His arguments, however, do not seem to be convincing.

[8] A typical example for this is C. B. MacPherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

[9] L. Strauss, *The Political Philosophy of Hobbes: Its Basis and Its Genesis*, trans. E. M. Sinclair (Chicago: University of Chicago Press, 1952), 157.

himself excludes this possibility when he draws an impenetrable demarcation line between the concepts of 'right' and 'law':

> "For though they that speak of this subject, use to confound *Jus*, and *Lex*, *Right* and *Law*; yet they ought to be distinguished; because RIGHT, consisteth in liberty to do, or to forbeare; Whereas LAW, determineth, and bindeth to one of them: so that Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."[10]

Hobbes consistently maintains this strict differentiation between law and right when he defines the concepts of 'right of nature' and 'law of nature'. According to his definitions, while the right of nature means the *freedom* to protect our own life, the law of nature *forbids* us to end our life, and also *commands* us to do everything possible to protect it.[11] If so, and right and law are such incompatible concepts, then the laws of nature cannot be derived from the fundamental right of self-preservation. Although either the natural rights or the laws of nature can be deduced from our innate instinct to preserve our life, it would be rather difficult to posit an organic, if any connection between them.

On the other hand, since Hobbes does not require moral rightness as a conceptual element of natural rights, he excludes the possibility that they could be regulated or measured by the laws of nature. Thus natural laws cannot frame and restrict rights, the result of which is that in the state of nature "every man has a Right to every thing; even to one anothers body."[12] Moreover, it is doubtful whether the laws of nature are able to fit into this role at all, inasmuch as their normative status is questionable. Hobbes's point of view is rather ambiguous as to whether the laws of nature are commands expressing the will of the sovereign, omnipotent God, and hence are real laws, or merely 'theorems', 'conclusions' (game rules, so to say) set by human reason in order to secure peace, which could only be called laws in a metaphorical sense.[13]

10 *Leviathan*, ed C. B. MacPherson (Harmondsworth: Penguin, 1982), ch. 14, 189.

11 *Ibid.*: "THE RIGHT OF NATURE, which Writers commonly call *Jus Naturale*, is the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and consequently, of doing any thing, which in his own Judgement, and Reason, hee shall conceive to be the aptest means thereunto. … A LAW OF NATURE, (*Lex Naturalis*,) is a Precept, or generall Rule, found out by Reason, by which a man is forbidden to do, that, which is destructive of his life, or taketh away the means of preserving the same; and to omit, that, by which he thinketh it may be best preserved."

12 *Ibid.*, 190.

13 *Ibid.*, ch. 15, 216-17: "These dictates of Reason, men use to call by the name of Lawes; but improperly:

In his early treatise on natural law written in Latin John Locke takes over Hobbes's strict separation of law and right, law of nature and right of nature. As he claims, 'law of nature' should be conceptually differentiated from 'natural right',

> "for right is grounded in the fact that we have the free use of a thing, whereas law is what enjoins or forbids the doing of a thing. Hence, this law of nature can be described as being the decree of the divine will discernible by the light of nature and indicating what is and what is not in conformity with rational nature, and for this very reason commanding or prohibiting."[14]

Later, in the *Two Treaties of Government*, he modifies this opinion stating that law is not so much limiting as directing the free and intelligent human beings according to their real interests.[15] The true end of law is thus "not to abolish or restrain, but to preserve and enlarge Freedom".[16] On the other hand, Locke's concept of man as 'owner of himself' that grounds natural rights could hardly be compatible with the other fundamental argument of his, stating that man as God's creature belongs to God as His property. Consequently, Locke had to give up, even if implicitly, this latter argument – for instance, by allowing suicide in certain cases.[17]

---

for they are but Conclusions, or Theoremes concerning what conduceth to the conservation and defence of themselves; whereas Law, properly is the word of him, that by right hath command over others. But yet if we consider the same Theoremes, as delivered in the word of God, that by right commandeth all things; then are they properly called Lawes."

14 *Essays on the Law of Nature: The Latin Text with a Translation, Introduction and Notes*, ed., trans. W. von Leyden (Oxford: Clarendon Press, 1970), 110-11: "Haec lex his insignita appellationibus a jure naturali distinguenda est: jus enim in eo positum est quod alicujus rei liberum habemus usum, lex vero id est quod aliquid agendum jubet vel vetat. Haec igitur lex naturae ita describi potest quod sit ordinatio voluntatis divinae lumine naturae cognoscibilis, quid cum natura rationali conveniens vel disconveniens sit indicans eoque ipso jubens aut prohibens."

15 *Two Treatises of Government*, ed. P. Laslett (Cambridge: University Press, 1988), bk. 2, ch. 6, § 57, 305: "For *Law*, in its true Notion, is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest, and prescribes no farther than is for the general Good of those under that Law. Could they be happier without it, the Law, as an useless thing would of it self vanish; and that ill deserves the Name of Confinement which hedges us in only from Bogs and Precipices" (emphasis omitted).

16 *Ibid.*, 306 (emphasis omitted).

17 M. Zuckert, 'Do Natural Rights Derive from Natural Law?', *Harvard Journal of Law and Public Policy* 20 (1997), 695-731 at 725. Locke writes of a slave who, "by his fault, forfeited his own Life" that "whenever he finds the hardship of his Slavery out-weigh the value of his Life, 'tis in his Power, by resisting the Will of his Master, to draw on himself the Death he desires." — *Two Treatises of Government* bk. 2, ch. 4, § 23, 284.

So far, our historical analysis seems to have justified Leo Strauss's and Michel Villey's theses. The main reason for this might be indicated by the fact that modern natural law theorists were rather inclined to regard natural law as a sum of moral precepts that strictly prescribe or prohibit certain acts, thus impeding the individual's freedom of action. As a result of this formalist or legalist approach, they could not formulate natural rights on the basis of natural law, only parallel to the laws of nature, or rather against them.

However, as I suggested at the beginning of the Introduction, the problem of the relationship between natural law and natural rights appears in different light if we extend our study to the period between Aquinas and Hobbes (or Grotius). Michael Oakeshott, in his classical edition of *Leviathan* from 1946, was one of the first to warn that

> "Hobbes was born into the world, not only of modern science, but also of medieval thought. The scepticism and the individualism, which are the foundations of his civil philosophy, were the gifts of late scholastic nominalism; the displacement of Reason in favour of will and imagination and the emancipation of passion were slowly mediated changes in European thought that had gone far before Hobbes wrote … the greatness of Hobbes is not that he began a new tradition in this respect but that he constructed a political philosophy that reflected the changes in the European intellectual consciousness which had been pioneered chiefly by the theologians of the fifteenth and sixteenth centuries. … Individualism … as a reasoned theory of society … has its roots in the so-called nominalism of late medieval scholasticism … Hobbes inherited this tradition of nominalism, and more than any other writer passed it on to the modern world."[18]

Since then several books and articles have pointed at – with different emphases and in different ways – the medieval origins of the idea of natural rights. Even if today some of their statements seem questionable from a scientific point of view, at the time of their publication Georges de Lagarde's and Michel Villey's works were pioneers in this field. Both French authors were convinced that the fourteenth-century philosopher and theologian William Ockham could be regarded as the "father" of natural rights. [19] Richard Tuck's *Natural Rights Theories* constituted a similar breakthrough in Anglo-saxon historiography,

[18] M. Oakeshott, 'Introduction to Leviathan', in *idem*, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991), 221-94 at 278.

[19] G. de Lagarde, *La naissance de l'esprit laïque au déclin du Moyen Age*, 6 vols. (Paris: Béatrice, 1934-46); *idem*, *La naissance de l'esprit laïque au déclin du Moyen Age*, 2nd, rev. ed., 5 vols. (Louvain – Paris: Nauwelaerts – Béatrice, 1956-70); M. Villey, *La formation de la pensée juridique moderne*. See also from Villey, 'Les origines de la notion du droit subjectif', in *idem*, *Lecons d'histoire de la philosophie du droit*

which on the one hand traced the concept of natural rights back to the revival of legal science in the twelfth century; on the other hand it claimed that the first "fully fledged" theory of natural rights was developed by the conciliarist and mystic Jean Gerson in the fifteenth century.[20]

Research in this field is definitely blossoming in the last decades.[21] This tendency reached its peak in Brian Tierney's and Annabel Brett's overarching, thoroughly – and independently – written monographs. These works discuss the continuous medieval evolution of the idea of natural rights in details from twelfth-century canon law to the so-called 'Second Scholasticism' of the sixteenth and seventeenth centuries.[22] We clearly get the impression from these scientific works that modernity inherited not only the concept of natural law but also that of natural rights from scholasticism – so as to transform it into its own image. As Tierney pertinently noticed, "if a doctrine of rights had not grown up in an earlier, more religiously oriented culture, there would, so to speak, have been nothing there to secularize."[23] This picture fundamentally contests the very common view that the idea of natural rights is a distinctively modern phenomenon that first appeared in the seventeenth cen-

---

(Paris: Dalloz, 1962), 221-49, and 'La genèse du droit subjectif chez Guillaume d'Occam', *Archives de philosophie du droit* 9 (1964), 97-127.

20 R. Tuck, *Natural Rights Theories*, 13, 25.

21 The main fruits of this blossoming are the following books and studies: A. S. McGrade, 'Ockham and the Birth of Individual Rights', in B. Tierney and P. Linehan (eds.), *Authority and Power: Studies on Medieval Law and Government Presented to Walter Ullmann on His Seventieth Birthday* (Cambridge: University Press, 1980), 149-65; B. Tierney, 'Villey, Ockham and the Origin of Natural Rights', in J. Witte and F. S. Alexander (ed.), *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), 1-31; *idem*, 'Origins of Natural Rights Language: Texts and Contexts, 1150–1250', *History of Political Thought* 10 (1989), 615-46; C. J. Reid, 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *Boston College Law Review* 33 (1991), 37-92; K. Pennington, *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993); V. Mäkinen, *Property Rights in the Late Medieval Discussion of Franciscan Poverty* (Leuven: Peeters, 2001); F. Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York – London: Continuum, 2005); V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006).

22 B. Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta: Scholars Press, 1997); A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: University Press, 1997).

23 B. Tierney, 'Dominion of Self and Natural Rights Before Locke and After', in *Transformations in Medieval and Early-Modern Rights Discourse*, 173-203 at 195-196.

tury, as a political-legal consequence of the rise of modern science and market economy and the philosophical individualism of the age.[24]

Accordingly, the analysis and comparison of the different – objective and subjective – scholastic usages of the term '*ius*' appears to be a much more legitimate and fruitful approach than the quest for the medieval antecedents of the "modern" concept of natural rights. This opinion is very clearly formulated by Annabel Brett: "This book, therefore, is not an attempt to find the origin for the, or any, modern concept of subjective right. What I try to do instead is to recover the variety of the senses of the term *ius* as employed to signify a quality or property of the individual subject in late medieval and renaissance scholastic discourse."[25] In a passage of his *Natural Law and Natural Rights*, presenting a short historical outline of the "academic career" of the word '*ius*', John Finnis touches upon this very subject. He sees a rupture in that history what he places "somewhere between" Aquinas and the Renaissance scholastic philosopher-theologian Francisco Suárez:

> "Aquinas prefaces his elaborate study of justice with an analysis of *jus*, at the forefront of which he gives a list of meanings of '*jus*'. The primary meaning, he says, is 'the just thing itself' … If we now jump about 340 years to the treatise on law by the Spanish Jesuit Francisco Suarez, written *c.* 1610, we find another analysis of the meanings of '*jus*'. Here the 'true, strict and proper meaning' of '*ius*' is said to be: 'a kind of moral power [*facultas*] which every man has, either over his own property or with respect to that which is due to him'. The meaning which for Aquinas was primary is rather vaguely mentioned by Suarez and then drops out of sight; conversely, the meaning

[24] Perhaps the most prominent representatives of this view are – in their very different ways – Leo Strauss and Crawford Brough MacPherson Cf. L. Strauss, *Natural Right and History*; C. B. MacPherson, *The Political Theory of Possessive Individualism*. In the book of Norberto Bobbio on Hobbes and the natural law tradition, to take another illustrative example of this modernist standpoint, we can also read that "the theory of natural rights is born with Hobbes." — N. Bobbio, *Thomas Hobbes and the Natural Law Tradition*, trans. D. Gobetti (Chicago: University of Chicago Press, 1993), 154.

[25] A. Brett, *Liberty, Right and Nature*, 7. On the other hand, it is a central thesis of Richard Tuck's *Natural Rights Theories* (introduced at p. 3) that "fully fledged" natural rights could appear only after that *ius* and *dominium* came to be equated with each other, which made possible the elaboration of a concept of "active right" and a possessive theory of rights, since this way it became "possible to argue that to have a right was to be the lord or *dominus* of one's relevant moral world, to possess *dominium*, that is to say, *property*." As Brian Tierney pointed out in his review, in medieval context, this approach, besides being influenced by certain theoretical preconceptions of MacPherson, leads to a false chronology and some conceptual misunderstandings of the relevant texts. — B. Tierney, 'Tuck on Rights: Some Medieval Problems', *History of Political Thought* 6 (1983), 429-41.

> which for Suarez is primary does not appear in Aquinas's discussion at all. Somewhere between the two men we have crossed the watershed."[26]

Apart from some specific problems concerning Aquinas and Suárez, the general problem with this judgement is, on the one hand, that the above-mentioned researches have revealed, with Francis Oakley's words, "a slow, evolutionary development of natural rights talk originating in what has well been called 'the great sea of medieval jurisprudence'".[27] This continuity is in sharp contrast with the discontinuity and dialectic between the intellectualist and voluntarist conceptions of natural law. On the other hand, as Brett remarks, at least roughly speaking, "objective right in later mediaeval scholasticism cannot be seen as a direct 'opposite' of subjective right."[28] That is not to say, however, that the radically divergent late medieval doctrines of natural law did not influence the presuppositions, conclusions, scope and significance of natural rights theories. I am convinced of the contrary; this is why in each structural element of my thesis I will first discuss objective right and natural law, and only then *iura naturalia*. Chapter I and III will be devoted to Aquinas and Suárez. The intermediate Chapter II will treat Ockham's legal philosophy, whom I consider the dominant figure of the period between Saint Thomas and the Second Scholasticism.

[26] J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 206-7.

[27] F. Oakley, *Natural Law, Laws of Nature, Natural Rights*, 105. The metaphor Oakley cites is from Tierney's *The Idea of Natural Rights*, 79.

[28] Brett, *Liberty, Right and Nature,* 124.

Chapter I
The Thomist Legacy

This first chapter is not intended to give a thorough analysis or even a general overview of Saint Thomas's legal philosophy. Its modest goal is, on the one hand, to present a kind of 'conceptual algebra': Part 1 will examine Aquinas's usage of two fundamental notions, *ius* and *dominium*, which both played a central role in scholastic natural rights theories. These Latin words are most often translated as 'right' and 'property'. This is not wrong but still it is a simplification, for in medieval use of language both terms had manifold meanings. First I will try to show how this variety of meanings appears in Saint Thomas, and then, secondly, I will scrutinize the interrelations between the two notions. On the other hand, in Part II I will treat the complex question as to whether Aquinas had or could have the concept of natural rights.

Part 1: Two Fundamental Notions: Ius and Dominium

1.1 The Notion of Ius

In Aquinas's legal philosophy we can find three different meanings of the term *ius*. *Ius* can mean (1) *iustum*, i.e. right action, (2) by metonymy a rule and measure of human acts (*lex*), and (3) occasionally subjective right.

(1) Like other medieval Aristotelians, the *doctor angelicus* understands *ius* fundamentally and primarily as the *iustum*, as the *obiectum iustitiae*, the object of the virtue of justice. Consequently he discusses the Questions '*De iure*' (On Right) and '*De iustitia*' (On Justice) side by side in the *Secunda Secundae* of the *Summa theologiae* (qq. 57-58).

In his discussion of *ius* Aquinas follows accurately Aristotle's analysis of *dikaion*. In Book V of the *Nicomachean Ethics*, Aristotle describes *dikaion* as the just thing in a given situation.[29] Aquinas, likewise, conceives of *ius* as the right action that justice requires of

[29] *Nicomachean Ethics* 1129a.

the agent under given circumstances.[30] Though both of them make frequent use of the term 'just thing', they seem to associate the object of justice rather with an action than with a thing.[31] For there are no *res iustae* without – at least implicit – reference to human acts.[32] That is why the word '*opus*' appears in Aquinas's definition of *ius*: "*ius sive iustum est aliquod opus adaequatum alteri secundum aliquem aequalitatis modum*" (the right or the just is an *opus* that is adjusted to another person according to some kind of equality).[33] The term '*opus*' is best translated here – in accordance with the meaning of the verb '*operari*' (to work, to be occupied with something) – as 'action'.[34]

This definition shows, on the other hand, that justice – in contrast with other virtues – is directed *ad alterum* (towards another person), and that the mean at which it aims is not constituted in relation to the subject of the action, but is objectively determined by the requirement of equality in human transactions.[35] Aquinas's example of right action is the payment of the wage due for a service rendered.[36]

(2) Secondly, it is by no means exceptional that Aquinas uses *ius* to replace *lex* understood as a *rationis ordinatio*, a rational rule of human actions. His general definition of *lex* is to be found in the treatise on law of the *Prima Secundae* (qq. 90-108), in the Question '*De essentia legis*' (On the Essence of Law). According to this definition, *lex* is (1) an ordinance

[30] *Summa Theologiae* II-II q. 57 a. 1.

[31] A. Brett, *Liberty, Right and Nature*, 90-91.

[32] Michel Villey claims that in contrast to the masculine and feminine adjective '*dikaoios*', the neuter noun '*to dikaion*' used by Aristotle always denotes an object, a thing, not an agent or an action, and for him the object of justice is the just distribution ('*juste partage*') of goods and burdens. — M. Villey, *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983), 47-48. Yet even if we were to accept these claims, we would arrive at a contradiction, since just division presupposes an act of distributing.

[33] *Summa Theologiae* II-II q. 57 a. 2 co.

[34] G. Kalinowski, 'Le fondement objectif du droit d'après la "Somme théologique" de saint Thomas d'Aquin', *Archives de philosophie du droit* 18 (1973), 59-75 at 64 n. 1.

[35] A. Brett, *Liberty, Right and Nature*, 90.

[36] *Summa Theologiae* II-II q. 57 a. 1 co.: "iustitiae proprium est inter alias virtutes ut ordinet hominem in his quae sunt ad alterum. Importat enim aequalitatem quandam, ut ipsum nomen demonstrat, dicuntur enim vulgariter ea quae adaequantur iustari. Aequalitas autem ad alterum est. … Rectum vero quod est in opere iustitiae, etiam praeter comparationem ad agentem, constituitur per comparationem ad alium, illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso."

of reason (2) for the common good, (3) made by him who has care of the community, and (4) promulgated.[37]

The problem of the relation between *ius* and *lex* (right and law) is one of the most debated questions among commentators of Aquinas's legal philosophy. Here I shall mention only the debate between Michel Villey and John Finnis. In Villey's view, it is not by chance that Aquinas treats *lex* and *ius* in two completely distinct parts of the *Summa theologiae*. This reflects that for Aquinas, as for Aristotle and in classical Roman law, there is an '*opposition capitale*' (a fundamental opposition) between *ius* and *lex*. According to Villey, Aquinas, as the last great representative of the pure classical tradition of natural law, avoids the interpretation of *ius* as prescriptive law. He asserts that whenever Aquinas writes *ius* instead of *lex*, he does so only because he respects the authorities (Gratian and Isidore of Seville) he cites.[38]

Finnis criticizes with good reason this "exaggerated distinction between *ius* and *lex*".[39] To be sure, in his treatment of *ius* Aquinas once explicitly distinguishes *ius* and *lex*, saying that "law is not the same as right". But in the same sentence he adds that law is "*aliqualis ratio iuris*".[40] And in the very next article he seems to equate *ius divinum* with *lex divina*; he speaks of the promulgation of *ius divinum*, which can make sense only in the case of divine law.[41] Finally, in other parts of the *Summa* – first of all in the treatise on law – as well as in his other works he uses *ius* and *lex* quite often interchangeably (not only *ius divinum*

37 *Summa Theologiae* I-II q. 90 a. 4 co.: "Et sic ex quatuor praedictis potest colligi definitio legis, quae nihil est aliud quam quaedam rationis ordinatio ad bonum commune, ab eo qui curam communitatis habet, promulgata." This is a perfect exemplification of the essentialist type of definition, composed of *genus* and *species*. Saint Thomas first defines law as such, the universal idea of law as *genus*, i.e. its nature, its essence, then in the subsequent questions (qq. 91 and 93-108) he describes its different *species*: eternal law, natural law, divine law and so on.

38 M. Villey, 'Sur les essais d'application de la logique déontique au droit', *Archives de philosophie du droit* 17 (1972), 407-12 at 408; *idem*, 'Si la théorie générale du droit, pour saint Thomas, est une théorie de la loi', *Archives de philosophie du droit* 17 (1972), 427-31 at 427-29. See also Villey's *La formation de la pensée juridique moderne* and 'Abrégé du droit naturel classique', *Archives de philosophie du droit* 6 (1961), 27-72. For a much more moderate version of this view, see E. T. Gelinas, '*Ius* and *Lex* in Thomas Aquinas', *American Journal of Jurisprudence* 15 (1970), 154-170.

39 J. Finnis, *Natural Law and Natural Rights*, 228. Finnis categorically states that "chez saint Thomas il n'y a pas d' 'oppostition capitale… entre droit et loi'". — J. Finnis, 'Un ouvrage récent sur Bentham', *Archives de philosophie du droit* 17 (1972), 423-27 at 424.

40 *Summa theologiae* II-II q. 57 a. 1 ad 2: "lex non est ipsum ius, proprie loquendo, sed aliqualis ratio iuris."

41 *Summa theologiae* II-II q. 57 a. 2 ad 3.

and *lex divina* but also *ius naturale* and *lex naturalis*, *ius positivum* and *lex positiva*, and so on) to mean 'law'.[42] Finnis, on the other hand, makes the not less contestable claim that in Aquinas right is derived from law.[43]

Perhaps the most adequate and plausible solution to this *crux interpretum* has been provided, in my opinion, by Georges Kalinowski. He argues that in Saint Thomas there is a '*lien organique*' (an intimate link) between *ius* and *lex*, and thus his treatise on right and justice and his treatise on law – like two panels of a diptych – cannot be separated from each other.[44] According to Kalinowski, Aquinas's metonymical use of the term *ius* is legitimated by the fact that the concepts of *ius* and *lex* are connected to each other in a relation of mutual causation: the *ius naturale* (natural right) forms the basis of the *lex naturalis* (natural law) on the one hand, and the *lex positiva* (positive law), be it divine or

42 See e.g. q. 94 a. 4, q. 94 a. 5 and q. 95 a. 4 of the treatise on law. Perhaps the most striking passage, which the most clearly shows the parallel use of *ius* and *lex*, can be found in q. 95 a. 4 (objection 1 and response): "Videtur quod inconvenienter Isidorus divisionem *legum humanarum* ponat, sive *iuris humani*. Sub hoc enim *iure* comprehendit *ius gentium*, quod ideo sic nominatur, ut ipse dicit, quia eo omnes fere gentes utuntur. Sed sicut ipse dicit, *ius naturale* est quod est commune omnium nationum. Ergo *ius gentium* non continetur sub *iure positivo humano*, sed magis sub *iure naturali*. … Sunt autem multa de ratione *legis humanae*, secundum quorum quodlibet *lex humana* proprie et per se dividi potest. Est enim primo de ratione *legis humanae* quod sit derivata a *lege naturae*, ut ex dictis patet. Et secundum hoc dividitur *ius positivum* in *ius gentium* et *ius civile*, secundum duos modos quibus aliquid derivatur a *lege naturae*, ut supra dictum est. Nam ad *ius gentium* pertinent ea quae derivantur ex *lege naturae* sicut conclusiones ex principiis, ut iustae emptiones, venditiones, et alia huiusmodi, sine quibus homines ad invicem convivere non possent; quod est de *lege naturae*, quia homo est naturaliter animal sociale, ut probatur in I Polit. Quae vero derivantur a *lege naturae* per modum particularis determinationis, pertinent ad *ius civile*, secundum quod quaelibet civitas aliquid sibi accommodum determinat" (emphasis added). In his *Commentary on the Sentences* (*In IV Sententiarum* d. 33 q. 1 a. 1 co.), Aquinas even speaks of '*lex naturalis vel ius naturale*'. See also *In III Sententiarum* d. 37 q. 1 a. 3.

43 Finnis, 'Un ouvrage récent sur Bentham', 424-25. A similar point of view is presented by Paul Van Overbeke in his article 'Saint Thomas et le droit. Commentaire de IIª-II, q. 57', *Revue thomiste* 55 (1955), 519-64 at 534, 537.

44 G. Kalinowski, 'Sur l'emploi métonymique du terme "ius" par Thomas d'Aquin et sur la muabilité du droit naturel selon Aristote', *Archives de philosophie du droit* 18 (1973), 331-39 at 335-36. For a similar view, see O. Lottin, *Le droit naturel chez saint Thomas d'Aquin et ses prédécesseurs* (Bruges: Beyaert, 1931); M. B. Crowe, 'St. Thomas and Ulpian's Natural Law', in A. A. Maurer (ed.), *St. Thomas Aquinas, 1274–1974: Commemorative Studies* (Toronto: Pontifical Institute of Medieval Studies, 1974) vol. I, 261-82; W. E. May, 'The Meaning and Nature of the Natural Law in Thomas Aquinas', *American Journal of Jurisprudence* 22 (1977), 168-89.

human, lays the foundation of the *ius positivum* (positive right) on the other.[45] Divine law, having a double – partly natural, partly positive – character, can perfectly illustrate this complex cause-effect relationship:

> "The divine law is that which is promulgated by God. Such things are partly those that are naturally just, yet their justice is hidden to man, and partly are made just by God's decree. Hence also divine law may be divided in respect of these two things, even as human law is. For the divine law commands certain things because they are good, and forbids others, because they are evil, while others are good because they are prescribed, and others evil because they are forbidden."[46]

(3) Thirdly, Thomas sometimes uses *ius* – besides the above two objective meanings – in the subjective sense as well.[47] For example, while discussing restitution he mentions right to property (*ius dominii*),[48] and in reference to theft he speaks of right of possessing (*ius possidendi*).[49] This usage is, however, sporadic, and it is only the common juristic ter-

[45] G. Kalinowski, 'Le fondement objectif du droit d'après la "Somme théologique" de saint Thomas d'Aquin', 70-71: "nous avons affaire à une relation de cause à effet: soit l'action juste en elle-même (intrinsèquement juste) est la cause de l'évidence avec laquelle s'impose la loi qui la prescrit, soit la loi est la cause du caractère conféré par elle à l'action donnée et qui en fait une action juste. Et c'est en raison de cette relation que '*ius*', nom propre de l'action juste, peut devenir un nom métonymique de la loi (*lex*)." It should be mentioned that in the treatise on right (*Summa theologiae* II-II q. 57 a. 1 ad 1) Aquinas explicitly calls attention to the metaphorical and metonymic use of language, saying that "it is usual for words to be distorted from their original signification so as to mean something else". Elsewhere in the *Summa* (I q. 79 a. 13 co.) we can also read that "it is customary for causes and effects to be called after one another."

[46] *Summa theologiae* II-II q. 57 a. 2 ad 3: "ius divinum dicitur quod divinitus promulgatur. Et hoc quidem partim est de his quae sunt naturaliter iusta, sed tamen eorum iustitia homines latet, partim autem est de his quae fiunt iusta institutione divina. Unde etiam ius divinum per haec duo distingui potest, sicut et ius humanum. Sunt enim in lege divina quaedam praecepta quia bona, et prohibita quia mala, quaedam vero bona quia praecepta, et mala quia prohibita."

[47] This was first demonstrated in a short article written in Latin by H. M. Hering, 'De iure subiective sumpto apud S. Thomam', *Angelicum* 16 (1939), 295-97.

[48] *Summa theologiae* II-II q. 62 a. 1 ad 2: "nomen restitutionis, inquantum importat iterationem quandam, supponit rei identitatem. Et ideo secundum primam impositionem nominis, restitutio videtur locum habere praecipue in rebus exterioribus, quae manentes eaedem et secundum substantiam et secundum ius dominii, ab uno possunt ad alium devenire."

[49] *Summa theologiae* II-II q. 66 a. 5 ad 2: "in parabola Evangelii dicitur, Matth. XIII, de inventore thesauri absconditi in agro, quod emit agrum, quasi ut habeteret ius possidendi totum thesaurum." For further examples, see J. Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford: University Press, 1998), 133 n. 10., 134 n. 12, and J.-M. Aubert, *Le droit romain dans l'oeuvre de saint Thomas* (Paris: Vrin, 1955), 91 n. 2.

minology of his age that Aquinas – presumably unreflectively – follows here, apparently not thinking of developing a theory of natural rights.[50] I shall expound this question in detail in Part 2.

1.2 The Notion of Dominium

In Aquinas's thought the term *dominium* may refer to (1) the authority of human reason over man's other capacities or (2) the possession of material things or (3) the dominion over human beings.

(1) The first sense of *dominium* is connected with human rationality. It expresses that man as a rational being has control over his will, desires, and so on. As Aquinas puts it, "in man reason has the position of a master and not of a subject."[51] Reason by nature dominates man's other capacities. The will is moved and directed by the intellect, and the sensitive ("irascible" and "concupiscible" appetites are also subject to reason.[52] *Dominium* in this sense also implies *dominium sui* (self-mastery or dominion of self), i.e. that men, unlike irrational creatures, not endowed with free choice and hence tending to an end only "by natural inclination, as being moved by another", are masters of their own acts and "move themselves to an end, because they have dominion over their actions through their free will, which is a faculty of will and reason."[53]

(2) The second sense of *dominium* extends this primary meaning by way of analogy to animals and material goods. Owing to his particular place in the order of creation (*imago Dei*) and his rational nature, man has a *dominium naturale* over animals and things – to

[50] B. Tierney, *The Idea of Natural Rights*, 23.

[51] *Summa theologiae* I q. 96 a. 2 co.: "Ratio autem in homine habet locum dominantis, et non subiecti dominio."

[52] *Summa theologiae* I-II q. 9 a. 1 ad 3: "quantum ad determinationem actus, … intellectus movet voluntatem". *Summa theologiae* I-II q. 17 a. 5 co.: "Manifestum est autem quod ratio potest ordinare de actu voluntatis, sicut enim potest iudicare quod bonum sit aliquid velle, ita potest ordinare imperando quod homo velit." *Summa theologiae* I q. 81 a. 3 co.: "ratio universalis imperat appetitui sensitivo, qui distinguitur per concupiscibilem et irascibilem".

[53] *Summa theologiae* I-II q. 1 a. 1 co.: "Differt autem homo ab aliis irrationalibus creaturis in hoc, quod est suorum actuum dominus. … Est autem homo dominus suorum actuum per rationem et voluntatem". *Summa theologiae* I-II q. 1 a. 2 co.: "Illa ergo quae rationem habent, seipsa movent ad finem, quia habent dominium suorum actuum per liberum arbitrium, quod est facultas voluntatis et rationis. Illa vero quae ratione carent, tendunt in finem per naturalem inclinationem, quasi ab alio mota, non autem a seipsis, cum non cognoscant rationem finis, et ideo nihil in finem ordinare possunt, sed solum in finem ab alio ordinantur."

the same extent as human reason controls man's other capacities. "It is by his reason that man is competent to have mastership … Man in a certain sense contains all things; and so according as he is master of what is within himself, in the same way he can have mastership over other things."[54] Already in the state of innocence, man had natural dominion over the use (but not the nature) of material goods to his benefit, which did not fundamentally change even after the original sin.[55]

(3) Finally, Aquinas's understanding of *dominium* covers the relations of dominion or rule between man and man, too.[56] Nevertheless, he keeps this type of *dominium* over rational beings consistently distinct from the *dominium* over things and animals.

1.3 Conceptual Relations I: Ius and Dominium as the Rule of Reason

(1) For Aquinas, as we have seen, the first and primary meaning of *ius* is the *iustum* (right action), the object of the virtue of justice. In the Question '*De iustitia*' he gives a definition of justice that associates justice with volition: "the constant and perpetual will to render to each one his right".[57] He notes immediately that he is only adopting the famous definition of Ulpian ("*constans et perpetua voluntas ius suum cuique tribuendi*"),[58] "the lawyers' definition", as he calls it.[59] In the fourth article of the question, after repeating that justice is in

[54] *Summa theologiae* I q. 96 a. 2 arg. 2: "cum dominium competat homini secundum rationem"; *Summa theologiae* I q. 96 a. 2 co.: "in homine quodammodo sunt omnia, et ideo secundum modum quo dominatur his quae in seipso sunt, secundum hunc modum competit ei dominari aliis."

[55] *Summa theologiae* II-II q. 66 a. 1 co.: "res exterior potest dupliciter considerari. Uno modo, quantum ad eius naturam, quae non subiacet 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". *Summa theologiae* I q. 96 a. 1 arg. 3: "Hieronymus dicit quod homini ante peccatum non indigenti, Deus animalium dominationem dedit, praesciebat enim hominem adminiculo animalium adiuvandum fore post lapsum." Cf. M.-F. Renoux-Zagamé, *Origines théologiques du concept moderne de propriété* (Genève: Droz, 1987), 72-78; J. Coleman, 'Property and Poverty', in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought* (Cambridge: University Press, 1988), 607-48 at 621-25.

[56] *Summa theologiae* I q. 96 a. 4.

[57] *Summa theologiae* II-II q. 58 a. 1 arg. 1.

[58] *Digest* 1.1.10.

[59] As Aristotle (*Nicomachean Ethics* 1129a) defines justice as a habit, in the *corpus* of the same article Aquinas corrects this definition, adding that "if anyone would reduce it to the proper form of a definition, he might say that 'justice is a habit whereby a man renders to each one his due by a constant and perpetual will': and this is about the same definition as that given by the Philosopher". It is a well-known

the will as its subject, Aquinas underlines that "the will is borne towards its object consequently on the apprehension of reason".[60] Thus he is consistent in maintaining that reason dominates will, which is subordinated to the dictates of reason.[61] On the other hand, the characterization of the will as "perpetual" and "constant" in the definition of justice, requiring the firmness of the will, shows that the right action or just is not a matter of personal choice. It is an obligation or duty that justice requires of a subject with regard to another person in a given situation.[62]

(2) The rationalism of Saint Thomas's moral philosophy manifests itself more clearly in his discussion of the second sense of *ius*, equivalent to *lex*. Rationality, as we have seen, is the first of the four elements of his general definition of *lex* given in the Question 'Of the Essence of Law'. In the very beginning of the *quaestio*, in the first article Aquinas asks whether *lex* pertains to reason. He answers the question, as might have been expected, in the affirmative, arguing that since law is a rule and measure of actions, it follows that law pertains to reason because "reason, which is the first principle of human acts, is the rule and measure of human acts."[63] Thus "law is in the reason alone".[64] *Lex* as such consists of propositions or precepts articulated by the *ratio practica* (practical reason).[65]

The reference to reason appears repeatedly in the subsequent discussions of the 'various kinds' of *lex*, too. First of all, the source of the *lex aeterna* (eternal law) is the divine reason or wisdom.[66] And *lex naturalis* (natural law) is nothing else than the "participation of the eternal law in the rational creature".[67] All created realities partake somewhat in the eternal law. But while non-rational beings participate only passively, through their

---

fact among commentators of Aquinas's legal philosophy that the *doctor angelicus* has a great respect for certain authorities and he shows an especial preference for Ulpian. As we will see later, this is not the only time when this preference gives him trouble.

[60] *Summa theologiae* II-II q. 58 a. 4 ad 2: "voluntas fertur in suum obiectum consequenter ad apprehensionem rationis."

[61] *Summa theologiae* II-II q. 58 a. 4 ad 3: "omnis appetitus obedit rationi. Sub appetitivo autem comprehenditur voluntas."

[62] A. Brett, *Liberty, Right and Nature*, 91-92.

[63] *Summa theologiae* I-II q. 90 a. 1 co.: "Regula autem et mensura humanorum actuum est ratio, quae est primum principium actuum humanorum".

[64] *Summa theologiae* I-II q. 90 a. 1 ad 1: "lex est in ratione sola".

[65] *Summa theologiae* I-II q. 90 a. 1 ad 2: "propositiones universales rationis practicae ordinatae ad actiones, habent rationem legis."

[66] *Summa theologiae* I-II q. 91 a. 1; *Summa theologiae* I-II q. 93.

[67] *Summa theologiae* I-II q. 91 a. 2 co.: "participatio legis aeternae in rationali creatura lex naturalis dicitur."

inclinations toward their proper acts and ends, intelligent, rational creatures, such as men, participate actively in the eternal law. They share intelligently and rationally in it. Thus natural law, as law, exists only in the rational creature. The participation of the eternal law in rational creatures is properly termed law. Irrational creatures, on the other hand, do not share in the eternal law in an intelligent and rational manner, and hence law cannot be predicated of them except *per similitudinem* (by similitude).[68] Finally, as for *lex humana* (human law), every human statute has to be to derived from natural law, which is "the first rule of reason".[69]

If *lex* is so closely related to *ratio*, why does Saint Thomas accommodate, instead of rejecting – as his mentor, Albert the Great explicitly did – Ulpian's definition of the natural law as "*quod natura omnia animalia docuit*" (what nature has taught all animals)?[70] In the Question '*De lege naturali*', to take an example, he classifies the precepts of natural law according to the different levels of natural tendency found in man: the inclinations of man considered (1) as a substance, (2) as an animal and (3) as a rational being. About the animal tendencies he says that "there is in man an inclination to things that pertain to him … according to that nature which he has in common with other animals: and in virtue of this inclination, those things are said to belong to the natural law, 'which nature has taught to all animals', such as sexual intercourse, education of offspring and so forth."[71] In the treatise on right, discussing the difference between *ius naturale* and *ius gentium*, he even states that "it belongs not only to man but also to other animals to apprehend a thing absolutely: wherefore the right which we call natural, is common to us and other animals … But the right of nations falls short of natural right in this sense, as the jurist says because 'the latter is common to all animals, while the former is common to men only.'"[72]

[68] *Summa theologiae* I-II q. 91 a. 2 ad 3: "etiam animalia irrationalia participant rationem aeternam suo modo, sicut et rationalis creatura. Sed quia rationalis creatura participat eam intellectualiter et rationaliter, ideo participatio legis aeternae in creatura rationali proprie lex vocatur, nam lex est aliquid rationis, ut supra dictum est. In creatura autem irrationali non participatur rationaliter, unde non potest dici lex nisi per similitudinem."

[69] *Summa theologiae* I-II q. 95 a. 2 co.: "In rebus autem humanis dicitur esse aliquid iustum ex eo quod est rectum secundum regulam rationis. Rationis autem prima regula est lex naturae, ut ex supradictis patet. Unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur."

[70] *Digest* 1.1.1.3.

[71] *Summa theologiae* I-II q. 94 a. 2 co.: "inest homini inclinatio ad aliqua …, secundum naturam in qua communicat cum ceteris animalibus. Et secundum hoc, dicuntur ea esse de lege naturali quae natura omnia animalia docuit, ut est coniunctio maris et feminae, et educatio liberorum, et similia."

[72] *Summa theologiae* II-II q. 57 a. 3 co.: "Absolute autem apprehendere aliquid non solum convenit homini,

At first sight, Ulpian's formulary, supposing a nature common to man and animals, seems to pose a great danger to the essential rationality of natural law.[73] Does its adoption by Aquinas mean that there exists a subrational level of natural law in man, or that natural law can be found in irrational creatures, too? Certainly not. For Saint Thomas, animals have natural inclinations only, not natural law, and in rational beings the set of inclinations common to man and other creatures cannot be called a law essentially but only "by participation, as it were."[74] As regards the relation of natural tendencies and rationality, Odon Lottin's remark is very apropos:

> "Saint Thomas n'entend toutefois aucunement par là retirer à la raison la maîtrise sur toutes les tendances de l'homme et il accepte tout ce qu'Albert le Grand avait dit à ce sujet; mais tandis que celui-ci en concluait qu'il fallait écarter la définition du droit romain comme étrangère au concept de raison, saint Thomas au contraire lui accorde l'hospitalité, en l'interprétant dans le sens d'une morale rationnelle: l'objet du droit naturel est ce que la 'raison naturelle' édicte au sujet des tendances communes à l'homme et à l'animal".[75]

Accordingly, Aquinas's accommodation of Ulpian' definition of natural law should be interpreted to mean, together with his statement that "all the inclinations of any parts whatsoever of human nature, e.g. of the concupiscible and irascible parts, *in so far as they are*

---

sed etiam aliis animalibus. Et ideo ius quod dicitur naturale secundum primum modum, commune est nobis et aliis animalibus. A iure autem naturali sic dicto recedit ius gentium, ut iurisconsultus dicit, quia illud omnibus animalibus, hoc solum hominibus inter se commune est." For other appearances of Ulpian's conception of natural law in Aquinas, see e.g. *Summa theologiae* I-II q. 95 a. 4 ad 1; *In IV Sententiarum* d. 33 q. 1 a. 1 ad 4; *In V Ethicorum* l. 12 n. 4.

[73] Odon Lottin (*Le droit naturel chez saint Thomas d'Aquin*, 66) explains the accommodation of Ulpian's definition with Aquinas's "sympathies secrètes pour les formules du droit romain". Michael Bertram Crowe ('St. Thomas and Ulpian's Natural Law', 282) finds this secret sympathy incongruent with Saint Thomas's general view and hence "slightly puzzling". William E. May ('The Meaning and Nature of the Natural Law in Thomas Aquinas', 184) argues, on the contrary, that Aquinas has good reason to make room for Ulpian's definition, as he wants to emphasize that a human being is first and foremost an animal (though by reason of his intelligence a very special kind of animal). Therefore "the tendencies that men possess in virtue of their animality are basic human tendencies, fundamental '*inclinationes naturales*,' and the goods correlative to those tendencies, goods such as the procreation and care of children, are basic human goods meriting the respest of human intelligence."

[74] *Summa theologiae* I-II q. 90 a. 1ad 1: "quaelibet inclinatio proveniens ex aliqua lege, potest dici lex, non essentialiter, sed quasi participative."

[75] O. Lottin, *Le droit naturel chez saint Thomas d'Aquin*, 62.

ruled by reason, belong to the natural law",[76] that what nature has taught all animals is part of the natural law only in so far as such inclinations are dominated and controlled by human rationality.[77]

1.4 Conceptual Relations II: Ius and Dominium as Property

(1) One of the peculiarities of natural *dominium* is that it does not specify the mode of possession, be it private or in common. So the question remains open: which one is the just form of property? In the third article of the Question '*De iure*', Aquinas describes private property as a just institution. But it is not *absolute* (absolutely speaking), by the very nature of the relationship that it is just – as male is related to female for the purpose of procreation or parent to child for the purpose of education. It is natural and just only with a qualification: in consideration of what results from it. "For if a particular piece of land be considered absolutely, it contains no reason why it should belong to one man more than to another, but if it be considered in respect of its adaptability to cultivation, and the unmolested use of the land, it has a certain commensuration to be the property of one and not of another man".[78] Consequently the possession of property is not a matter of natural right but belongs to the *ius gentium*. From this passage alone it would be quite difficult to determine the status of property in Aquinas's thought, especially as he noticeably oscillates between two competing conceptions of *ius gentium*.[79] Sometimes he locates it, after Saint Isidore, in positive human law.[80] On other occasions – including the present article – he understands

[76] *Summa theologiae* I-II q. 94 a. 2 ad 2: "omnes inclinationes quarumcumque partium humanae naturae, puta concupiscibilis et irascibilis, *secundum quod regulantur ratione*, pertinent ad legem naturalem" (emphasis added).

[77] E. T. Gelinas, '*Ius* and *Lex* in Thomas Aquinas', 164.

[78] *Summa theologiae* II-II q. 57 a. 3 co.: "ius sive iustum naturale est quod ex sui natura est adaequatum vel commensuratum alteri. Hoc autem potest contingere dupliciter. Uno modo, secundum absolutam sui considerationem, sicut masculus ex sui ratione habet commensurationem ad feminam ut ex ea generet, et parens ad filium ut eum nutriat. Alio modo aliquid est naturaliter alteri commensuratum non secundum absolutam sui rationem, sed secundum aliquid quod ex ipso consequitur, puta proprietas possessionum. Si enim consideretur iste ager absolute, non habet unde magis sit huius quam illius, sed si consideretur quantum ad opportunitatem colendi et ad pacificum usum agri, secundum hoc habet quandam commensurationem ad hoc quod sit unius et non alterius".

[79] For a useful brief overview and comparison of Saint Thomas's different texts on *ius gentium*, see P. Van Overbeke, 'Saint Thomas et le droit', 557-63.

[80] *Summa theologiae* I-II q. 95 a. 4; *In I Politicorum* l. 4 n. 1.

it as a special type of *ius naturale*, quoting Gaius's dictum that "whatever natural reason decrees among all men, is observed by all equally, and is called *ius gentium*".[81]

(2) If we want to know more about the status of (private and common) property in Saint Thomas, we have to examine its relation to natural law. First of all, Aquinas rejects the quite common medieval view that natural law requires – at least in the state of innocence – the community of goods. He refutes this view on the basis of a subtle distinction, arguing that something can be said to belong to the natural law in two ways: (1) because nature inclines thereto; (2) because nature did not introduce the contrary. In the latter sense it might be said, for example, that "for man to be naked is of the natural law, because nature did not gave him clothes". Now common property is of natural law only in this second sense, referring to the primitive condition of mankind, which is obviously not the proper meaning of the term.[82]

For Saint Thomas private property is not prescribed by natural law either. Regarding its relation to natural law, its status is quite similar to that of common property – nature is neither for nor against it. In general, natural law professes a "benevolent neutrality" on the question of the mode of possession of material things.[83] In replying to an objection in Question 66 of the *Secunda Secundae*, Aquinas gives an excellent brief summary of his teaching on the relation of natural law and property:

> "Community of goods is ascribed to the natural law, not that the natural law dictates that all things should be possessed in common and that nothing should be possessed

[81] *Summa theologiae* II-II q. 57 a. 3, citing *Digest* 1.1.9: "*quod naturalis ratio inter omnes homines constituit, id apud omnes gentes custoditur, vocaturque ius gentium*". See also *In V Ethicorum* l. 12 n. 4.

[82] *Summa theologiae* I-II q. 94 a. 5 ad 3: "aliquid dicitur esse de iure naturali dupliciter. Uno modo, quia ad hoc natura inclinat, sicut non esse iniuriam alteri faciendam. Alio modo, quia natura non induxit contrarium, sicut possemus dicere quod hominem esse nudum est de iure naturali, quia natura non dedit ei vestitum, sed ars adinvenit. Et hoc modo communis omnium possessio, et omnium una libertas, dicitur esse de iure naturali". The analogy of nakedness will reappear later in Suárez's discussion of the relation of property and natural law (*De legibus* 2.14.6): "it can be said that nakedness is natural to man, and that this nakedness would not require covering in the state of innocence; whereas in the condition of fallen human nature natural reason imposes a different requirement" [potest dici nuditas naturalis homini, quae in statu innocentiae operienda non esset; in statu vero naturae lapsae aliud dictat naturalis ratio].

[83] O. Lottin, *Le droit naturel chez saint Thomas d'Aquin*, 89. Likewise, Alexander (Sándor) Horváth underlines that in Aquinas "das reine Naturrecht ist in diesem Punkte wohl indifferent, läßt also sowohl dem Sonder- als auch dem Kollektiveigentum freien Spielraum." A. Horváth, *Eigentumsrecht nach dem hl. Thomas von Aquin* (Graz: Moser, 1929), 140.

> as one's own: but because the division of possessions is not according to the natural law, but rather arose from human agreement which belongs to positive law … Hence the ownership of possessions is not contrary to the natural law, but an addition thereto devised by human reason."[84]

Private property is thus merely a positive, temporal institution, an invention of human intelligence. It is neither prescribed nor forbidden by natural law but is a human addition to natural law principles, a mode of possession that has only conventional justification, on the basis of the *ius gentium* (assimilated here to positive law). Reason devised private property for the benefit of human life, after having considered its comparative advantages and disadvantages. This rational consideration forms, together with common human consensus, the basis of private property.[85] Aquinas gives three rational, pragmatic arguments – very similar to those deployed by Aristotle in the *Politics*[86] – in favour of private property. (1) Everybody is more careful with a thing which is for himself alone than with that which is common to many or to all. (2) Human affairs are more orderly and efficiently organised when everyone has his own responsibility for his own things, whereas there would be a chaos if everyone cared for everything. (3) Men live together more peaceably if each has what suits his own taste; quarrels would erupt more frequently, if men were to hold things in common without distinction.[87]

Part 2: Natural Rights?

We saw in Part I that at times Aquinas did use *ius* in a subjective sense. The Dominican master was well acquainted with law (especially with canon and Roman law), and by the time he wrote his works, as we also have seen, the subjective meaning of *ius* had widely spread in medieval legal language. One could even say, remarks Jean-Marie Aubert, that

[84] *Summa theologiae* II-II q. 66 a. 2 ad 1: "communitas rerum attribuitur iuri naturali, non quia ius naturale dictet omnia esse possidenda communiter et nihil esse quasi proprium possidendum, sed quia secundum ius naturale non est distinctio possessionum, sed magis secundum humanum condictum, quod pertinet ad ius positivum … Unde proprietas possessionum non est contra ius naturale; sed iuri naturali superadditur per adinventionem rationis humanae."

[85] A. Horváth, *Eigentumsrecht nach dem hl. Thomas von Aquin*, 132-43; A.-H. Chroust and R. J. Affeldt, 'The Problem of Private Property according to St. Thomas Aquinas', *Marquette Law Review* 34 (1950-51), 151-82; J. Coleman, 'Property and Poverty', 621-25.

[86] *Politics* 1261b and 1263b.

[87] *Summa Theologiae* II-II q. 66 a. 2 co.

"il aurait été étonnant que saint Thomas, qui a largement utilisé les sources juridiques, n'ait pas été influencé par le langage courant en ces matières."[88] Is this enough to prove that Aquinas possessed the concept of natural rights or human rights? The great majority of historians of ideas answer this question emphatically in the negative.[89] Annabel Brett's statement clearly represents the majority opinion: "the scattered usage of the subjective construction of *ius* with the gerund does not affect the theoretical elucidation of *ius* as objective, which is indeed the sense that *ius* normally bears in Aquinas's text; nor does it necessarily imply a concept of subjective right as liberty."[90]

A major exception to this majoritarian view is John Finnis's book *Aquinas*, in which Finnis – reversing his former interpretation cited in the Introduction – makes a strong case for an affirmative answer.[91] He enumerates many examples of subjective use of *ius* in Aquinas – *ius contradicendi*, *ius dandi baptisma*, *ius petendi debitum* and so on –, while on the other hand he has to admit "the relative rarity of *iura*, the plural of *ius*, with the meaning 'rights'".[92] This is, however, of little significance, claims Finnis, since "though he never uses a term translatable as 'human rights', Aquinas clearly has the concept."[93] But "isn't Aquinas

[88] J.-M. Aubert, *Le droit romain dans l'oeuvre de saint Thomas*, 91. Tierney is of the same opinion (*The Idea of Natural Rights*, 258): "Aquinas must have known perfectly well that, in the everyday discourse of his own time, the word *ius* could also mean a subjective right and that, in contemporary jurisprudence, a right was sometimes defined as a faculty or power."

[89] See e.g. B. Tierney, *The Idea of Natural Rights*, 23, 258; A. Brett, *Liberty, Right and Nature*, 91-92; O. Lottin, *Le droit naturel chez saint Thomas d'Aquin*, 97; M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', 103-4; L. Lachance, *Le concept de droit selon Aristote et S. Thomas*, 2nd ed. (Ottawa: Lévrier, 1948), 294, 303; J.-M. Aubert, *Le droit romain dans l'oeuvre de saint Thomas*, 90-91; D. Composta, *La "moralis facultas" nella filosofia giuridica di F. Suarez* (Torino: Società Editrice Internazionale, 1957), 10, 23; R. McInerny, *Aquinas on Human Action: A Theory of Practice* (Washington: The Catholic University of America Press, 1992), 213-15.

[90] A. Brett, *Liberty, Right and Nature*, 91 n. 12.

[91] This change of view is even more perplexing in light of the fact that in a conference paper delivered between the publication of *Natural Law and Natural Rights* and the appearance of *Aquinas* Finnis maintained his older interpretation, stating very categorically: "'Natural right' is a phrase which St Thomas never uses, and 'rights' (*jura*) is never used by him in the sense which that term invariably and usefully has in modern usage." — J. Finnis, 'Natural Inclinations and Natural Rights: Deriving "Ought" from "Is" according to Aquinas', in L. J. Elders and K. Hedwig (eds.), *Lex et libertas: Freedom and Law according to St. Thomas Aquinas* (Vatican City: Pontificia Accademia di S. Tommaso e di religione cattolica, 1987), 43-55 at 43.

[92] J. Finnis, *Aquinas,* 133-34.

[93] *Ibid.*, 136.

primarily interested in the moral uprightness, the just character, of the duty-bearer", rather than in the rights of the right-holder? – objects Finnis himself. His perhaps surprising answer is: "Not at all … In Aquinas's understanding of justice, rights are as fundamental as duties".[94]

In order to ground these ambitious claims, Finnis undertakes an essential reinterpretation of Aquinas's treatise on right and justice:

> "When Aquinas says that *ius* is the object of justice, he means: what justice is about, and what doing justice secures, is the *right* of some other person or persons – what is due to them, what they are entitled to, what is rightfully theirs. This meaning of *ius* is made clear in the Roman law definition which Aquinas adopts: justice is the steady willingness to give others what is *theirs*. … What is theirs, or their right, is: what, as a matter of equality, they are entitled to … *Almost always* this 'something due (owed) {debetur}' is to the advantage of the person who has the right {ius} to it. … So, if I have a natural – as we would now say, human – right I have it by virtue of natural law {ius naturale}; if I have a legal right I have it by virtue of positive law {ius positivum} … Thus law, natural or positive, is the basis for one's right(s) {ratio iuris}".[95]

Finally, Finnis uses a peculiar logical argument too, asserting that Aquinas's discussions of *iniuriae* (injustices) – for example his analysis of the Decalogue and his treatment of the presumption of innocence – are implicitly discussions of rights, viz. of violations of rights.[96]

However impressive Finnis's argumentation may appear, taking everything into account, it does not seem convincing to me. On the simplest level, it can hardly be purely accidental that Aquinas never uses the term *ius naturale* (or *iura naturalia*) in the subjective sense, or that when he gives a list of the primary and derivative meanings of *ius* – "the just thing", the law, "the art whereby it is known what is just", the court and the judicial sentence –, he omits the subjective sense of the word.[97]

[94] *Ibid.*, 137, 170.

[95] *Ibid.*, 133, 135. Finnis refers to *Summa theologiae* II-II q. 57 a. 1 and q. 58 a. 1.

[96] *Ibid.*, 136-37.

[97] B. Tierney, 'Natural Law and Natural Rights', 393 n. 13, 392; B. Tierney, *The Idea of Natural Rights*, 258. — *Summa Theologiae* II-II q. 57 a. 1 arg. 2 and ad 1: "Praeterea, lex, sicut Isidorus dicit, in libro Etymol., iuris est species. … Ad primum ergo dicendum quod consuetum est quod nomina a sui prima impositione detorqueantur ad alia significanda … Ita etiam hoc nomen ius primo impositum est ad significandum ipsam rem iustam; postmodum autem derivatum est ad artem qua cognoscitur quid sit iustum; et ulterius ad significandum locum in quo ius redditur, sicut dicitur aliquis comparere in iure; et ulterius dicitur etiam ius quod redditur ab eo ad cuius officium pertinet iustitiam facere, licet etiam id quod decernit

The Achilles heel of Finnis's attempt of reinterpretation of Aquinas's discussion of *ius* is that, as a matter of fact, Finnis is merely transcribing objective right into subjective in the passages cited. But, as we saw, it is evident that for Aquinas the object of justice is not another person's right but the right action, and law is the "basis" or "expression" not of one's right but of "the just", and so on.[98] In the treatise on right and justice the word *ius* never occurs in a subjective sense. The sole exception is the Roman law definition of justice took up by Aquinas, which – containing the possessive pronoun '*suum*' – really seems to suggest that *ius* belongs to the recipient of the action, as his right, '*ius suum*' (or simply '*suum*').[99] As a result, stresses Annabel Brett, Aquinas has to proceed with great care to reconcile Ulpian's definition with the text of the *Nicomachean Ethics*, equating *dikaion* with the just thing for a just man to do. Brett argues that "Aquinas is able to harmonise the two languages of right by exploiting the language of due (*debere*, *debitum*). The right thing is due *from* the just man *to* another citizen." Nevertheless, this occasional shift of meaning by no means provides a conclusive argument on Finnis's side;[100] especially as Aquinas is but borrowing here the terminology of Roman law, which, in addition, is far from being unequivocal. Finnis himself acknowledges (tacitly taking in this question Villey's side) that the *ius* of an ancient Roman could even be a punishment: "Roman law, and still, vestigially, the language of Aquinas' time, accepted that a liability might also be a *ius*; to be given the appropriate penalty is a malefactor's *ius*."[101]

As to Finnis's logical argument of implicit entailment, I believe Brian Tierney warns with good reason against

---

sit iniquum." As we have seen in the Introduction, when Finnis analyzed this passage of the *Summa* in *Natural Law and Natural Rights*, he came basically to the same conclusion.

[98] B. Tierney, 'Natural Law and Natural Rights', 392-93.

[99] A. Brett, *Liberty, Right and Nature*, 92. Both Brett (*ibid.*) and Finnis (*Aquinas*, 133) notice that '*ius suum*' and '*suum*' are used in this context interchangeably by Aquinas.

[100] *Ibid.* Brett underlines again that "the primary and theoretically important sense of *iustum* in Aquinas, however, remains that of 'just action'."

[101] J. Finnis, *Aquinas*, 133-34. In *Natural Law and Natural Rights* (at p. 209) Finnis mentions another good counterexample from the *Institutes* of Gaius, hardly capable of being translated with the notion of 'right': the *ius* of *not* raising a building higher, lest the neighbour's light be obstructed. He adds that it was a common characteristic of all pre-modern legal vocabularies that they did not strictly differentiate between the notions if 'right' and 'duty'. Thus the "systematic bifurcation between 'right' (including 'liberty') and 'duty', is something that sophisticated lawyers were able to do without for the whole life of classical Roman law."

> "the error of discerning a doctrine of human or natural rights each time we encounter some congenial ethical claim in any religious or political system. Moral teachings can be expressed in a variety of ways … But, if we are trying to understand the history of natural rights thinking, it merely confuses the issue if we see an assertion of natural or human rights whenever we encounter moral or legal teachings that are not inconsistent with the idea of subjective rights but that actually make no appeal to such rights as the basis of their formulations."[102]

On the whole, Finnis seems to write about – as Arthur S. McGrade suggested in his review – "what Aquinas should have said" (rather than what he actually said), using a language more accessible to modern readers.[103] His endeavour to derive a doctrine of subjective rights from Aquinas's discussion of objective right and justice can hence be better described as an elegant and inventive re-reading than as an authentic interpretation of Aquinas's theory. This is, of course, not without precedents. Jacques Maritain already accommodated the notion of 'human rights' into the Neo-Thomist system of natural law in the mid-twentieth century;[104] and ultimately, all these efforts can be traced back to the sixteenth-seventeenth-century revival of Thomism.

What Finnis undeniably proves is that Aquinas's ideas are not incompatible with a subjective concept of right, and that consequently the *doctor angelicus* could have complemented his natural law theory with a doctrine of natural rights.[105] A commentator of John Locke's rights theory, A. John Simmons went so far as to say that Aquinas's concep-

[102] B. Tierney, 'Natural Law and Natural Rights', 394.

[103] A. S. McGrade, 'What Aquinas Should Have Said? Finnis's Reconstruction of Social and Political Thomism', *American Journal of Jurisprudence* 44 (1999), 125-49, at 126-27: "We have … what Aquinas should have said if he had been putting out a second, improved edition of, for example, the treatise on law in the *Summa Theologiae* … Finnis's adoption of recent trends in translation and nomenclature … suggest that Finnis is presenting us with what he thinks Aquinas would say if he were doing all of the above today." Finnis admittedly gives a corrected reading of Aquinas, but in his view a self-corrected one: "There are some serious flaws in Aquinas' thoughts about human society. A sound critique of them can rest on premisses he himself understood and articulated". — J. Finnis, *Aquinas*, vii.

[104] Cf. above all J. Maritain, *Les droits de l'homme et la loi naturelle* (New York: Maison française, 1942), and *idem*, *Man and the State* (Chicago: University of Chicago Press, 1951), ch. 4.

[105] B. Tierney, 'Natural Law and Natural Rights', 394. The legal philosophy of the Second Scholasticism can be mentioned in this respect as well, inasmuch as it furnishes an indirect, historical evidence of this lack of inconsistency. As Tierney (*ibid.*) notices: "After all, later Spanish Thomists were able, without undue strain, to associate Aquinas's natural law with their own teachings on natural rights".

tion of human equality "cries out for the development of a theory of natural rights."[106] This is a manifest exaggeration, but it remains true that it would have been relatively easy for Aquinas – or at least now it is to us – to translate his conception of natural law and justice partly into the language of natural rights.[107] For instance, he could have deduced a series of rights from the natural inclinations that make up the human essence and determine natural law duties.[108] Natural rights would be in this case derivative of natural obligations.[109] Or he could perhaps have reformulated the idea of man's dominion of himself in terms of autonomous choice rights, as a natural right to liberty – like the nominalist Conrad Summenhart and the Thomist theologians of the Second Scholasticism centuries later did. This would not have been impossible, since Aquinas's notion of *dominium sui* was underpinned by a conception of autonomy based on human rationality and a strong doctrine of freedom of choice.[110]

But this is only speculation about what Aquinas could have said. The fact is that these and other possibilities notwithstanding, Aquinas avoided – arguably deliberately – the language of individual rights.[111] Finding the reasons of this requires much less speculation.

[106] A. J. Simmons, *The Lockean Theory of Rights* (Princeton: University Press, 1992), 96 n. 79.

[107] M. Zuckert, 'Do Natural Rights Derive from Natural Law?', 714.

[108] A. J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford: Clarendon Press, 1996), 233, 236: "In one sense, the natural law which determines human obligations will also determine human rights. … The theoretical derivation of human rights is from the basic set of duties which in turn are derived from the set of dispositional properties which determine the content of a human essence."

[109] A further consequence is, according to Zuckert ('Do Natural Rights Derive from Natural Law?', 716), that in this case "the natural-law-inspired right to liberty is not a right to do or not to do, as each agent determines. Rather, it is a right only to adhere to the natural-law mandate in a truly human way – that is, through the use of the agent's reason and will. It implies nothing whatsoever about a broader moral freedom – a realm of personal sovereignty or of relatively completely free choice". Zuckert echoes here Herbert Hart's definition of right, rephrased by Richard Tuck as "the individual's sovereignty within the relevant section of his moral world". — H. L. A. Hart, 'Are There any Natural Rights?', *The Philosophical Review* 64 (1955), 175-91 at 184; R. Tuck, *Natural Rights Theories*, 6.

[110] B. Tierney, 'Dominion of Self and Natural Rights Before Locke and After', 179-81. In this writing Tierney offers a concise general history of the scholastic idea of *dominium sui*. For a similar essay, see R. Schüßler, 'Moral Self-Ownership and *Ius Possessionis* in Scholastics', in *Transformations in Medieval and Early-Modern Rights Discourse*, 149-72.

[111] B. Tierney, *The Idea of Natural Rights*, 258: "Aquinas acknowledged that violence could lawfully be resisted but he did not refer specifically to a right of self-defense. He took from canon law the teaching that property was common in the sense that it was to be shared with those in need, but he did not ask whether the poor had a natural right to the means of subsistence. From Roman law Aquinas accepted Uplian's

As Michael Zuckert rightly notes, "there are important elements of Thomistic theory that resist this translation", hence "the Thomist doctrine does not well serve as a basis for a general natural-rights position."[112] First of all, one can discern a potential tension between *ius* as a subjective right and *ius* as the right action, inasmuch as the former implies free decision, whereas the latter presupposes an obligation of the agent: "doing the right thing is not a matter of personal choice."[113] And it is not necessary to accept the strict Hobbesian dichotomy of *ius* and *lex* to acknowledge that while natural rights define a sphere of individual autonomy and free choice, the precepts and prohibitions of natural law tend to limit freedom of action.[114] This tension can be significantly mitigated or eliminated with the adoption of the idea of 'permissive natural law'. The essence of this idea is that natural law does allow and approve certain courses of action without however commanding (or forbidding) them, and thereby gives man freedom of choice – within the framework determined by the precepts and prohibitions of natural law.

The conception of permissive natural law has its roots in twelfth-century canon law, and was originally inspired by the problem of private property. Gratian caused great difficulty of interpretation to the Decretists, as at the beginning of the *Decretum* he presented a definition of *ius naturale* – taken from Isidore of Seville – encompassing both common possession and acquisition of things,[115] and then he attributed common property to natural law and private ownership to human positive law and custom, writing a bit later that human laws contrary to natural law are invalid.[116] It was Rufinus whose solution to this difficulty became the most widely accepted. He contrasted natural law commands and pro-

---

dictum that 'Natural law is what nature has taught all animals,' but he did not ask whether animals have corresponding natural rights."

[112] M. Zuckert, 'Do Natural Rights Derive from Natural Law?', 715-16.

[113] A. Brett, *Liberty, Right and Nature*, 91.

[114] B. Tierney, 'Natural Law and Natural Rights', 395, 399; M. Zuckert, 'Do Natural Rights Derive from Natural Law?', 716.

[115] *Concordia discordantium canonum* d. 1 c.7: "Ius naturale est commune omnium nationum, eo quod ubique instinctu naturae, non constitutione aliqua habetur, ut viri et feminae coniunctio, liberorum successio et educatio, *communis omnium possessio* et omnium une libertas, *acquisitio eorum, quae celo, terra marique capiuntur*; item depositae rei vel commendatae pecuniae restitutio, violentiae per vim repulsio" (emphasis added). Isidore offered this definition in *Etymologiae* 5.4.1-2.

[116] *Concordia discordantium canonum* d. 8 ante c.1: "Nam iure naturae sunt omnia communia omnibus … Iure vero consuetudinis vel constitutionis hoc meum est, illud vero alterius." *Ibid.*, post c.1: "Dignitate vero ius naturale simpliciter prevalet consuetudini et constitutioni. Quecunque enim vel moribus recepta sunt, vel scriptis comprehensa, si naturali iuri fuerint adversa, vana et irrita sunt habenda."

hibitions with *demonstrationes* (indications), "which nature does not forbid nor command but shows to be good", and classified common property only under the *demonstrationes* of natural law susceptible to change by human law.[117] It was another Italian canonist of the twelfth century, Huguccio, who developed this distinction further and thus introduced the concept of 'permissive natural law':

> "By natural law something is mine and something is yours, but this is by permission, not by precept, since divine law never commanded that all things be common or that some things be private, but it permitted that all things be common and some private, and so by natural law something is common and something private".[118]

The idea of permissive natural law soon pervaded not only canon law but also theology and was frequently invoked as a ground of natural rights. However, contrary to many other medieval theologians or canon lawyers (but not unlike Hobbes and Locke), Aquinas did not assimilate this idea into his legal philosophy.[119] For Brian Tierney, this is a fundamental reason why Saint Thomas did not develop a doctrine of natural rights.[120] There is a strong element of truth in this view, nevertheless, I think Aquinas could have easily decided to accommodate the concept of permissie natural law; especially in view of the fact that in the Question '*De effectibus legis*' (On the Effects of Law) he readily accepts that "some acts are

[117] Rufinus, Summa *decretorum* d. 1: "Consistit autem ius naturale in tribus, scilic.: mandatis, prohibitionibus, demonstrationibus. Mandat namque quod prosit, ut: 'diliges Dominum Deum tuum'; prohibet quod ledit, ut: 'non occides'; demonstrat quod convenit, ut 'omnia in commune habeantur', ut: 'omnium una sit libetas', et huiusmodi. … Detractum autem ei est non utique in mandatis vel prohibitionibus, que derogationem nullam sentire queunt, sed in demonstrationibus – que scil. natura non vetat non precipit, sed bona esse ostendit – et maxime in omnium una libertate et communi possessione; nunc enim iure civili hic est servus meus, ille est ager tuus."

[118] Huguccio, *Summa decretorum* d. 1 c. 7: "De iure naturali aliquid est meum et aliquid est tuum, set de permissione, non de precepto, quia ius divinum numquam precipit omnia esse communia vel aliqua esse propria, set permittit omnia esse communia et aliqua esse propria et ita de iure naturali aliquid est commune et aliquid est proprium". Cited by Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München: Hueber, 1967), 353. It should be noted that Huguccio himself did not adopt the above "common explanation". Instead, he argued that natural law commands that everything be common (*communis*) only in the sense that private possessions are to be shared (*communicanda) w*ith others in time of need. — Brian Tierney, 'Permissive Natural Law and Property: Gratian to Kant', *Journal of the History of Ideas* 62 (2001), 381-99 at 385 n. 16.

[119] O. Lottin, *Le droit naturel chez saint Thomas d'Aquin*, 89.

[120] B. Tierney, 'Natural Law and Natural Rights', 406.

generically indifferent, and in respect of these the law permits".[121] Moreover, he could have applied it fruitfully to the very problem (viz. of private property) that initiated the whole discourse, but, as we have seen, he chose instead to extend the meaning of *ius naturale* to a primeval condition of things.

Another serious – though more technical – obstacle is that as Aquinas's natural law doctrine is purposefully sketchy and indeterminate in some crucial respects, it does not allow the formulation of specific, conclusive rights based on it.[122] As Anthony J. Lisska rightly stresses, "the concept of 'casuistry' is a necessary condition in determining a list of human rights."[123] But Thomistic natural law differs radically from the *more geometrico* elaborated, deductive systems of natural law of the seventeenth and eighteenth centuries.[124] An important consequence of this is that "the ultimate array of duties actually applicable cannot be captured in a simple table or code" in Aquinas; and "without a natural table of obligations, there can be no derivation of a table of natural rights."[125]

Taking everything into account, the decisive reason for the absence of natural rights in Aquinas's legal theory seems to lie in his system of thought as a whole, which is, as it is well known, a harmonious but fragile synthesis of Christian theology and Aristotelian philosophy. This being a complex and far-reaching issue, I can only touch the surface of the question here, relying on Frederick Copleston's eloquent and illuminating analysis:

> "For the Aristotelian philosopher it is the universal and the totality which really matters, not the individual as such … Individuals exist for the good of the species: it is the species which persists through the succession of individuals; … man is an item in, a part of, the universe … For the Christian on the other hand the individual human being has a supernatural vocation … the individual stands in a personal relation to God, and however much one may stress the corporate aspect of Christianity, it remains true that each human person is ultimately of more value than the whole material universe, which exists for the sake of man".[126]

It appears to me that while on the one hand the individualist or personalist aspects of Christianity precluded a total subordination of the individual to the community in the

[121] *Summa theologiae* I-II q. 92 a. 2 co.: "Quidam vero ex genere suo sunt actus indifferentes, et respectu horum, lex habet permittere."

[122] M. Zuckert, 'Do Natural Rights Derive from Natural Law?', 717-19.

[123] A. J. Lisska, *Aquinas's Theory of Natural Law*, 239.

[124] J. Frivaldszky, *Természetjog: Eszmetörténet* (Budapest: Szent István Társulat, 2001), 135.

[125] M. Zuckert, 'Do Natural Rights Derive from Natural Law?', 717, 718.

[126] F. Copleston, *A History of Philosophy* (London: Continuum, 2003), vol. II: *Medieval Philosophy*, 428.

Thomist system, Aristotelian holism on the other hand, together with the consistent rationalism of Aquinas's thought, did not leave much space for a doctrine of individual rights either. In the next century, the intellectual climate changed in scholastic philosophy in favour of the idea of natural rights, with the rise of nominalism bringing the individual to the forefront, and voluntarism radicalizing the freedom of – human and divine – will. The protagonist of this "nominalist revolution" was the famous (or ill-famed) English philosopher and theologian William Ockham.

Chapter II
The Nominalist "Revolution": William Ockham

For a long time, the most influential interpretation of William Ockham's legal philosophy was – or perhaps still it is – the one presented by Michel Villey.[127] According to Villey, Ockham's nominalist and voluntarist philosophy necessarily led to the abandonment of the traditional idea of objective natural law and to its replacement by the modern conception of natural rights. The concept of subjective rights, claims Villey, first appeared in the *venerabilis inceptor*'s political works, as the legal fruit of his nominalism. It should be mentioned that though Villey's account is undoubtedly the most widely known, a similar view was presented before Villey by Georges de Lagarde.[128] His extensive work is considered by certain commentators of Ockham as "the most sophisticated" or "the most incisive and stimulating" formulation of the above-mentioned theses.[129] Villey also acknowledges that the significance of Ockham's legal theory was first realized by de Lagarde.[130]

In the last period, however, this traditional picture was severely and widely criticized. One of the most prominent critics, Brian Tierney contests both of Villey's two central theses. On the one hand, he demonstrates that the concept of subjective rights made its first appearance not in Ockham's polemical writings but in twelfth-century canonistic discourse. On the other hand, he argues that Ockham's notion of natural rights is not incompatible

[127] Cf. above all M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', and *idem*, *La formation de la pensée juridique moderne,* 199-262.

[128] Cf. G. de Lagarde, *La naissance de l'esprit laïque*, vol. V: *Ockham: Bases de départ*, vol. VI: *Ockham: La morale et le droit*; *idem*, *La naissance de l'esprit laïque*, 2nd ed., vol. IV: *Guillaume d'Ockham: Défense de l'empire*, vol. V: *Guillaume d'Ockham: Critique des structures ecclésiales.*

[129] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', in J. G. Rowe (ed.), *Aspects of Late Medieval Government and Society: Essays Presented to J. R. Lander* (Toronto: University of Toronto, 1986), 3-24 at 4; A. S. McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles* (Cambridge: University Press, 1974), 34.

[130] M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', 111.

but correlative with natural law and that Ockham did not derive his rights theory from his nominalist and voluntarist philosophy; his conception of natural rights as well as of natural law was inspired by a rationalist ethics. [131] The aim of this chapter is to re-examine Ockham's relevant doctrines in the light of these opposing views. In Part 1 first I will discuss the fairly problematic relationship between the philosophy and political thought of Ockham, then I will scrutinize Ockham's moral philosophy. Part 2 will deal with Ockham's legal philosophy. Part 2.1 will examine his natural law theory, first of all whether the *doctor plus quam subtilis* is capable to construct a coherent doctrine of natural law on the basis (or in spite) of his nominalist philosophy and to reconcile the voluntarist and rationalist elements of his theory. In Part 2.2, finally, I will give a short account of Ockham's natural rights theory, focusing primarily on the alleged novelty of Ockham's concept of subjective rights and on its relation to his nominalism and voluntarism.

Part 1: Philosophical-Theological Grounds

1.1 The Philosopher and the Political Thinker

Ockham *qua* philosopher, unlike other medieval thinkers, showed almost perfect indifference for law. In his academic writings, he reflected, like all contemporary philosophers and theologians, on the basis of morality, on the role of will and reason in human actions, on the freedom and end of these acts and so on, but he did not inquire into the legal or political consequences of his nominalist philosophy; he made only some indirect and scattered allusions concerning legal phenomena.[132] However, certain special circumstances more or less beyond Ockham's control – the condemnation of a great number of his theological and philosophical theses at Avignon[133] and his involvement into the debate on evangelical poverty between Pope John XXII and the Franciscan Order[134] – led him to treat the problems of law.

[131] Cf. B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*'; *idem*, 'Villey, Ockham and the Origin of Natural Rights'; *idem*, 'Origins of Natural Rights Language'; *idem*, *The Idea of Natural Rights*.

[132] G. de Lagarde, *La naissance de l'esprit laïque*, VI: 93-95.

[133] It should be added that although 51 of his propositions were condemned by a commission of theologians at Avignon, this condemnation was never later officially ratified by the magisterial authority of the papacy. — J. B. Morrall, 'Some Notes on a Recent Interpretation of William of Ockham's Political Philosophy', *Franciscan Studies* 9 (1949), 335-69 at 337.

[134] It is very probable that it was Micheal of Cesena, the minister general of the Franciscan Order (with whom the *venerabilis inceptor* later fled from Avignon and took refuge at the court of the anti-papal em-

The question then arises: what is the relation, if any, between Ockham's early philosophical and theological *oeuvre* and his later political and legal thought? This question – even if it might seem at first sight rather artificial – can be considered as a watershed dividing the two fundamental interpretative approaches to Ockham's political and legal philosophy. According to one approach, represented among others by Georges de Lagarde and Michel Villey, there is an interdependence and continuity between Ockham's nominalist philosophical and theological doctrines and his political theory, and therefore the latter is to be interpreted in the context of the former. In de Lagarde's opinion, Ockham's Oxford period "exerted a decisive influence" on his later political activity, and his legal philosophy is nothing else than "the prolongation and application" of his nominalist and voluntarist philosophy.[135] Villey, sharing this view, declares in his classic *La formation de la pensée juridique moderne*: "On a nié qu'il y eût un rapport entre ses oeuvres philosophiques et ses oeuvres de politique; je suis quant à moi persuadé que ce lien existe. ... Avec une cohérence parfaite, Occam-juriste suit la voie d'Occam-philosophe."[136]

---

peror, Ludwig of Bavaria) who commanded Ockham to study the pope's decretals as well as the canonical texts concerning property. For a useful introduction to the Franciscan poverty disputes, see M. D. Lambert, *Franciscan Poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210–1323* (London: SPCK, 1961). For a good analysis of the same debates from the perspective of property rights, see V. Mäkinen, *Property Rights in the Late Medieval Discussion of Franciscan Poverty*.

135 G. de Lagarde, *La naissance de l'esprit laïque*, 2nd ed., IV: 17: "sans vouloir chercher *a priori* dans ses oeuvres philosophiques les principes de sa politique, nous considérons que la première étape philosophique de sa pensée a exercé une influence décisive sur les suivantes." *Idem*, *La naissance de l'esprit laïque*, VI: 96: "Ses solutions ne prennent leur véritable valeur que si on les insère dans l'ensemble des principes qui constituent le corps résistant de la doctrine nominaliste. Elles en sont le prolongement et l'application." M. Wilks consciously adopts de Lagarde's point of view and thus makes Ockham's nominalism central to the understanding of his political and ecclesiological positions. Cf. M. J. Wilks, *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge: University Press, 1963), 17, 88-96.

136 M. Villey, *La formation de la pensée juridique moderne*, 202, 224. Léon Baudry asserts in a similar manner about Ockham's political turn that "sans renier aucune de ses idées, il ne fait qu'aborder des problèmes d'un ordre niveau. Puisque c'est cela même qui s'est produit pour Guillaume d'Ockham, nous devons nous attendre à voir sa philosophie pénétrer et peut-être dominer ses vues sociales et politiques." — L. Baudry, 'Le philosophe et le politique dans Guillaume d'Ockham', *Archives d'histoire doctrinale et littéraire du Moyen Age* 12 (1939), 209-30 at 210. Michel Bastit also sees a "profound link" between Ockham's philosophical-theological and political views. He adds an interesting observation: "Si nous n'apercevions pas cette relation, nous nous serions laissé séduire par la pensée nominaliste au point de ne plus voir dans sa pensée que deux instants sans liens; sa politique nous apparaîtrait absurde, sans cause, pur fruit du hasard." — M. Bastit, *Naissance de la loi moderne: La pensée de la loi de Saint Thomas*

A more moderate version of this view discerns, without asserting a relationship of strict logical entailment, broad areas of congruence between Ockham's philosophy and political thought. Arthur S. McGrade, for example, doubts on the one hand that "a global interpretation of nominalism provides a good basis for a global interpretation of Ockham's political thought", but on the other hand he emphasizes that "we may still look to specific aspects of Ockham's metaphysics, epistemology or ... his logic for at least a partial explanation of various points in his polemical works", and himself points out numerous "political repercussions" of Ockham's logical individualism.[137] Likewise, H. S. Offler, while admitting that there is only narrow and unsubstantial evidence for the claim that Ockham's political and social ideas were determined by his philosophical positions, argues at the same time that "Ockham the logician was important to the career or the polemicist"[138].

The other approach perceives no necessary relation between Ockham's political theory and his philosophical-theological doctrines. Scholars adopting this approach seek to explain the two areas of thought, as far as possible, independently from each other. An outspoken critic of de Lagarde's analysis, J. B. Morrall maintains that the linkage between Ockham's political views and his general philosophy is solely a product of the neo-Thomist revival: "It is only in writers influenced by the Neo-Thomist interpretation that we meet with the idea that Ockham's polemical position was a necessary result of his philosophy."[139] One of the most recognized authorities on Ockham's philosophy, Philotheus Boehner writes in

---

à Suarez (Paris: Presses universitaires de France, 1990), 244. Finally, in Richard Scholz's opinion, Ockham is above all a theologian, "der theologische Ansatzpunkt seines Denkens und Handelns ist immer erkennbar, und nichts kann zu größeren Irrtümern über seine Auffassung von politischen Fragen und Lehren führen, als wenn man davon glaubt absehen zu können." — R. Scholz, *Wilhelm von Ockham als politischer Denker und sein Breviloquium de principatu* tyrannico (Leipzig: Hiersemann, 1944), 1.

137 A. S. McGrade, 'Ockham and the Birth of Individual Rights', 150, 156-62. Marilyn McCord Adams presented a useful survey of the great variety of Ockham's 'individualisms' (in metaphysics, epistemology, moral philosophy and politics), concluding that Ockham brings individuals consistently into prominence in all the afore-mentionned areas. — M. M. Adams, 'Ockham's Individualisms', in W. Vossenkuhl and R. Schönberger (eds.), *Die Gegenwart Ockhams* (Weinheim: VCH, 1990), 3-24. Likewise, Gordon Leff emphasizes the thoroughness of Ockham's epistemological and ontological individualism. Furthermore, he maintains that Ockham gave a "critique of the traditional assumptions about the nature" of spiritual and temporal power "largely by drawing upon his own wider philosophical and theological assumptions", particularly upon his concepts of necessity and contingency. — G. Leff, *William of Ockham: The Metamorphosis of Scholastic Discourse* (Manchester: University Press, 1975), 616.

138 H. S. Offler, 'The "Influence" of Ockham's Political Thinking: The First Century', in *Die Gegenwart Ockhams*, 338-65 at 345.

139 J. B. Morrall, 'Some Notes on a Recent Interpretation', 338.

a similar vein that "to base Ockham's political ideas on, or to develop them from, his so-called Metaphysics ... appears to us more as an adventure and certainly as a construction of the writer. ... Ockham's political ideas in their great outlines could have been developed, so far as we can see, from any of the classical metaphysics of the 13th century"[140]. Finally, Annabel Brett argues that "because Ockham is, at one level, a voluntarist, it does not follow that this affects his notion of a natural subjective right."[141] All these views are reiterated, together with other arguments, and synthesized in Brian Tierney's *The Idea of Natural Rights*, who concludes that "there is indeed no incongruity between Ockham's philosophy and his political theory, but there is no necessary connection between them either." Consequently, "Ockham's theory of rights was compatible with his nominalist philosophy, but it was also compatible with any philosophy that acknowledged – as all Christian philosophies did – the existence and value of individual human persons."[142]

The difference between these two approaches to Ockham is not without consequences on the characterization and evaluation of his political philosophy. In fact, while those scholars who discern a correlation or connection between Ockham's nominalist philosophy and his political thought are in many cases inclined to see in the *doctor plus quam subtilis* a radical innovator who sparked off a "révolution sémantique ... au moment copernicien de l'histoire de la science du droit, à la frontière de deux mondes",[143] those who deny a necessary link between the two areas have a strong tendency to regard Ockham the political writer as an "interpreter and defender of the achievements of the past", accomplishing a "conservative synthesis".[144]

[140] P. Boehner, 'Ockham's Political Ideas', in *idem*, *Collected Articles on Ockham*, ed. E. M. Buytaert, (St. Bonaventure: Franciscan Institute, 1958), 442-68 at 445-46. Charles Zuckerman goes even further, arguing on a general level that all attempts to relate medieval theories of church government to metaphysical doctrines involve logical errors. Ockham, for instance, instead of claiming, as one would expect from a thoroughgoing nominalist, that ecclesiastical sovereignty must inhere ultimately in the individual members of the church, advocated in reality the contrary idea that the papacy had been given directly by Christ the entire governmental authority of the church. — C. Zuckerman, 'The Relationship of Theories of Universals to Theories of Church Government in the Midddle Ages: A Critique of Previous Views', *Journal of the History of Ideas* 36 (1975), 579-94 at 586.

[141] A. Brett, *Liberty, Right and Nature*, 51-52.

[142] B. Tierney, *The Idea of Natural Rights*, 32, 197.

[143] M. Villey, *La formation de la pensée juridique moderne*, 261. Of course, this is not a rule and there are important exceptions to this inclination.

[144] J. B. Morrall, 'Some Notes on a Recent Interpretation', 369.

Let us start with the apparently easiest problem. There seems to exist a consensus among commentators of Ockham that there is no strong break or strict discontinuity between Ockham's two intellectual periods. After all, "we are not dealing with a schizophrenic", and "it would be silly to suggest that round about the year 1328 Ockham's brain underwent some sort of drastic leucotomy".[145] This common view can also be confirmed by the fact that, although Ockham had composed most or almost all of his theological and philosophical works until 1324 (his summoning to the papal court of Avignon), he did not completely abandon his philosophical preoccupations thereafter: he finished his philosophical *chef d'oeuvre*, the *Summa logicae* and his last theological work, the *Quodlibeta septem* very probably in the course of his heresy trial at Avignon between 1324 and 1328,[146] and may have written two short treatises of logic during his exile in Munich.[147] We should not forget either, as Offler observed, that "Ockham the writer on politics was carried into public notice mainly on the back of Ockham the philosopher and theologian."[148]

Is it true, as Michel Bastit claims, that we can find already in Ockham's early philosophical and theological works, at least in an embryonic or implicit form, some of his later political and legal ideas?[149] As a matter of fact, since Ockham the philosopher did not have the slightest interest in political or legal questions, we can barely find any political ideas

[145] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 5. H. S. Offler, 'The "Influence" of Ockham's Political Thinking', 345. According to Léon Baudry ('Le philosophe et le politique dans Guillaume d'Ockham', 210), the hypothesis that it is possible to separate rigorously Ockham the polemicist from the philosopher Ockham is *a priori* improbable.

[146] G. Leff, *William of Ockham*, xvii; R. Wood, *Ockham on the Virtues* (West Lafayette: Purdue University Press, 1997), 4. According to George Knysh, it is possible that originally Ockham went to Avignon for other reasons (he received a commission from the Franciscan Order to teach there), and it was only later, in 1326 that he was officially summoned for examination before the papal court. — G. Knysh, 'Biographical Rectifications concerning Ockham's Avignon Period', *Franciscan Studies* 46 (1986), 61-91at 64-65. The "traditional" story is recounted in full details by Léon Baudry in his *Guillaume d'Occam: Sa vie, ses oeuvres, ses idées sociales et politiques* (Paris: Vrin, 1949), vol. I: *L'homme et les oeuvres*, 96-116.

[147] The editors of Ockham's *Opera philosophica* placed the *Tractatus minor logicae* and the *Elementarium logicae* in Volume VII, containing "dubious and spurious works". Jürgen Miethke, however, has argued convincingly for accepting their authenticity. See J. Miethke, 'Wilhelm von Ockham', in M. Greschat (ed.), *Gestalten der Kirchengeschichte*, vol. 4: *Mittelalter II* (Stuttgart: Kohlhammer, 1983), 155-75 at 168; *idem*, 'Der Abschluß der kritischen Ausgabe von Ockhams akademischen Schriften', *Deutsches Archiv für Erforschung des Mittelalters* 47 (1991), 175-85 at 180-84.

[148] H. S. Offler, 'The "Influence" of Ockham's Political Thinking', 346.

[149] M. Bastit, *Naissance de la loi moderne*, 268: "les points les plus importants de la notion occamienne du droit naturel avaient déjà été esquissés dans les ouvrages les plus spéculatifs, et l'on n'aura pas de difficulté

worth mentioning in his academic works. Nevertheless, at times Ockham explicitly related his nominalist metaphysical views to social and political phenomena. For instance, in a passage of his *Summulae in libros Physicorum*, Ockham not only says (as at many other places) that a whole is nothing else than the aggregate of the parts composing it, but adds immediately that this is also true of a people, which is formed by individual persons.[150]

To reverse the question: did Ockham expressly refer to his nominalist philosophical and theological doctrines in his political works? According to Tierney, he "hardly ever" did so, and "there were good reasons for this."[151] To be sure, while Ockham's political corpus is full of references to canon law and Scripture, it is only on relatively rare occasions that he refers to his own philosophical or theological ideas. Still, these latter references can by no means be considered insignificant, inasmuch as Ockham deploys several logical, ethical and even theological arguments in his polemical writings. In the *Dialogus inter magistrum et discipulum de imperatorum et pontificum potestate* (hereafter *Dialogus*), for example, he discusses examples of *fallacia figure dictionis* (fallacy of figure of speech)[152] and *amphibolia* (amphiboly).[153] Some passages of the *Opus nonaginta dierum* invoke his

---

à montrer que les esquisses théoriques du *Commentaire sur les Sentences* sont utilisées et développées dans le cadre des écrits politiques, avec une grande continuité." See also pp. 250, 270.

150 *Summulae in libros Physicorum* I, c. 25: "Totum nihil est aliud a partibus simul acceptis, id est, junctis et unitis. ... Compositum non est nisi omnes partes suae sed non semper, sed tunc solum quando sunt debito modo ordinatae et unitae quia ad diversa composita requiritur diversa unio partium. Quandoque enim requiritur quod partes sint simul localiter, quandoque quod sint indistantes, quandoque quod nihil sit medium, quandoque potest esse aliquod medium, sed requiritur certus ordo sicut plures homines faciunt unum populum." Cited by L. Baudry, 'Le philosophe et le politique dans Guillaume d'Ockham', 212 n. 6.

151 B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 4.

152 *Dialogus* 1.4.9, 1.5.5. In the latter passage, the Master answers the Student's question whether the proposition 'Any Christian can err against faith; therefore the whole community of Christians can err against faith' is valid as follows: "Many people say that such a mode of arguing is not valid but is a fallacy of a figure of speech, because it is a common fallacy of a figure of speech to move from a noun which is not collective to a collective noun. One example is this: any one of the people can be sustained by one piece of bread a day, so the people can be sustained by one piece of bread a day" [Nonne talis modus arguendi valet? Quilibet Christianus potest errare contra fidem; ergo tota Christianorum communitas potest errare contra fidem. … Talis modus arguendi, ut multi dicunt, non valet sed est fallacia figure diccionis, quia sepe a nomine quod non est collectivum ad nomen collectivum est fallacia figure diccionis, sicut hic: quilibet de populo potest sustentari uno pane in die, ergo populus potest sustentari uno pane in die].

153 *Dialogus* 3.1.2.17.

doctrine of morally indifferent acts.[154] Also in the *Opus nonaginta dierum*, Ockham makes use of two central elements of his theology in his argumentation, the principle of divine omnipotence and the distinction between *potentia Dei absoluta* (absolute power of God) and *potentia Dei ordinata* (ordained or ordered power of God).[155] And in the *Dialogus* he applies these theological doctrines to numerous ecclesiological problems.[156]

A more difficult and substantial question is whether Ockham's political and legal ideas reflect, and if yes, to what extent, his philosophical views. We have seen recently that Ockham sometimes related his metaphysical individualism to social entities already in the early philosophical works. Similarly, in the political writings he repeats over and over again that a community is not a real being but only an aggregate of real beings, i.e. individual persons.[157] Ockham's most interesting statements in this regard can be read in Chapter 6 and 62 of the *Opus Nonaginta Dierum*, where he attacks Pope John XXII for applying the canon law concept of corporation as a fictitious person (*persona ficta*) or imaginary person (*persona imaginaria*) to the Franciscan Order. In his bull *Quia vir reprobus*, John XXII merely asserted that the Order, being an imaginary person, could not actually use things but it had a right of using. The canonistic theory of '*persona ficta*' seems to be absolutely compatible with a nominalist ontology, for it starts from the supposition that only individuals are true persons.[158] But Ockham, because of misunderstanding the pope's view (and because he wants to refute every word of the bull), replies that to attribute a right to a person whom we declare incapable of performing acts implies a logical contradiction, and maintains that the Order is not imaginary but consists – just like the people or the Church – of true persons:

[154] *Opus nonaginta dierum* c. 58, c. 65, c. 123. Moreover, in Chapter 58 the moral indifference of the act of using a thing serves as an important argument to ground the concept of *simplex usus facti* (simple factual use) and to differentiate it from the right of using (*ius utendi*): "For every external act of using a temporal thing … is indifferent to a licit act and an illicit act, and so every such act is a simple use of fact, that is, is a use which can exist without any right" [Omnis enim actus exterior utendi re temporali … est indifferens ad actum licitum et illicitum: et ita omnis talis est simplex usus facti, hoc est, est usus, qui potest esse sine omni iure].

[155] *Opus nonaginta dierum* c. 95.

[156] *Dialogus* 1.5.2, 1.5.23, 1.5.31.

[157] *Opus nonaginta dierum* c. 6, *Opus nonaginta dierum* c. 62, *Octo quaestiones de potestate papae* 8.7, *De imperatorum et pontificum potestate* c. 27.

[158] B. Tierney, *The Idea of Natural Rights*, 122 n. 65.

> "When he [John XXII] says that a community is not a true person, they [the Franciscans] say that it is not one true person but many true persons. Accordingly, a people is many men gathered into one, as the community of the faithful is many faithful professing one faith … so the Brothers are the Order, and the Order is the Brothers. From this it follows evidently that the Order is not a person imaginary and represented, but is true real persons."[159]

However grotesque this piece of argumentation may be, it is illuminating insofar as it clearly shows that Ockham *qua* political thinker still adhered to the idea that all collectivities are reducible to their individual members. Even Tierney admits that this is one of the "intrusions of Ockham's nominalist philosophy into his polemical writings."[160]

I have mentioned earlier that McGrade pointed out "affinities" between Ockham's logic and political theory.[161] He argues, I think convincingly, that Ockham's political and legal philosophy "resulted partly from a way of looking at things which came quite naturally to a logician whose preferred response to general propositions was to search for adequate individual equivalents to them."[162] As in logic Ockham endeavoured to find for every general proposition an equivalent individual proposition containing no general terms at all, in a similar way in politics he proceeded by treating statements about social or political groups as statements about the individuals that constitute those groups.[163] And this in turn had a far-reaching influence on not only the way, but also the content of Ockham's argumentation:

[159] *Opus nonaginta dierum* c. 6: "Cum vero dicit quod communitas non gerit veram pesonam, dicunt quod communitas non est una vera persona, sed est plures verae personae. Unde populus est multi homines congregati in unam, sicut communitas fidelium est multi fideles unam fidem profitentes"; *Opus nonaginta dierum* c. 62: "ita Fratres sunt ordo et ordo est Fratres. Ex quo sequitur evidenter quod ordo non est persona imaginaria et repraesentata, sed Ordo est verae personae reales." This argument rests on a complete misunderstanding, since John XXII was very far from denying that the Order consisted of real persons.

[160] B. Tierney, *The Idea of Natural Rights*, 122 n. 65.

[161] For good discussions of Ockham's logic, see e.g. M. M. Adams, *William Ockham* (Notre Dame: University of Notre Dame Press, 1989), vol. I, pt. 2: 'Logic', 317-491; Ph. Boehner, 'Ockham's Theory of Supposition and the Notion of Truth', in *idem*, *Collected Articles on Ockham*, 232-67; G. B. Matthews, 'Ockham's Supposition Theory and Modern Logic', *The Philosophical Review* 73 (1964), 91-99; R. Price, 'William of Ockham and *suppositio personalis*', *Franciscan Studies* 30 (1970), 131-40; J. Corcoran and J. Swiniarski, 'Logical Structures of Ockham's Theory of Supposition', *Franciscan Studies* 38 (1978), 161-83.

[162] A. S. McGrade, 'Ockham and the Birth of Individual Rights', 164.

[163] *Ibid.*, 153, 156.

> "The clearest indication of which I am aware that Ockham did indeed regard political communities as identical with the individuals composing them is the sort of argument he typically gives in favour of one or another form of government. … In all of these arguments, it seems to me, we are dealing with a view of communal life as made up of interactions among concrete individuals, which can be facilitated or impeded by political action …, but which do not derive their essential character from anything supra-individual. And I know of no Ockhamist arguments which do call for us to assume a supra-individualistic conception of what a community is."[164]

Ockham's peculiar, logician's way of thinking is present in his political writings in another respect as well, namely in the form of a certain logical *jusqu'auboutisme*: he takes every discussion through to the ultimate conceivable position, however unlikely or ridiculous that may appear.[165]

The most obvious case of the reflection of Ockham's philosophical doctrines in his polemical works is that of his moral philosophy. Even the otherwise sceptical Tierney acknowledges that insofar as regards Ockham's ethical theory, "there is indeed a perfect coherence between his earlier and later thought", adding that "Ockham's teaching on the origin of property in the *OND* seems a precise exemplification of his rational moral theory."[166] I will examine Ockham's moral philosophy in detail soon in Part 1.2; nevertheless, two important qualifications have to be made in advance. First, it does not follow from this that the relation of Ockham's moral philosophy to his political and legal thought is altogether unproblematic.[167] Secondly, the Franciscan theologian's moral theory contains as many or more voluntarist than rationalist elements.

[164] *Ibid.*, 158.

[165] H. S. Offler, 'The "Influence" of Ockham's Political Thinking', 346. Offler illustrates this trait of the polemical works with the striking example of the lengthy discussion of the problem of heresy in Part 1, Book 5 of the *Dialogus*: "Christ's promises assure us that the Christian faith shall not fail. Does this mean that the pope cannot fall into heresy? No. Does it mean that the college of cardinals cannot fall into heresy? No. Or a general council or every member of the clerical body? No. Or … all male Christians? No: for the Christian faith can be saved in women … But among the whole multitude of rational Christian men and women is someone necessarily immune from error? A final 'No' marks the end of the line: Christ's promise that the Christian faith shall persist can be saved in baptized infants not yet capable of using reason."

[166] B. Tierney, *The Idea of Natural Rights*, 199.

[167] A. S. McGrade, for example, sees a tension between Ockham's moral and legal theory, but considers it apparent, not real. — A. S. McGrade, 'Natural Law and Moral Omnipotence', in P. V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: University Press, 1999), 273-301 at 273-74 and 286-87.

Before turning to this subject, there remains a rather complicated (and to a great extent speculative) question to answer. If there are really significant parallels between Ockham's philosophical-theological and political-legal ideas, why can we find only relatively few references to his early philosophical and theological doctrines in his political writings? In Morrall's view, Ockham did not apply "the destructive results of his philosophical reasoning" to political and ecclesiological problems, but consciously drew instead on traditional sources – the Bible and the teachings of the Church Fathers – in his polemical works.[168] Likewise, Tierney stresses the significance of Ockham's use of canon law texts and argues that Ockham seldom referred to his earlier philosophical and theological views because "he wanted to convince the whole Christian world of the pope's error. He could obviously do this more effectively by arguing from generally accepted principles than by relying on his own controversial and suspect innovations in philosophy."[169] As a consequence, "his political thinking was sometimes shaped more by merely tactical considerations than by any underlying metaphysical principles."[170]

However, the argument put forward by Tierney is Janus-faced. Formulated conversely: "it may well have been the practical fears of a controversial theologian in a hostile world which spurred Ockham to those efforts at autodidacticism in the study of canon law which *surface* so remarkably in his political works"[171], it supports the opposite hypothesis that on certain occasions at least, Ockham used the canonistic and biblical texts as an ornamental facade to hide some of his underlying philosophical assumptions and views.[172] Of course, as a prudent nominalist living in a world of realists and hoping to achieve important practical goals, if he could find political arguments both consistent with his own principles and capable of convincing a realist, he used those arguments.[173] As McGrade notes, it would be no more than a pleasant but illusory fancy "to imagine Ockham, in a happier time than

[168] J. B. Morrall, 'Some Notes on a Recent Interpretation', 338.

[169] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 4.

[170] B. Tierney, *The Idea of Natural Rights*, 171.

[171] H. S. Offler, 'The "Influence" of Ockham's Political Thinking', 345 (emphasis added).

[172] De Lagarde presents a much stronger version of this hypothesis. He suggests that the extensive use of traditional sources allowed Ockham on the one hand to dissimulate his true, radical intentions, and on the other to turn against the canonists their own weapons: "Il s'agit du plaidoyer d'un théologien contre les canonistes. Et c'est parce que les canonistes sont, selon Ockham, ses principaux adversaires qu'il entend les combattre de préférence avec leurs propres armes." — G. de Lagarde, *La naissance de l'esprit laïque*, 2nd ed., IV: 54. See also vol. V: 126-27, 269-70.

[173] A. S. McGrade, 'Ockham and the Birth of Individual Rights', 163.

his career in public life gave him, commenting on Aristotle's *Politics*, deploying invincible arguments to show that the Philosopher held, or at least should have held, a distinctively nominalistic conception of the *polis* and the common good."[174] Nonetheless, this is very far from proving that Ockham did not rely on his nominalist philosophical doctrines in his political works.

As a matter of fact, the contrary seems to be the case. McGrade accurately summarizes Ockham's views on politics and government:

> "The political element in human affairs becomes with him a means to the social existence of free men, but not the basis of the community or its end. …The proper beneficiaries of political thought and action are concrete individuals rather than abstract corporate wholes. … Especially in the secular sphere, he assesses governments instrumentally, in terms of their effectiveness in taking appropriate action for or, very often, against certain classes of individuals."[175]

On the basis of this instrumental approach, Ockham confers only negative, peacekeeping functions on the temporal power: the punishment of evildoers, the adjudication of disputes among subjects, and so on,[176] and conceives the promotion of virtue, unlike

[174] *Ibid.*

[175] A. S. McGrade, *The Political Thought of William of Ockham*, 85, 113; *idem.*, 'Ockham and the Birth of Individual Rights', 158.

[176] *Dialogus* 3.2.1.1; *Octo quaestiones de potestate papae* 3.3-8.The arguments that Ockham puts forward in favour of a secular world government in *Dialogus* 3.2.1.1 are highly illuminating: "The form of government most beneficial to the whole world is that by which the bad are restrained more easily, more justly, more severely, more effectively, and more salutariliy, and the good live more quietly among the bad. … Also, that form of government is best by which discord is removed and taken away from the totality of mortals most effectively and most perfectly, as far as is possible for the present life, and concord and justice chiefly preserved. … Also, that form of government is beneficial to the totality of mortals by which quarrels and litigations, to which the nature of mortals is inclined, are decided more equitably and more suitably … Moreover, that form of government or lordship is beneficial to the totality of mortals by which not only inferiors, but also superiors, if they do wrong, can justly be corrected." [Nam illud regimen est maxime universo mundo expediens per quod mali facilius iustius severius et efficacius ac salubrius coercentur et boni vivunt quietius inter malos. … Item, illud regimen est optimum per quod potissime et perfectissime, quantum est possibile pro praesenti vita, discordia ab universitate mortalium removetur et tollitur ac concordia et iustitia praecipue conservatur. … Item, illud regimen est expediens universitati mortalium per quod iurgia et litigia, ad quae prona est natura mortalium, aequius et convenientius deciduntur. … Praeterea, illud regimen seu dominium est expediens universitati mortalium per quod non solum inferiores sed etiam superiores, si deliquerint, iuste poterunt castigari.]

many medieval Aristotelian political thinkers, as an essentially spiritual function, thus belonging to the spiritual and not to the secular power.[177] This "minimal" character of the secular government can also be explained with another striking "political repercussion" of Ockham's philosophical individualism, viz. his strong concern for natural rights and personal liberty. He appears to regard freedom, again in contrast to medieval Aristotelians, not as a participation in a supra-individual whole, but as an individual freedom of action, a negative liberty.[178]

1.2 Ockham's Moral Theory

As we have seen, Ockham *qua* philosopher developed no legal philosophy. On the other hand, he possessed already a moral theory that could later serve for him as a starting point, when he set out to construct his natural law doctrine. So before analysing the *venerabilis inceptor*'s natural law theory, it may be expedient first to scrutinize his moral philosophy. The fundamental difficulty in the interpretation of Ockham's moral doctrine lies in the fact that it contains both voluntarist and rationalist elements, which seem to be hard (if not impossible) to reconcile. In his writings "we find, in intimate juxtaposition, the rationalist and voluntarist theories."[179] In Georges de Lagarde's elegant words:

> "Ainsi la morale occamiste apparaît-elle comme un jeu alterné où le voluntarisme et le rationalisme se répondent curieusement. Au départ, lorsque nous analysions la nature de la loi morale promulguée par Dieu, tout nous paraissait arbitraire et irrationel pur. En étudiant la moralité naturelle et le jeu de l'agir humain, nous avons vu la raison prendre une part de plus en plus importante dans la définition et l'orientation de la vie morale."[180]

It seems appropriate to start with the voluntarist side of Ockham's ethical theory. Ockham was an emblematic figure of the fourteenth-century philosophical reaction against the Aristotelian "necessitarianism" and "naturalism" of thirteenth-century scholasticism.[181]

[177] *Octo quaestiones de potestate papae* 3.8.

[178] A. S. McGrade, 'Ockham and the Birth of Individual Rights', 158 n. 12; *idem.*, *The Political Thought of William of Ockham*, 118-22, 204-5, esp. 119 n. 115.

[179] F. Oakley, 'Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition', *Natural Law Forum* 6 (1961), 65-83 at 70.

[180] G. de Lagarde, *La naissance de l'esprit laïque*, VI: 81.

[181] Étienne Gilson describes this theoretical reaction as a philosophical criticism made "in the name of theology, for theology, by theologians" who defended the liberty of Christian God against the Greek

Thus it is not surprising that throughout his works he exalts and lays great emphasis on free will, both divine and human. The former plays in particular an essential role in Ockham's moral philosophy, according to which the divine will has an absolute power to place moral obligation, and whatever God commands is by that fact good.[182] This is because "from the very fact that He wills something, it is done well and justly."[183]

Ockham's voluntarist conception of the moral law is closely connected with his insistence on divine omnipotence.[184] He differentiates between two kinds of divine power (more precisely two modes of speaking about it): *potentia Dei absoluta* and *potentia Dei ordinata*. This is a traditional, thirteenth-century scholastic distinction, the idea behind which may be traced back to Peter Damian in the eleventh century. Originally, it was used to assert that by his absolute power God could have done other things (e.g. He could have created a different world), than those he chose to do by his ordained power, and the phrase *potentia absoluta* denoted not a form of divine action but God's power or ability considered in the abstract, without reference to the created order. In this way, the dialectic inherent in this doctrine permitted "to affirm simultaneously the freedom and omnipotence of God

concept of natural necessity. In this context, to refer to the traditional principle of divine omnipotence, "c'était le dresser contre le nécessitarisme gréco-arabe de l'intelligible et, par voie de conséquence, contre tout ce que les théologies chrétiennes du xiiie siècle en avaient accueilli, fût-ce en le limitant." — É. Gilson, *La philosophie au Moyen Age: Des origines patristiques à la fin du XIVe siècle*, 2nd, rev. ed. (Paris: Payot, 1947), 609, 420, 653. Another precision should be made too: in Oxford as in Paris, the Franciscan supporters of voluntarism were already dominant at the end of the thirteenth century. — J. B. Korolec, 'Free Will and Free Choice', in N. Kretzmann *et al.* (eds.), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600* (Cambridge: University Press, 1982), 629-41 at 638.

[182] D. W. Clark, 'Voluntarism and Rationalism in the Ethics of Ockham', *Franciscan Studies* 31 (1971), 72-87 at 73-74.

[183] *In I Sententiarum* d. 17 q. 3: "eo ipso quod ipse vult, bene et iuste factum est." See also *In I Sententiarum* d. 14 q. 2: "ex hoc ipso quod vult, convenienter fit et non frustra."; *In I Sententiarum* d. 47 q. 1: "Deus non potest velle malum quia tunc posset esse malus; igitur non postest paecipere malum."; *In IV Sententiarum* qq. 3-5: "eo ipso quod Deus aliquid facit, iuste factum est."; *In IV Sententiarum* qq. 10-11: "eo ipso quod Deus vult hoc, est iustum fieri."

[184] Copleston, *A History of Philosophy*, vol. III: *Late Medieval and Renaissance Philosophy*, 104. Taina M. Holopainen especially emphasizes that "Ockham's view of God as omnipotent and absolutely free forms the theological basis for his ethical theory." — T. M. Holopainen, *William Ockham's Theory of the Foundation of Ethics* (Helsinki: Luther-Agricola-Society, 1991), 134.

and the reliability of the ordained orders of nature and grace."[185] The distinction of *potentia absoluta* and *potentia ordinata* was also accepted by Aquinas, who gave an exact formulation of it, making absolutely clear that in fact God never uses his absolute power and acts contrary to the rational order that He instituted:

> "God can do other things by His absolute power than those He has foreknown and pre-ordained He would do. But it could not happen that He should do anything which He had not foreknown, and had not pre-ordained that He would do, because *His actual doing* is subject to His foreknowledge and pre-ordination".[186]

Nevertheless, as Mary Anne Pernoud rightly notes, Aquinas's "decided emphasis upon the intellectual aspect of God" made this distinction only "a minor point in his overall thought".[187]

John Duns Scotus gave a radical twist to the doctrine. Relying on canonistic precedents,[188] he defined absolute and ordained power in juristic terms, and by drawing an analogy between God and man he argued that

> "in every agent acting intelligently and voluntarily that can act in conformity with an upright or just law but does not have to do so of necessity, one can distinguish between its ordained power and its absolute power. The reason is that either it can act in conformity with some right and just law, and then it is acting according to its ordained power …, or else it can act beyond or against such a law, and in this case its absolute power exceeds its ordained power …; therefore the jurists say that someone can act *de facto*, that is, according to his absolute power, or *de iure*, that is, according to his ordained legal power."[189]

[185] W. J. Courtenay, *Capacity and Volition: A History of the Distinction of Absolute and Ordained Power* (Bergamo: Lubrina, 1990), 13-14 and 15.

[186] *Summa theologiae* I q. 25 a. 5 ad 1: "Deus potest alia facere, de potentia absoluta, quam quae praescivit et praeordinavit se facturum, non tamen potest esse quod aliqua faciat, quae non praesciverit et praeordinaverit se facturum. Quia *ipsum facere* subiacet praescientiae et praeordinationi" (emphasis added).

[187] M. A. Pernoud, 'The Theory of the *Potentia Dei* according to Aquinas, Scotus and Ockham', *Antonianum* 47 (1972), 69-95 at 83.

[188] It were the canonists who first described the two powers with legal notions and drew a parallel between absolute divine power and the *plenitudo potestatis* of the pope.

[189] *Ordinatio* I d. 44 q. unica n. 3: "In omni agente per intellectum et voluntatem, potente conformiter agere legi rectae et tamen non necessario conformiter agere legi rectae, est distinguere potentiam ordinatam a potentia absoluta; et ratio huius est, quia potest agere conformiter illi legi rectae, et tunc secundum potentiam ordinatam …, et potest agere praeter illam legem vel contra eam, et in hoc est potentia absoluta,

In this "humanised" version, *potentia Dei absoluta* is not conceived any more as a mere "realm of initial capacity or potentiality without regard to action", but as a sphere of extraordinary divine action, as the unhindered ability of God the lawgiver to act outside the order He himself established.[190] This does not only mean that God can act independently from His laws, but also that He is able to prescribe a totally different set of laws.[191] According to Scotus, these new laws would also be right, "because no law is right except to the extent that it is set up by the divine will that accepts it", and in doing so God would still be acting ordinately, that is, within the limits of his ordained power.[192] As Marylin McCord Adams pertinently remarks, the explanation for this – at first sight perplexing – statement is quite simple: "An absolute lawgiver always acts according to his ordered power".[193] In Scotus's own words: "the law and the rightness of the law is in the power of the agent".[194] This opens the way for the 'operationalization' of divine absolute power: as Gijsbert van den Brink puts it, "clearly now the possibility should be conceded that God acts today or will act in the future by means of His *potentia absoluta*."[195] In contrast with Aquinas, who holds that being immutable, God chooses his plan of action for good, Duns Scotus suggests that God as lawgiver sets up one system of laws at one time and another at a later

---

excedens potentiam ordinatam …; ideo dicunt iuristae quod aliquis hoc potest facere de facto, hoc est de potentia sua absoluta, – vel de iure, hoc est de potentia ordinata secundum iura."

[190] W. J. Courtenay, *Capacity and Volition*, 98, 101-2.

[191] M. A. Pernoud, 'The Theory of the *Potentia Dei* according to Aquinas, Scotus and Ockham', 86.

[192] *Ordinatio* I d. 44 q. unica n. 8: "Ideo sicut potest aliter agere, ita potest aliam legem rectam statuere, – quae si statueretur a Deo, recta esset, quia nulla lex est recta nisi quatenus a voluntate divina acceptante est statua; et tunc potentia eius absoluta ad aliquid, non se extendit ad aliud quam ad illud quod ordinate fieret, si fieret: non quidem fieret ordinate secundum istum ordinem, sed fieret ordinate secundum alium ordinem, quem ordinem ita posset voluntas divina statuere sicut potest agere." *Ibid.*, n. 5: "Nec tunc potentia sua absoluta simpliciter excedit potentiam ordinatam, quia esset ordinata secundum aliam legem sicut secundum priorem".

[193] M. M. Adams, *William Ockham*, 2: 1192.

[194] *Ordinatio* I d. 44 q. unica n. 5: "in potestate agentis est lex et rectitudo legis". In his *Lectura* (I d. 44 q. unica n. 3), Scotus applies this argument to a human ruler, too. Centuries later, under James I's reign, this usage of *potentia absoluta* became extremely common. Cf. F. Oakley, 'Jacobean Political Theology: The Absolute and Ordinary Powers of the King', *Journal of the History of Ideas* 29 (1968), 323-46.

[195] G. van den Brink, *Almighty God: A Study of the Doctrine of Divine Omnipotence* (Kampen: Kok Pharos, 1993), 79. I borrow the term 'operationalization' from Heiko Augustinus Oberman; in this context, it refers to "the transition from the speculation about what God *could* have done to what he *actually* does 'extra ordinem'." — H. A. Oberman, '*Via Antiqua* and *Via Moderna*: Late Medieval Prolegomena to Early Reformation Thought', *Journal of the History of Ideas* 48 (1987), 23-40 at 39.

time. Consequently, "the scope of God's ordered power not only can but *does change* from time to time."[196]

After having examined these antecedents, it is time to turn to Ockham's use of the *potentia absoluta/ordinata* distinction. It is beyond doubt that Ockham employs it even more frequently than Scotus. But is this difference in quantity a reflection of a difference in quality? As a matter of fact, Ockham appears to oscillate between the traditional and the Scotian view.[197] His most detailed description of the distinction given in the *Quodlibeta septem* clearly betrays his hesitation. For the sake of clarity, I quote the passage at full length:

> "God is able to do certain things by his ordained power and certain things by his absolute power. This distinction should not be understood to mean that in God there are really two powers, one of which is ordained and the other of which is absolute. For with respect to things outside himself there is in God a single power, which in every way is God himself. Nor should the distinction be understood to mean that God is able to do certain things ordinately and certain things absolutely and not ordinately. For God cannot do anything inordinately.
>
> Instead, the distinction should be understood to mean that 'power to do something' is sometimes taken as 'power to do something in accordance with the laws that have been ordained and instituted by God', and God is said to be able to do these things by his ordained power. In an alternative sense, 'power' is taken as 'power to do anything such that its being done does not involve a contradiction', regardless of whether or not God has ordained that he will do it. For there are many things God is able to do that he does not will to do … And these things God is said to be able to do by his absolute power. In the same way, there are some things that the Pope is unable to do in accordance with the laws established by him, and yet he is able to do those things absolutely."[198]

[196] M. M. Adams, *William Ockham*, II: 1194-95 (my emphasis).

[197] Adams offers a thorough and thoughtful analysis of Ockham's "documented vacillation between the two accounts of ordered power" in her *William Ockham*, II: 1186-1207.

[198] *Quodlibeta septem* VI q. 1 a.1: "quaedam potest Deus facere de potentia ordinata et aliqua de potentia absoluta. Haec distinctio non est sic intelligenda quod in Deo sint realiter duae potentiae quarum una sit ordinata et alia absoluta, quia unica potentia est in Deo ad extra, quae omni modo est ipse Deus. Nec sic est intelligenda quod aliqua potest Deus ordinate facere, et aliqua potest absolute et non ordinate, quia Deus nihil potest facere inordinate. Sed est sic intelligenda quod 'posse aliquid' quandoque accipitur secundum leges ordinatas et institutas a Deo, et illa dicitur Deus posse facere de potentia ordinata. Aliter accipitur 'posse' pro posse facere omne illud quod non includit contradictionem fieri, sive Deus ordinavit

On the one hand, Ockham's insistence on the unity of God's power – in number and in its ordinate character – is a traditional trait of his definition.[199] But on the other hand, he follows Scotus in using legal terminology and in appealing to the dangerous analogy between divine and human lordship.[200] And although we can take it for granted that unlike the canonist Hostiensis, Ockham does not apply *potentia absoluta* to papal power in order to support the extraordinary power of the pope to act apart from his laws,[201] it is far from being clear that by saying that "God cannot do anything inordinately", Ockham means – as Aquinas did – that God never actually acts against the order He created, or – like Scotus – that it is within God's power to do so without acting illegally. In Courtenay's interpretation, Ockham did not consider *potentia Dei absoluta* as an active power and "never seriously entertained the notion of a radical and sudden substitution of some other order in place of the present one. All his discussions of this point, as with Thomas, only highlight God's ability to *have acted* otherwise."[202] However, several texts seem to contradict this view and

---

se hoc facturum sive non, quia multa potest Deus facere quae non vult facere … et illa dicitur Deus posse de potentia absoluta. Sicut papa aliqua non potest secundum iura statua ab eo, quae tamen absolute potest."

[199] The ordinateness of both powers of God is also made explicit in his other long treatment of the distinction, to be found in *Summa logicae* 3.4.6: "Item, talis propositio 'Deus per suam potentiam absolutam potest aliquem acceptare sine gratia sed non per suam potentiam ordinatam' multiplex est. Unus sensus est quod Deus per unam potentiam, quae est absouta et non ordinata, potest acceptare aliquem sine gratia, et per unam aliam potentiam, quae est ordinata et non absoluta, non potest acceptare eum, quasi essent duae potentiae in Deo per quarum unam posset hoc et non per aliam. Et iste sensus est falsus. Aliter accipitur improprie, ut ponatur ista propositio pro ista oratione: Deus potest acceptare aliquem sine gratia informante, quia hoc non includit contradictionem, et tamen ordinavit quod hoc numquam est facturus. Et iste sensus verus est."

[200] This tendency is even more apparent in the *Opus nonaginta dierum* (c. 95), where Ockham explains the differentiation of the two powers by pointing out the ambiguity in the word 'posse', which "is taken equivocally in writings that speak of God, just as that word is taken equivocally when we speak of men. For in one way we are said to be able to do the things we can do *de iure* … In another way we are said to be able to do the things that we absolutely can do, whether well or badly" [verbum 'potest' accipitur aequivoce in scripturis de Deo loquentibus: quemadmodum idem verbum, cum loquimur de hominibus, accipitur aequivoce. Uno enim modo dicimur illa posse, quae de iure possumus … Aliter dicimur posse illa quae absolute possumus sive bene sive male]. It should be added, however, that contrary to Scotus, Ockham associates *potentia absoluta* with the first meaning.

[201] W. J. Courtenay, 'The Dialectic of Omnipotence in the High and Late Middle Ages', in T. Rudavsky (ed.), *Divine Omniscience and Omnipotence in Medieval Philosophy: Islamic, Jewish and Christian Perspectives* (Dordrecht: Reidel 1984), 243-69 at 252, 255-56.

[202] W. J. Courtenay, *Capacity and Volition*, 120.

to attest Ockham's "predilection for exceptions to the established rules *de potentia ordinata*."[203] To take the nearest example, Ockham illustrates the definition of the distinction quoted above with the sacrament of baptism. He affirms that in the time of the Old Law some entered the kingdom of God without baptism, but "what was at that time possible in accordance with the laws then instituted is not now possible in accordance with the law that has been instituted since that time, even though it is possible in an absolute sense."[204] This assertion evidently implies that God has changed the laws governing salvation, what He could do only by his absolute power. Another glaring example is Ockham's statement that as it is clear from the biblical story of Jacob and Esau, out of two persons equal in all their natural and supernatural features, God can *de potentia absoluta* accept the one and reprobate the other.[205] As Ockham declares this to be contrary to the (present) ordinances of God, the case is either that God sometimes acts inordinately, or that the ordinances in force in the days of Jacob and Esau were different, which involves ultimately the same conclusion.[206] While reading these (and certain other) passages, one is easily tempted to think – together with van den Brink – that in Ockham, "despite all assurances to the contrary, the distinction obviously does refer to two distinct powers in God, both of which can be actualized at any time".[207]

This distinction has a crucial consequence in the realm of ethics. As David W. Clark has accurately highlighted: "Since the metaphysical basis of morality is the divine freedom and omnipotence, the validity of moral norms is contingent and changeable."[208] Ockham asserts time and again that although God established a moral order, by virtue of His abso-

[203] H. A. Oberman, *The Harvest of Medieval Theology: Gabriel Biel and Late Medieval Nominalism* (Cambridge, Mass.: Harvard university Press, 1963), 192.

[204] *Quodlibeta septem* VI q. 1 a.1: "Cum enim Deus sit aequalis potentiae nunc sicut prius, et aliquando aliqui introierunt regnum Dei sine omni baptismo, sicut patet de pueris circumcisis tempore Legis defunctis antequam haberent usum rationis, et nunc est hoc possible. Sed tamen illud quod tunc erat possible secundum leges tunc institutas, nunc non est possible secudum legem iam institutam, licet absolute sit possible."

[205] *Quaestiones variae* q. 1: "Quia si sint duo aequales in omnibus naturalibus et omnibus habitibus supernaturalibus et actibus, potest [Deus] primum acceptare et alium reprobare, licet non de potentia ordinata. Sicut patet de Iacob et Esau".

[206] M. M. Adams, *William Ockham*, II: 1204-5. Adams proposes a third hypothesis, too, according to which the laws of redemption are not general after all.

[207] G. van den Brink, *Almighty God*, 82. For similar passages, see *In IV Sententiarum* qq. 10-11, *In I Sententiarum* d. 41, *Opus nonaginta dierum* c. 95.

[208] D. W. Clark, 'Voluntarism and Rationalism in the Ethics of Ockham', 78.

lute power He could establish or could have established another moral order or he could at any time order what he has previously forbidden.[209] Thus the created moral order is radically contingent, insofar as not only its existence but also its essence and character depend on the divine creative and omnipotent will.[210] Ockham does not hesitate to draw the logical conclusions of this premise. He chooses, with the *jusqu'auboutisme* of the true logician, the most drastic examples to show that moral obligation is freely constituted by the divine wish:

> "I say that although hate [of God], theft, adultery and the like have a bad circumstance annexed *de communi lege*, in so far as (*quatenus*) they are done by someone who is obliged by divine precept to the contrary, nevertheless, in respect of everything absolute in those acts they could be done by God without any bad circumstance annexed. And they could be done by the wayfarer even meritoriously if they were to fall under a divine precept, just as now in fact their opposites fall under divine precept . . . But if they were thus done meritoriously by the wayfarer, then they would not be called or named theft, adultery, hate, etc., because those names signify such acts not absolutely but by connoting or giving to understand that one doing such acts is obliged to their opposites by divine precept."[211]

[209] *In II Sententiarum* q. 15, *In I Sententiarum* dd. 47-48, *Quodlibeta septem* VI q. 1, *Breviloquium 5.2*.

[210] Copleston, *A History of Philosophy*, III: 104.

[211] *In II Sententiarum* q. 15: "dico quod licet odium [Dei], furari, adulterari et simila habeant malam circumstantiam annexam de communi lege, quatenus fiunt ab aliquo qui ex praecepto divino obligatur ad contrarium, tamen quantum ad omne absolutum in illis actibus possunt fieri a Deo sine omni circumstantia mala annexa. Et etiam meritorie possunt fieri a viatore si caderent sup praecepto divino, sicut nunc de facto eorum opposita cadunt sub praecepto. … Sed si sic fierent a viatore meritorie, tunc non dicerentur nec nominarentur furtum, adulterium, odium etc., quia ista nomina significant tales actus non absolute sed connotando vel dando intelligere quod faciens tales actus per praeceptum divinum obligatur ad oppositum." Translated by John Kilcullen in his 'Natural Law and Will in Ockham', *History of Philosophy Yearbook* 1 (1993), 1-25, republished on the webpage http://www.humanities.mq.edu.au/Ockham/wwill.html. The new critical edition of the *Reportatio* omits – on the basis of the original manuscripts – the word '*Dei*' from the first sentence. According to Kilcullen, this corrected version of the text "does not bear on the question what would happen if God commanded someone to hate Him – it refers to a divine command to hate some human being." But as both the preceding and following passages, as he himself notes, relate to the problem of hatred of God, which appears in numerous other texts of Ockham as well, we have good reasons to suppose that Ockham means it this way. Cf. L. Freppert, *The Basis of Morality according to William Ockham* (Chicago: Franciscan Herald Press, 1988), 159; F. Oakley, 'The Absolute and Ordained Power of God in Sixteenth- and Seventeenth-Century Theology', *Journal of the History of Ideas* 59 (1998), 437-61 at 443 n. 21. For similar passages in

Scotus maintains that the second table of the Decalogue, having to do with neighbour-love, does not belong to the natural law strictly speaking and hence God can dispense from its precepts.[212] Ockham extends this claim with the possibility of a divine command to hate God to the whole Decalogue. The only limit of God's omnipotence, he says, is the principle of non-contradiction: God can do or order anything which does not involve logical contradiction.[213]

As God is not bound by the laws of the moral order created by Himself, every moral dictate becomes contingent; the only permanent, unchangeable and indispensable norm of morality is the will of God. Therefore a creature must obey God by willing whatever God wants to be willed.[214] The only necessarily virtuous act is to love God above all and for His own sake which means to love what God wants to be loved and to hate what God wants to be hated.[215] God on the other hand (who is always just and cannot will evil) is under no obligation. God is debtor to no one, and since He has no obligation to violate, He cannot act unjustly or sin no matter what He does.[216] Ockham denies that moral norms can be read off of human natural tendencies.[217] He emphasizes that acts are good and just, or bad and unjust, not of their own nature or essence, but simply because God has prescribed or forbidden them.[218] The nature of an act or an agent does not determine the moral quality of behaviour. Instead, the divine evaluation of an act produces its moral status. Value terms such as 'just' and 'meritorious' do not indicate a natural quality of an act. The term 'evil' simply indicates an act within the power of the will whose opposite is required by a superior.[219] All these value terms reflect the absolute freedom of God to constitute (or not)

Ockham's academic works, see *In I Sententiarum* d. 48, *In IV Sententiarum* q. 16, *Quodlibeta septem* III q. 14, *De connexione virtutum* a. 4.

[212] *Ordinatio* III d. 37 q. 1.

[213] *In II Sententiarum* q. 15, *In I Sententiarum* d. 17, *In I Sententiarum* d. 43.

[214] *Quodlibeta septem* III qq. 14-15, *In I Sententiarum* d. 48, *Quaestiones variae* q. 8.

[215] *Quodlibeta septem* III q. 14, *De connexione virtutum* a. 4, *In I Sententiarum* d. 1 q. 4.

[216] *In I Sententiarum* d. 14 q. 2, *In I Sententiarum* d. 17 q. 3, *In II Sententiarum* qq. 3-4, *In II Sententiarum* q. 15, *In IV Sententiarum* q. 3-5, *In IV Sententiarum* qq. 10-11, *Quaestiones variae* qq. 1, 8.

[217] M. M. Adams, 'The Structure of Ockham's Moral Theory', *Franciscan Studies* 46 (1986), 1-34 at 4.

[218] *In II Sententiarum* 15, *In II Sententiarum* qq. 3-4.

[219] *In I Sententiarum* d. 47: "Ad secundum dicerent quod idem actus est bonus tali bonitate et malus, sicut idem actus est iustus quia fit ab uno iuste et est iniustus quia fit ab alio iniuste. Unde si ab aliquo superiore idem praecipiatur uni subdito ut fiat, et alteri prohibeatur ne fiat, si uterque illorum faciat illud, idem opus erit iustum quia fit ab uno obediente praecepto superioris, et erit iniustum quia fit ab alio transgrediente praeceptum superioris, et ita idem totaliter potest fieri ab uno iuste et ab alio iniuste. Et

any possible act as morally valuable. An act is just if God orders that act. An act is unjust if God prohibits that act.[220] If an act is neither ordered nor prohibited by the divine will, then it is a morally neutral, 'indifferent' act. In sum, God can command virtually anything, and no matter what command is issued by God, the human will must conform. In the light of this, it is not surprising that de Lagarde concludes somewhat exasperatedly is his study of Ockham's moral theory that "au terme de cette analyse, nous sommes donc convaincus du caractère arbitraire, irrationnel et totalement extérieur que prend la loi morale à l'égard de l'homme."[221]

Following the Franciscan philosophical tradition, Ockham emphasizes the role of not only divine but also human will in his ethics. Like Duns Scotus, Ockham discerns a sharp contrast between the order of nature and the order of liberty, and by stressing human free will, he places man in the order of liberty.[222] Accordingly, he removes every natural tendency and necessity from the human will as inconsistent, even antithetical, to the freedom required for morality,[223] and he asserts that the individual's free volitions are, strictly speaking, the only objects of moral evaluation.[224] Ockham affirms that the will is not naturally determined to choose in accordance with intellectual cognitions nor by any sensory acts; if it were, its actions would not be within its power.[225] This means that the will is a free and active force, which is capable to desire or not to desire whatever is presented to it or

---

sicut idem totaliter potest fieri ab uno iuste ed ab alio iniuste, ita idem actus totaliter fit ab homine male et a deo iuste et bene."

[220] *In IV Sententiarum* qq. 10-11: "Quia peccatum, ut dictum est, non dicit aliud nisi actum aliquem commissionis vel omissionis ad quem homo obligatur, propter cuius commissionem vel omissionem obligatur ad poenam aeternam. Deus autem ad nullum actum potest obligari, et ideo eo ipso quod Deus vult hoc, est justum fieri."

[221] G. de Lagarde, *La naissance de l'esprit laïque*, VI: 63.

[222] J. B. Korolec, 'Free Will and Free Choice', 638. The significance of the Franciscan philosophical tradition in Ockham's moral theory is particularly stressed by L. Freppert and M. M. Adams. Cf. L. Freppert, *The Basis of Morality according to William Ockham*; M. M. Adams, 'The Structure of Ockham's Moral Theory'.

[223] D. W. Clark, 'William of Ockham on Right Reason', *Speculum* 48 (1973), 13-36 at 20-21.

[224] In *I Sententiarum* Prol. q. 10, In *III Sententiarum* q. 11, *De connexione virtutum* a. 1, *Quodlibeta septem* III q. 14.

[225] *In IV Sententiarum* q. 16.

dictated to it by reason and can act against habit and inclination.[226] The will can choose or not choose good; it is even free to will or not to will happiness.[227]

But Ockham's ethical theory has another, rationalist side as well. He explains the connection of virtues under Aristotelian influence,[228] and he makes frequent use of the scholastic concept of *recta ratio* (right reason).[229] However ambitious, Ockham's vision of human free will is balanced by a consistent portrait of reason as the proper rule of volition.[230] He repeatedly asserts that to consider free actions as right or wrong requires criteria beyond those which identify freedom: "In order for the will to elicit a right act, some right reason is necessarily required in the intellect."[231] In contrast with the divine will, which is a right will in and by itself, and hence it is its own directing norm, the human will, since it can act either rightly or evilly, requires some directing reason as an external rule of action in order to act rightly.[232] Ockham maintains that *recta ratio* is a norm of morality, and a source of moral obligations. A precept is not morally binding upon a moral agent until a conscientious judgment considers the precept to be true: "It is impossible that some act of the will elicited against conscience and against the dictate of right reason, whether right or erroneous, be virtuous."[233] Moreover, a person must conform his actions to the dictates of right reason for the sake of right reason, inasmuch as "no act is perfectly virtuous unless

[226] *Ibid.* See also *In III Sententiarum* q. 7, *In III Sententiarum* q. 11.

[227] In *I Sententiarum* Prol. q. 10, In *I Sententiarum* d. 10 q. 2, *In II Sententiarum* qq. 3-4, *In IV Sententiarum* q. 16, Quaestiones variae q. 8, *Quodlibeta septem* III q. 19.

[228] In the *De connexione virtutum*, Ockham analyses morality along generally Aristotelian lines. Cf. Rega Wood's commentary in her *Ockham on the Virtues*, 191-282.

[229] The phrase '*recta ratio*' had a generic and flexible meaning in scholastic philosophy : its manifestations included *synderesis* (knowledge of general norms), *prudentia* (knowledge of particular norms) and *conscientia* (knowledge of personal duties). Ockham, otherwise sensitive to problems of terminology, neglected to explain the exact meaning of the term. — D. W. Clark, 'William of Ockham on Right Reason', 13.

[230] *Ibid.*, 22.

[231] Quaestiones variae q. 8: "ad hoc quod actus rectus eliciatur a voluntate necessario requiritur aliqua recta ratio in intellectu."

[232] *Ibid.*: "illa voluntas quae potest, quantum est de se, indifferenter bene agere et male, quia de se non est recta, necessario ad hoc quod recte agat, indiget aliqua regula dirigente alia a se. Hoc patet, quia ideo voluntas divina non indiget aliquo dirigente quia ipsa est prima regula directiva et non potest male agere. Sed voluntas nostri et huiusmodi quod potest recte et non recte agere. Igitur indiget aliqua ratione recta dirigente."

[233] *Ibid.*: "impossibile est quod aliquis actus voluntatis elicitus contra conscientiam et contra dictamen rationis – sive rectum sive erroneum – sit virtuosus."

by that act the will wills a dictate of right reason on account of its being a dictate of right reason".[234]

In one place Ockham defines 'good' as "a being desirable according to right reason"[235]. Elsewhere he mentions right reason as a synonym of prudence, writing that "it is impossible for moral virtue to exist without right reason which is an act of prudence."[236] And *prudentia*, strictly speaking, indicates those moral judgments which are based upon the experience of a moral agent.[237] In addition, in the *Dialogus* Ockham refers to natural reason that in no case fails, offering the Decalogue's prohibitions of adultery and bearing false witness as examples of immutable, invariable moral precepts: "For, in one way, that is called natural law which is in conformity with natural reason that in no case fails, such as 'Do not commit adultery', 'Do not lie', and the like".[238] In a word, as Tierney rightly observes, "for Ockham as for other scholastic philosophers ... the term right reason did not mean merely ratiocination (or 'reckoning' as Hobbes would put it)."[239]

A highly important rationalist element of Ockham's moral theory is his insistence that men can have demonstrable, necessary knowledge regarding morality, and therefore a demonstrative moral science is possible. Ockham affirms that there are universal moral principles which are necessarily true and evident to reason. Neither their validity nor their meaning depends upon divine commands.[240] For example, the dictate that 'the will should conform itself to right reason' is a self-evident principle.[241] Such general norms are known *per se* so that when the terms of these principles are apprehended, the intellect immediately and necessarily consents to them as true. Furthermore, such principles can serve as the

[234] *De connexione virtutum* a. 4: "nullus actus est perfecte virtuosus, nisi voluntas per illum actum velit dictatum a recta ratione propter hoc quod est dictatus a recta ratione". See also *In III Sententiarum* q. 12.

[235] *In I Sententiarum* d. 2 q. 9: "bonum est ens appetibile secundum rectam rationem".

[236] *In IV Sententiarum* q. 5: "impossibile est virtutem moralem esse sine recta ratione quae est actus prudentiae."

[237] *De connexione virtutum* a. 2.

[238] *Dialogus* 3.2.3.6: "Uno enim modo dicitur ius naturale illud quod est conforme ratione naturali quae in nullo casu fallit, sicut est 'Non moechaberis', 'Non mentieris', et huisusmodi". Similar statements can be found in some of Ockham's other political works, too. See e.g. *Opus nonaginta dierum* c. 99, *Octo quaestiones de potestate papae* 1.12.

[239] B. Tierney, *The Idea of Natural Rights*, 99.

[240] D. W. Clark, 'William of Ockham on Right Reason', 27-28.

[241] *Quodlibeta septem* II q. 14: "quia multa sunt principia per se nota in morali philosophia; puta quod voluntas debet se conformare rectae rationi, omne malum vituperabile est fugiendum, et huiusmodi."

premises of a demonstration.[242] This implies that the basic principles of natural morality can be discerned by human reason, and men have anything needed for an objective, non-positive science of morals.[243] Ockham divides moral doctrine into two parts: non-positive and positive moral sciences. Non-positive moral science "directs human acts apart from any precept of a superior, in the way that principles known either *per se* or through experience direct them – principles that Aristotle talks about in moral philosophy, e.g., that everything that is right is to be done and everything that is wrong is to be avoided, etc."[244] By contrast, positive moral science "is the science that contains divine and human laws that obligate one to pursue or to avoid what is neither good nor evil except because it is commanded or prohibited by a superior whose role it is to establish laws."[245] According to M. M. Adams, regarding the former, Ockham upholds the Aristotelian ideal of rational self-government and considers this moral science as "the surest of all the sciences".[246]

The question now arises: how to reconcile the voluntarist and rationalist elements of Ockham's moral theory? It is clear that Ockham seeks to include both the absolute freedom and power of God and human autonomy and rationality within his system of ethics. But how to reconcile a divine command ethics with a demonstrative science of morals? According to certain commentators of Ockham's moral thought, this is simply not possible. David W. Clark, for instance, argues that "Ockham has no ethical 'system' ... Ockham's understanding of morality has no formal or systematic unity."[247] "There are aspects of Ockham's ethic which might be called authoritarian or voluntaristic; other facets of his system are better classified as rationalistic. However, asserting that voluntarism or rationalism is the fundamental character of Ockham's doctrine of morality is unwarranted."[248] On the

[242] *Ibid.*: "notitia deducens conclusiones syllogistice ex principiis per se notis vel per experientiam scitis est demonstrativa".

[243] M. M. Adams, 'The Structure of Ockham's Moral Theory', 15.

[244] *Quodlibeta septem* II q. 14: "Scientia moralis non positiva est illa quae sine omni praecepto superioris dirigit actus humanos; sicut principia per se nota vel nota per experientiam sic dirigunt, sicut quod omne honestum est faciendum, et omne inhonestum est fugiendum, et huiusmodi, de quibus loquitur Aristoteles in morali philosophia." See also *Quaestiones variae* q. 6 a. 10.

[245] *Quodlibeta septem* II q. 14: "Scientia moralis positiva est illa quae continet leges humanas et divinas, quae obligant ad prosequendum vel fugiendum illa quae nec sunt bona nec mala nisi quia sunt prohibita vel imperata a superiore, cuius est leges statuere."

[246] M. M. Adams, 'The Structure of Ockham's Moral Theory', 33.

[247] D. W. Clark, 'William of Ockham on Right Reason', 35.

[248] D. W. Clark, 'Voluntarism and Rationalism in the Ethics of Ockham', 81-82. Frederick Copleston suggests in a similar manner that two independent systems of ethics can be found in Ockham's philosophy. One

other hand, it should be stressed that the interpretation of the *venerabilis inceptor*'s ethical theory can be decisive of his natural law theory: while the voluntarist elements of Ockham's moral philosophy seem to undermine the rationality and stability of natural law, a demonstrative, non-positive moral science appear to provide an adequate base for a natural law doctrine.[249]

One of the questions of interpretation is raised by the problem of the relation between human right reason and free will. First of all, it should be mentioned that for Ockham intellect and will are not really distinct. On the contrary, Ockham insists that intellect and will are really the same as each other and as the intellectual soul. The difference lies not in the reality of the powers but in the different connotations by the terms 'intellect' and 'will'.[250] As regards their concrete relation: on the one hand, Ockham claims that the obligation to follow right reason is known *per se*, without revelation and is binding without the support of a superior will. Therefore an act of will is never virtuous unless it is in conformity with right reason.[251] And even divine commands must be affirmed as true moral rules before they bind the creature. But on the other hand, he asserts that a morally virtuous act has two components: "no one acts virtuously unless he acts knowingly and freely."[252] First, an act of prudence "is an efficient cause, necessarily requisite to an act of virtue".[253] Secondly, only acts of will can be morally virtuous, because only voluntary acts are imputable; and the will can act in accordance with right reason *or not*: "if a virtuous act were necessarily posited when right reason had been posited, it would necessarily conform to right reason, and thus that act would not be primarily virtuous".[254] That is to say, Ockham clearly maintains, in

is an "authoritarian" and "ultra-personal" conception of the moral law, the other is a "lay" or "non-theological" ethics. The former is offered by Ockham *qua* theologian, whereas he advances the latter *qua* philosopher: "The authoritarian conception of morality expresses Ockham's conviction of the freedom and omnipotence of God as they are revealed in Christianity, while the insistence on right reason would seem to represent the influence on his thought of Aristotle's ethical teaching and of the moral theories of his mediaeval predecessors." — F. Copleston, *A History of Philosophy*, III: 107-9.

[249] See A. S. McGrade, 'Natural Law and Moral Omnipotence'.

[250] *In II Sententiarum* q. 20.

[251] *De connexione virtutum* a. 4: "stante ordinatione quae nunc est, nullus actus est perfecte virtuosus nisi eliciatur conformiter rectae rationi actualiter inherenti."

[252] *De connexione virtutum* a. 3: "nullus virtuose agit nisi scienter agat et ex libertate."

[253] *Ibid.*: "Si quaeras de actu prudentiae, … respondeo quod est causa efficiens necessario requisita ad actum virtuosum, sine qua impossibile est actum esse virtuosum, stante ordinatio divina quae nunc est".

[254] *Ibid.*: "si actus virtuosus necessario poneretur posita recta ratione, necessario conformaretur sibi, et sic ille actus non esset primo virtuosus".

line with the Franciscan tradition, that human will is a free and active force, which is independent of the intellect in the sense that it may freely choose or reject whatever object is presented or dictated to it by the intellect.[255]

What concerns us above all is the relationship of absolute divine freedom and human rationality. On the one hand, as we have seen above, divine commands must be affirmed as true moral rules by right reason. On the other hand, in Ockham's moral theory divine will, as the ultimate norm of morality, stands behind right reason and is superior to it, in at least three senses. First, although the principle 'the will should conform itself to right reason' is a self-evident practical principle, we are obliged to obey the dictates of *recta ratio* primarily because God commanded so. The reason why an act contrary to conscience or right reason is wrong is that "such an act would be elicited against the divine precept and the divine will commanding that an act should be elicited in conformity with right reason".[256] In other words, the ultimate and sufficient reason why we ought to follow right reason or conscience is that God wills that we should do so.[257] Some of Ockham's successors, namely Gregory of Rimini and Gabriel Biel, maintain the legitimacy of the dictate of right reason as independent of the divine will. Their defence of the authority of *recta ratio* already foreshadows the famous "impious hypothesis" of Hugo Grotius. But Ockham's doctrine of right reason by no means repudiates a theological foundation.[258] The *doctor plus quam subtilis* takes not only right reason but also divine omnipotence seriously – the most seriously.

Secondly, as Taina M. Holopainen underlines, right reason "dictates to will what God wills to be willed."[259] The negative precept 'no one should be induced to do anything contrary to the precept of his God' is known *per se*, and right reason informed by revelation issues in addition the positive dictate that 'everything that pleases God should be done'.[260] The paradoxical character of this situation lies in the fact, as M. M. Adams remarks, that "*autonomous* self-government commands *heteronomous* subjection to the will of God."[261]

[255] J. B. Korolec, 'Free Will and Free Choice', 635, 638.

[256] *Quaestiones variae* q. 8: "quia talis eliceretur contra praeceptum divinum et voluntatem divinam volentem talem elicere actum conformiter rectae rationi."

[257] F. Copleston, *A History of Philosophy*, III: 109.

[258] D. W. Clark, 'William of Ockham on Right Reason', 17-19.

[259] T. M. Holopainen, *William Ockham's Theory of the Foundation of Ethics*, 147.

[260] *De connexione virtutum* a. 3.

[261] M. M. Adams, 'Ockham's Individualisms', 15.

Thirdly, the dictates of right reason are normative propositions known naturally or by revelation. Experiential, conceptual or revealed evidence can provide and verify moral directives. And Ockham decides apparent conflicts between laws known naturally and divine laws in favour of the revealed norms.[262] The last word lies with the divine will, for it is rather "by the very fact that the divine will wishes it that right reason dictates what is to be willed."[263] As it is always rational to obey a divine command, an agent who both does what right reason dictates, simply and precisely because right reason dictates it, and recognizes a divine command will obey the divine command on the ground that it is rational to do so, even if the recognition of the command depends on faith or revelation.[264] Moreover, the moral agent cannot refer even to the self-evident principles of demonstrative moral science as substantial objections against a divine command, since these principles have an *a priori* or formal character. These propositions are true, but – being composed of connotative terms – they are "contentless".[265] Thus Ockham's moral theory opens the way to a system of 'theological positivism'. Since revealed laws take precedence over naturally known norms, and revealed laws are contingent decrees of God, the truth value of a dictate of right reason becomes mutable.[266]

Part 2: Natural Law and Natural Rights

2.1 Natural Law: God's Will or Human Rationality?

As we have seen above, the free, omnipotent and contingent will of God presents in Ockham's moral theory a considerable danger on the rationality and stability of natural law. Furthermore, there are other important elements of Ockham's philosophy, namely his nominalist metaphysics, his theory of relations and his non-teleological natural philosophy which do not seem to be favourable to natural law either.

[262] D. W. Clark, 'William of Ockham on Right Reason', 15. See e.g. *In I Sententiarum* Prol. q. 10: "nulla ratio recta potest dictare quod inimicus est odiendus contra divinum praeceptum."

[263] *In I Sententiarum* d. 41: "omnis voluntas recta est conformis rationi rectae, sed non semper est conformis rationi rectae praeviae quae ostendat causam quare debet voluntas hoc velle. Sed eo ipso quod voluntas divina hoc vult, ratio recta dictat quod est volendum."

[264] A. S. McGrade, 'Natural Law and Moral Omnipotence', 282.

[265] D. W. Clark, 'Voluntarism and Rationalism in the Ethics of Ockham', 85.

[266] D. W. Clark, 'William of Ockham on Right Reason', 15-16.

Thus many commentators argue that Ockham's philosophical nominalism and voluntarism preclude the development of a coherent natural law doctrine: while his nominalism excludes a belief in universal immutable principles, his voluntarism minimizes or precludes the possibility of a natural morality. Francis Oakley, for instance, suggests that "it seems impossible to extract" form Ockham's philosophical and political works "a coherent interpretation of the nature of morality and hence a clear doctrine of natural law. In both we find, in intimate juxtaposition, the rationalist and voluntarist theories, and no peace can be found to grow between these antinomies."[267] Frederick Copleston holds that in Ockham "men, without revelation, are able to discern the moral law in some sense. In this case they can presumably discern a prudential code or a set of hypothetical imperatives ... but they could not discern an immutable natural law, since there is no such immutable natural law, nor could they know, without revelation, whether the acts they thought right were really the acts ordered by God."[268] Villey goes so far as to assert that all what remains of the natural law tradition in the *venerabilis inceptor*'s thought is "un respect apparent et verbal" of the term.

> "C'est que l'authentique droit naturel ne saurait entrer dans l'optique du nominalisme; celui-ci est impuissant même à le concevoir. Je ne vois plus rien subsister du droit naturel, au terme de cette discussion théorique d'Occam; rien si ce n'est le mot."[269]

Arthur S. McGrade, on the other hand, sees no necessary contradiction between divine will and rational natural law. In his view, "Ockham's emphasis on obedience to God as a

[267] F. Oakley, 'Medieval Theories of Natural Law', 70.

[268] F. Copleston, *A History of Philosophy*, III: 108. A stronger version of this view can be found in numerous histories of natural law. Heinrich Rommen, for instance, claims that Ockham's doctrine of natural law leads "to pure moral positivism, indeed to nihilism. The will is the nobler faculty; the intellect is but the ministering torch-bearer of the will, which is the master. ... God cannot sin because no law stands above Him, not because it is repugnant to His holiness. Hence there exists no unchangeable *lex naturalis*, no natural law that inwardly governs the positive law. Positive law and natural law, which indeed is also positive law, stand likewise in no inner relation to each other." — H. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. T. R. Hanley (St. Louis: Herder, 1964), 58, 59. Similarly, Alessandro Passerin d'Entrèves writes that "the vindication of the primacy of the will over the intellect led to the denial that ethical values can have any other foundation but the will of God that imposes them. The notion of God as an unlimited and arbitrary power implied the reduction of all moral laws to inscrutable manifestations of divine omnipotence. The basis of the 'natural system of ethics' was discarded." — A. P. d'Entrèves, *Natural Law: An Historical Survey* (New York: Harper, 1951), 68.

[269] M. Villey, *La formation de la pensée juridique* moderne, 216.

basic practical principle allows due weight to the essential rationality of natural law."[270] He claims that

> "the issue of God's willfulness in relation to natural law is of only marginal bearing on Ockhamist political thought, since Ockham's appeals to *ius naturale* in his political writings are based on its rationality (in explicit contrast with positive law)."[271]

Brian Tierney argues in a similar manner that "Ockham's nominalism did not in fact prevent him from asserting that, in the actual existing world, general principles of natural morality could be discerned by human reason."[272]

What is then the relation of divine omnipotence and freedom to natural law in Ockham's legal thought? While in his philosophical and theological works Ockham seems to maintain that in principle God, not bound by the laws of the moral order created by Himself, could at any time establish by His absolute power another moral order, in his political writings he discusses the *potentia Dei absoluta* in a more traditional vein. Certain statements in the *Contra Benedictum* appears to exclude any 'operationalization' of the absolute power of God; most particularly that which categorically tells us that "God is able to do certain things by his absolute power, which nevertheless He will never do by his ordained power; that is, *de facto* He will never do them".[273] Likewise, in the *Opus nonaginta dierum* Ockham dismisses the proposition 'God does something by his absolute power that He does not do by his ordained power' as impossible and contradictory, saying that "by the very fact that God did something He would do it by his ordained power."[274]

However, this is possibly one of the cases where Ockham the polemicist was led to change his views by tactical considerations. As a matter of fact, in the political writings Ockham had no interest at all in demonstrating that God could create or could have created another moral order. Tierney asks with good reason: "What conceivable purpose could have been served, in the context of those works, by Ockham asserting that, through his absolute power, God could have created some other universe of moral values? In some other

[270] A. S. McGrade, 'Natural Law and Moral Omnipotence', 278.

[271] A. S. McGrade, *The Political Thought of William of Ockham*, 175-176.

[272] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 4.

[273] *Contra Benedictum* 3.3: "Deus aliqua potest de potentia absoluta, quae tamen nunquam faciet de potentia ordinata (hoc est, de facto numquam faciet)".

[274] *Opus nonaginta dierum* c. 95: "Prima enim ex falso intellectu procedit, quasi haec esset possibilis secundum sic distinguentes: 'Deus aliquid facit de potentia absoluta, quod non facit de potentia ordinata'. Haec enim de inesse secundum eos est impossibilis et contradictionem includit; quia eo ipso quod Deus aliquid faceret, ipse faceret illud de potentia ordinata."

universe Pope John XXII might have been right all along and the Franciscans wrong."[275] But even if Ockham did not intentionally conceal his real views, his way of expressing them remained quite ambiguous here in the polemical works, too. In the *Opus nonaginta dierum*, for example, immediately after giving a conventional formulation of the *potentia absoluta/ordinata* distinction: 'God can do some things which nevertheless he has not decided that he will do', he adds in an unmistakably Scotian tone that "if nevertheless He were to do these things, He would do them by ordained power, for if he did them he would decide that he was going to do them."[276] And in respect of the vital issue of evangelical poverty, to John XXII's objection that if Christ had renounced all temporal authority and ownership, He would have acted against the Father's ordinance, which is impossible, Ockham replies that although "by God's ordained power it could not have happened that Christ renounced kingship and ownership, … it could have happened by God's absolute power".[277] Of course, the Franciscans and Ockham did not only claim that Christ (and imitating Him themselves) *could have* renounced power and property but also that He *did so*.[278]

As concerns the present order of things, nevertheless, Ockham seems to presuppose that God's absolute power normally expresses itself in accordance with the supernatural or natural order which has been ordained. Thus as Christians we must believe that God guarantees to fulfil the divine promises contained in the Scripture, and even as philosophers we can safely assume that the order apparent in nature betrays certain constant rules according to which God will normally act.[279] Therefore we should examine the natural order as it is, not as God might have created or might create it by virtue of His absolute power. His

[275] B. Tierney, *The Idea of Natural Rights*, 197-98.

[276] *Opus nonaginta dierum* c. 95: "Et ita dicere quod Deus potest aliqua de potentia absoluta, quae non potest de potentia ordinata, non est aliud, secundum intellectum recte intelligentium, quam dicere quod Deus aliqua potest, quae tamen minime ordinavit se facturum; quae tamen si faceret, de potentia ordinata faceret ipsa; quia si faceret ea, ordinaret se facturum ipsa." Holopainen rightly notes that this kind of clause can be interpreted as follows: "What God does by His absolute power becomes ordinate precisely because it is a state of things ordained by God." — T. M. Holopainen, *William Ockham's Theory of the Foundation of Ethics*, 135.

[277] *Ibid.*: "Secundum, in quo dicunt istum errare, est quod ideo Christus nullo modo potuit renuntiare regno et dominio supradictis, quia, si fecisset, contra ordinationem Patris fecisset … per potentiam Dei ordinatam non putuit fieri quod Christus renuntiaverit regno et dominio, … hoc tamen potuit fieri per Dei potentiam absolutam".

[278] M. M. Adams, *William Ockham*, II: 1201.

[279] F. Oakley, 'Medieval Theories of Natural Law', 71.

reference to the absolute power of God serves thus in the political works only to express the contingent character of the physical and moral world.

Ockham did not produce a systematic theory of natural law comparable with the synthesis of Thomas Aquinas's *Summa theologiae*. His most detailed analysis of natural law can be found in a passage of the *Dialogus* which discusses the question whether the Roman people has the right to elect the pope by divine law. It should be mentioned that Ockham could have solved the problem very quickly and easily, saying – as he did in his other political works and in other passages of the *Dialogus*[280] – that every people has the right to choose its own ruler. Still, he decided to present a detailed discussion of natural law. A probable explication for this is that Ockham's analysis "was to some extent conditioned, even if not motivated by the well-known difficulties" raised by Gratian's treatment of *ius naturale* in the *Decretum*.[281] As we have seen in Chapter I, Part 2, the main source of these difficulties was a text of Isidore of Seville quoted by Gratian in support of his own definition of natural law.

Ockham discusses three varieties (modes: *modi*) of natural law. He has good reasons to do so. On the one hand, it was a common scholastic method to distinguish the different meanings of a term, and in particular it was quite usual among medieval canonists to multiply the definitions of *ius naturale*.[282] On the other hand, this is in harmony with Ockham's nominalist philosophy which teaches that the general terms are only artificial signs and hence can be used more or less arbitrarily.[283] In the very beginning of the discussion, Ockham extends the concept of divine law to include all the three kinds of natural law. He gives two arguments for this. The first is that God is the creator or author (*conditor*) of nature:

> "every law that is from God, who is the creator of nature, can be called a divine law; but every natural law is from God who is the creator of nature".[284]

[280] See e.g. *Breviloquium* 3.7-8, *Breviloquium* 3.11, *Dialogus* 1.6.8, *Dialogus* 3.2.1.29.

[281] H. S. Offler, 'The Three Modes of Natural Law in Ockham: A Revision of the Text', *Franciscan Studies* 37 (1977), 207-18 at 211.

[282] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 9-10. Stephen of Tournai, for instance, gave five definitions of 'natural law', and Johannes Teutonicus distinguished four meanings in the *Ordinary Gloss* to the *Decretum Gratiani*.

[283] M. Villey, *La formation de la pensée juridique moderne*, 214.

[284] *Dialogus* 3.2.3.6: "omne ius quod est a Deo, qui est conditor naturae, potest vocari ius divinum; omne autem ius naturale est a Deo, qui est conditor naturae".

The second argument is that the principles of natural law are to be found in the Scripture:

> "every law that is contained explicitly or implicitly in the divine Scriptures can be called a divine law, ... but every natural law is contained explicitly or implicitly in the divine Scriptures, because in the divine Scriptures there are certain general propositions from which, either alone or with other premises, can be inferred every natural law, spoken of in the first way, in the second way, and in the third way, though it may not be found in them explicitly."[285]

It is important to stress that this is not the first or only time that Ockham attaches natural law to divine law. He discusses natural law and divine law usually side by side, almost as synonyms.[286] As regards the first argument, the idea of the natural order as a book written by God is traditional in the Middle Ages, but it is typically used to argue that creation tells us something about God's nature or that God's authority over creation serves as a model for human affairs, and neither of these uses can be found in Ockham's thought.[287] The second argument, viz. that the Scripture contains explicitly or implicitly all natural law appears to be much more significant, since it implies that natural law is itself *positive* – at a higher level. The definition Ockham gives of the *ius divinum* (extended to include natural law) also supports this conclusion. Ockham defines divine law as the aggregate of universally valid, expressed divine commands.[288] Divine law is God's expressed, *positive* will which manifests itself mostly in the divine Scriptures.[289] Tierney argues that there is nothing extraordinary in Ockham's argumentation, since Gratian and the Decretists also identified natural law with the moral precepts of the Old and New Testaments.[290] Undoubtedly they did, but they were no academic philosophers and they did not equate natural law with

[285] *Ibid.*: "omne ius quod explicite vel implicite continetur in scripturis divinis potest vocari ius divinum, … omne autem ius naturale in scripturis divinis explicite vel implicite continetur, quia in scripturis divinis sunt quaedam regulae generales ex quibus, vel solis vel cum aliis, colligi potest omne ius naturale et primo et secundo et tertio modo dictum, licet in eis non inveniatur explicite."

[286] Other relevant passages are, for example, *Dialogus* 1.1.8, *Dialogus* 1.6.45, *Dialogus* 1.6.55, *Dialogus* 1.6.75, *Dialogus* 1.6.81, *Dialogus* 3.1.3.18, *Breviloquium* Prol., *Breviloquium* 1.8, *Breviloquium* 2.14, *Breviloquium* 3.11, *Breviloquium* 5.2.

[287] A. S. McGrade, 'Natural Law and Moral Omnipotence', 294 n. 11.

[288] *Dialogus* 3.1.2.24, *Opus nonaginta dierum* c. 88, *Breviloquium* 3.6, *Breviloquium* 3.10, *Breviloquium* 3.15, *Breviloquium* 4.7, *Breviloquium* 5.7.

[289] *Dialogus* 1.6.47, *Dialogus* 1.6.75, *Breviloquium* 2.17.

[290] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 10.

divine law founded on the free, omnipotent will of God. Moreover, in Ockham's theory divine will is not bound, contrary to Aquinas's conception of divine law, by any eternal law (or eternal wisdom). In his political works the *doctor plus quam subtilis* makes no mention of eternal law, and in his philosophical writings he explicitly denies the existence of eternal divine ideas.

Ockham defines natural law I (*ius naturale primo modo dictum*) as follows:

> "in one way, that is called natural law which is in conformity with natural reason that in no case fails, such as 'Do not commit adultery', 'Do not lie', and the like ... natural law in the first way is immutable, invariable, and indispensable".[291]

It might be slightly puzzling that Ockham considers here the prohibition of adultery as a dictate of infallible reason, if we remember how much he insisted in his *Commentary on the Sentences* that adultery (just like theft and hatred of God) is merely *malum quia prohibitum*, i.e evil because God's free and contingent will prohibited them. Moreover, he asserts that the precepts of Natural Law I are absolute, immutable, and admitting of no dispensation.[292] Of course, the absolute and immutable character of natural law should be understood only within the framework of the ordained or ordered power of God ("given the present divine ordination", "according to the present order"),[293] supposing that God respects the limits of the created order, and likewise, by the 'indispensability' of natural law Ockham means that no one except God can grant a dispensation from its precepts.[294] Ockham's reference to the Decalogue's prohibitions of adultery and bearing false witness, on the other hand, strengthens the link between natural law and divine law. presented to

[291] *Dialogus* 3.2.3.6: "Uno enim modo dicitur ius naturale illud quod est conforme ratione naturali quae in nullo casu fallit, sicut est 'Non moechaberis', 'Non mentieris', et huisusmodi ... ius naturale primo modo est immutabile et invariabile ac indispensabile".

[292] Similarly, in *Dialogus* 3.2.1.10 he writes: "Some natural commandments are absolute and without any condition, qualification, specification, or determination, such as 'Do not worship strange gods', 'Do not commit adultery', 'Do not bear false witness','Do not lie', and the like." [Praeceptum autem naturale quoddam est absolutum, absque omni conditione, modificatione, specificatione seu determinatione, sicut 'Non coles deos alienos', 'Non moechaberis', 'Non falsum testimonium dices', 'Non mentieris', et huiusmodi.]

[293] *De connexione virtutum* aa. 3 and 4: "stante ordinatione divina quae nunc est"; *De connexione virtutum* a. 4: "stante ordinatione quae nunc est". Cf. *Quodlibeta septem* III q. 14: "stante praecepto divino".

[294] F. Oakley, 'Medieval Theories of Natural Law', 71-72; J. Kilcullen, 'Natural Law and Will in Ockham'.

Natural Law II (*ius naturale secundo modo dictum*)

> "is to be observed by those who use natural equity alone without any custom and human legislation. This is called 'natural' because its contrary is contrary to the state of nature as originally established, end if all men lived according to natural reason or divine law it should not be observed or done."[295]

Natural Law II "is not immutable; rather, it is permissible to enact the contrary, so that the contrary is done by law."[296] The term 'natural' here refers to the primeval condition of humankind, which is not normative for all time. Ockham adds that this kind of natural law is not merely in principle mutable; in fact it existed only in the state of innocence. After the Fall, on account of human iniquity, it has been changed by human laws and customs.[297] (In the *Opus nonaginta dierum* he also makes it clear that there is no going back to the state of primordial innocence, since the defects of human nature cannot be repaired.) The other basic element of Ockham's definition of Natural Law II is natural equity. This second element appears already in his earlier discussion of *ius poli* in the *Opus nonaginta dierum*. The distinction between *ius poli* (right of heaven) and *ius fori* (right of the forum) was originally made by Augustine, and was later incorporated – with the intermediary of Peter Lombard's *Sentences* – into the *Decretum Gratiani*.[298] The *Ordinary Gloss* to the *Decretum* defined *ius poli* (commonly regarded as a synonym of *ius naturale*) as meaning natural equity.[299] Ockham takes over this juristic definition and extends it. His version is as follows:

> "the natural equity that is, without any human ordinance or any merely positive divine ordinance, in harmony with right reason – in harmony either with purely natural right reason or with right reason taken from things revealed to us by God – is called 'the right of heaven'. Accordingly, this right is sometimes called 'natural right' … Sometimes it is called divine right, for many things are in harmony with right rea-

[295] *Dialogus* 3.2.3.6: "Aliter dicitur ius naturale quod servandum est ab illis qui sola aequitate naturali absque omni consuetudine et constitutione humana utuntur, quod ideo dicitur naturale quia contrarium est contra statum naturae institutae et, si homines omnes viverent secundum rationem naturalem aut legem divinam, non esset servandum nec faciendum."

[296] *Ibid.*: "ius naturale uno modo accepto vocabulo non est immutabile, imo licet contrarium statuere, ut iure fiat contrarium."

[297] *Ibid.*

[298] M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', 118.

[299] B. Tierney, *The Idea of Natural Rights*, 128.

son taken from things revealed to us by God which are not in harmony with purely natural reason."[300]

As we will see in Part 2.2, later on in the same chapter the meaning of *ius poli* often glides to a subjective sense. But let us return to the state of nature. Ockham mentions (quoting the text of Isidore of Seville on natural law) two fundamental characteristics of the state of innocence: universal freedom and community of possession. He also notes that existing law recognizes private property and servitude:

> "In this second way, and not in the first, all things are common by natural law, because in the state of nature as originally established all things would have been common, and if after the fall all men lived according to reason all things should have been common and nothing owned, for ownership was introduced because of wickedness, … by natural law all men are free, and yet by the law of nations some are made slaves." [301]

The third and most complex mode of natural law is Natural Law III (*ius naturale tertio modo dictum*):

> "In a third way that is called natural law which is gathered by evident reasoning from the law of nations or another law or from some act, divine or human, unless the contrary is enacted with the consent of those concerned. This can be called natural law 'on supposition' (*ex suppositione*)".[302]

Though '*suppositio*' is a technical term in Ockham's logic, it is not probable that he uses the word in a specialized sense here. Thus *ex suppositione* simply means 'on the supposition that' or 'on the condition that' and *ius naturale ex suppositione* denotes 'conditional natural

[300] *Opus nonaginta dierum* c. 65: "Ius autem poli vocatur aequitas naturalis, quae absque omni ordinatione humana et etiam divina pure positiva est consona rationi rectae, sive sit consona rationi rectae pure naturali, sive sit consona rationi rectae acceptae ex illis, quae sunt nobis divinitus revelata. Propter quod hoc ius aliquando vocatur ius naturale … Aliquando vocatur ius divinum; quia multa sunt consona rationi rectae acceptae ex illis, quae sunt nobis divinitus revelata, quae non sunt consona rationi pure naturali".

[301] *Dialogus* 3.2.3.6: "Isto modo et non primo modo ex iure naturali omnia sunt communia, quia in statu naturae institutae omnia fuissent communia, et si post lapsum omnes homines secundum rationem viverent, omnia deberent esse communia et nihil proprium; proprietas enim propter iniquitatem est inducta … iure naturali omnes homines sunt liberi, et tamen aliqui iure gentium fiunt servi."

[302] *Ibid.*: "Tertio modo dicitur ius naturale illud quod ex iure gentium vel alio, aut ex aliquo facto (divino vel humano), evidenti ratione colligitur, nisi de consensu illorum quorum interest contrarium statuatur. Quod potest vocari ius naturale 'ex suppositione'."

law' containing rational answers to contingent conditions. Ockham's examples (also taken from Isidore's text) are illuminating:

> "supposing that things and money have been appropriated by the law of nations or by some human law, then it is gathered by evident reasoning that a thing deposited and money lent should be returned, unless for a reason the contrary is decided by him or those concerned. Similarly, supposing that some one in fact unjustly inflicts violence on another (which is not in accordance with natural law but against natural law), then it is gathered by evident reasoning that it is permissible to repel such violence by force."[303]

The third example Ockham offers is the one that inspired the whole discussion: the right of the Roman people to elect the pope. Supposing that a ruler was to be appointed, then evident reason concludes that those whom he is to be set over should have the right to elect him.[304]

From these examples certain conclusions can be drawn. First, from the perspective of moral philosophy, Natural Law III is, as de Lagarde noted, "la zone des actes moralement indifférents".[305] Secondly, this variant of natural law presupposes the existence of positive human institutions, for example the introduction of private property, therefore it comes into play only after the Fall. Thirdly, as the problem of the institution of a ruler is located here, all the questions relating government and politics fall under Natural Law III. Last but not least, it should be stressed that we can discern in this passage a tacit but significant shift from the objective to the subjective meaning of *ius*. Ockham is really writing about rights of individuals or communities that they could freely renounce, not about natural laws that bound them: a person with a right to receive payment could cancel the debt, and a person under attack could waive his right of self-defence.[306]

The French nominalist and conciliarist Pierre d'Ailly praised later this threefold classification of natural law as "a new and very fine division of natural law" (*novam distinctionem*

[303] *Ibid.*: "supposito quod res et pecunie sint appropriate iure gentium vel aliquo iure humano, evidenti ratione colligitur quod res deposita et pecunia commodata debent restituti, nisi ex causa per illum (vel per illos) cuius (vel quorum) interest contrarium ordinetur. Similiter, supposito quod aliquis violentiam de facto iniuriose inferat alteri, quod non est de iure naturali sed contra ius naturale, evidenti ratione colligitur quod licet per vim violentiam talem repellere."

[304] *Ibid.*

[305] G. de Lagarde, *La naissance de l'esprit laïque*, VI: 154.

[306] B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 13.

de iure naturali valde bonam).[307] The Student of the *Dialogus* also observes: "I have not elsewhere heard that distinction of natural law".[308] But is Ockham's classification really novel? As for Natural Law I, we can agree with McGrade that this mode is "more significant as an acknowledgment of common ground with the previous tradition than as an original contribution."[309] Nevertheless, we should not forget that by detaching natural law from the essence or nature of things and attaching it to divine law Ockham renders it ultimately positive.

On the other hand, the contraposition of the changeable Natural Law II based on the state of man before the Fall with the immutable Natural Law I seems to be – though it has some canonistic precedents[310] – a distinctive feature of Ockham's natural law theory. Wilhelm Kölmel rightly notes that "weder Thomas noch Duns Scotus kennen diese Formulierung, die Scholastik geht zumeist von der 'Natur' des Menschen schlechthin aus."[311] We can add that the distinction between Natural Law I and Natural Law II could provide an adequate conceptual basis for a theory of social contract, too.

The most original and at the same time the most debated type of natural law in Ockham's classification is Natural Law III. Georges de Lagarde considers the idea of conditional, changing natural law radically novel and emphasizes that *ius naturale ex suppositione* is a zone of human autonomy unregulated either by divine or moral law, where human will has free play.[312] Tierney is convinced, on the contrary, that "we are dealing with a medieval platitude. Civil and canon lawyers and earlier scholastic philosophers all acknowledged the existence of a mass of legal rules that depended only on human choice ... the function of such law was to regulate matters that were morally indifferent but that needed to be regulated in an ordered society. Thomas Aquinas made the same point when he taught that some human laws were not deduced from natural law but merely deter-

[307] Cited by A. S. McGrade in his *The Political Thought of William of Ockham*, 175 n. 4.

[308] *Dialogus* 3.2.3.6: "istam distinctionem iuris naturalis alias non audivi".

[309] A. S. McGrade, *The Political Thought of William of Ockham*, 178.

[310] We remember Rufinus asserting that natural law consists of commands, prohibitions and indications (*demonstrationes*). Tierney points out that several canonists relying on Rufinus's distinction took *demonstrationes* – for instance that of community of possession – to be descriptions of a primeval state of affairs. — B. Tierney, 'Origins of Natural Rights Language', 635.

[311] W. Kölmel, 'Das Naturrecht bei Wilhelm Ockham', *Franziskanische Studien* 35 (1953), 39-85 at 49.

[312] G. de Lagarde, *La naissance de l'esprit laïque*, VI: 154-55: "Il s'agit donc d'un droit naturel de seconde zone dont la caracéristique essentielle est d'échapper à la moralité, et de s'exercer dans le domaine des actes moralement indifférents sur lesquels ni la loi de Dieu, ni la loi morale n'ont rien prescrit de positif."

mined matters that natural law left open."[313] I think that Tierney's argument is incoherent. Certainly, Aquinas acknowledged that positive laws can be deduced from natural law *per modum additionis* (by way of addition),[314] but he was far from developing a conception of conditional natural law on the basis of this – and even farther from accepting Ockham's doctrine of morally indifferent acts. On the other hand, Tierney is right in emphasizing that Ockham's discussion of Natural Law III "was concerned much more with rights than with laws".[315] The other important novelty of the text is that it sets the question of the people's right to elect a ruler in the framework of a discussion of natural law and natural rights.[316]

Is there any common core that unites the different kinds of *ius naturale*, and if yes, what is it? It seems that Ockham derived each of the three modes of natural law from an underlying assumption of human rationality. Natural Law I follows "natural reason that in no case fails". Natural Law II reflects "natural equity that is … in harmony with right reason". And the responses given by Natural Law III to contingent situations are "gathered by evident reasoning". But this does not alter the fundamental fact that, after all, natural law is nothing but a particular manifestation of God's will. As McGrade pertinently observes, "Ockham did not abandon God' will in favor of philosophical reason when he abandoned John XXII for the protection of Ludwig of Bavaria."[317] The question arises again: how to reconcile divine will with human rationality? Ockham seems to find a peculiar solution. He conceives of natural law as a *tacit* or *implicit* divine command. If a natural law is not contained explicitly in the Scripture, it pertains to right reason to show us (with the aid of the general propositions of the Scripture) what God wills – or is supposed to will.[318]

2.2 Natural Rights

The *venerabilis inceptor* was for a long time considered, due to the influence of Michel Villey's extensive studies, as the "father" of the doctrine of subjective natural rights. For Villey, Ockham was the first to give a clear and complete definition of subjective right and

313 B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 6.

314 *Summa theologiae* I-II q. 95 a. 2.

315 B. Tierney, 'Natural Law and Canon Law in Ockham's *Dialogus*', 13.

316 B. Tierney, *The Idea of Natural Rights*, 182.

317 A. S. McGrade, 'Natural Law and Moral Omnipotence', 273.

318 Cf. B. Tierney, *The Idea of Natural Rights*, 174-75, 182; A. S. McGrade, 'Natural Law and Moral Omnipotence', 274-79. We will see in Part 2.2. how Ockham's conception of tacit or implicit divine command appears in his discussion of property.

to develop a legal theory on its basis.[319] He also argued that the direct source of Ockham's theory of subjective rights was his nominalist philosophy. Since

> "il n'a plus l'idée d'un ordre social supra-individuel, ... Occam ne peut imaginer, à partir du nominalisme, qu'un art [juridique] tendu, non vers la recherche d'une harmonie dans la cité prise comme fin en soi, mais seulement vers le service des individus orienté vers l'utilité particulière. ... De partage équitable des biens, selon la justice distributive, ce qui était autrefois le but de l'art juridique, il n'est plus question. Les droits subjectifs des individus ont comblé le vide résultant de la perte du droit naturel."[320]

Researches made after the publication of Villey's studies have proved, however, that the semantic origins of the concept of subjective rights can be traced back long before Ockham's work, namely to the 'renaissance of the twelfth century'. Brian Tierney, for instance, has demonstrated in a series of articles that the subjective meaning of *ius* had already appeared in twelfth-century canonistic texts.[321] As a consequence, Ockham is no longer regarded as the father of the theory of subjective rights. Brett even claims that Ockham "currently occupies no particular position in the history of subjective right."[322] This is obviously an exaggeration of the author who, as we will see later, herself emphasizes the originality of Ockham's usage of *ius*.

It remains true, however, that Ockham's political works are beyond doubt saturated with concern for rights. In the Prologue of the *Breviloquium de principatu tyrannico* (henceforth *Breviloquium*) – which work can be considered as "the first essentially rights-based treatise on political theory"[323] – Ockham argues that papacy, owing to its aspiration for *plenitudo potestatis* (fullness of power), abused papal power and neglected to respect "the rights and liberties granted by God and nature",[324] and criticizes in general those "who, not content with their own rights, do not fear ... to reach out for others' rights."[325] Also in the *Breviloqium* and in his other works as well Ockham refers to the gospel as a "law of free-

[319] M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', 111.

[320] *Ibid.*, 121, 126.

[321] Cf. B. Tierney, 'Tuck on Rights'; *idem*, 'Villey, Ockham and the Origin of Natural Rights'; *idem*, 'Origins of Natural Rights Language'.

[322] *Liberty, Right and Nature*, 51.

[323] B. Tierney, *The Idea of Natural Rights*, 185.

[324] *Breviloquium* Prol.: "iuribus et libertatibus a Deo et a natura vobis concessis adversus".

[325] *Ibid.*: "qui propriis iuribus non contenti, ad aliena ... manus extendere non pavescunt."

dom" (*lex libertatis*) which limits papal power by safeguarding the natural and civil rights of the pope's subjects.[326]

Ockham defines *ius* in the subjective sense as a *potestas* (power),[327] more precisely as a *potestas licita* (licit power).[328] Villey sees the juncture of the concepts of *ius* and *potestas* as a striking innovation, a "semantic revolution".[329]

> "Arrivons aux définitions juridiques du *dominium*, de l'usufruit, du *ius utendi*. Elles offrent cette particularité ... que la notion de droit s'y trouve résolument virer au sens de pouvoir. ... Le droit, au sens technique du mot, cesse donc de désigner le bien qui vous revient selon la justice (*id quod justum est*), il signifie cette notion beaucoup plus étroite: le pouvoir qu'on a sur un bien."[330]

Tierney has shown that association of *ius* and *potestas* had not been Ockham's own invention. In reality this association first occurred in twelfth-century canonistic discourse and appeared later in the Franciscan literature on evangelical poverty, too. The understanding of a right as a power was thus common in juristic thought long before Ockham.[331] Likewise, Tuck says that "Villey may have got this (in a sense) completely the wrong way round."[332]

If Ockham is not innovative in respect of the association of *ius* and *potestas*, then in what does the novelty of Ockham's concept of subjective right lie? First of all, Villey's criticism is justified to the extent that in the *venerabilis inceptor*'s legal philosophy we can find only two meanings of *ius*. For Ockham *ius* can have either the objective meaning of a prescriptive law or the subjective meaning of a licit power; the classical Aristotelian-Thomist concept of *ius* as right action thus vanishes. Secondly, Ockham is the first to distinguish carefully between *ius naturale* and *ius positivum* in the subjective sense – for example be-

326 *Breviloquium* 2.3-4, *Breviloquium* 2.17-18, *Breviloquium* 2.21, *An princeps* c. 2, *Dialogus* 3.1.1.5-8, *De imperatorum et pontificum potestate* cc. 1-9.

327 *Opus nonaginta dierum* c. 2, *Opus nonaginta dierum* c. 14, *Opus nonaginta dierum* c. 65, *Breviloquium* 3.7-11.

328 *Opus nonaginta dierum* c. 2, *Opus nonaginta dierum* c. 11, *Opus nonaginta dierum* c. 61.

329 M. Villey, *La formation de la pensée juridique moderne*, 261.

330 M. Villey, 'La genèse du droit subjectif chez Guillaume d'Occam', 117. See also M. Villey, 'Les origines de la notion du droit subjectif', 241.

331 Cf. B. Tierney, 'Villey, Ockham and the Origin of Natural Rights'; *idem*, 'Origins of Natural Rights Language'.

332 R. Tuck, *Natural Rights Theories*, 22-23.

tween the natural and positive right of using things.[333] Thirdly, Ockham is original, as Annabel Brett points out, in not assimilating *ius*, contrary to the earlier Franciscan discourse, either to liberty or to *dominium* and in using the Aristotelian notion of potency to base the concept of right as licit power.[334]

Ockham lays particular stress on two natural rights, the right to appropriate things and the right to elect a ruler. How can the *potestas appropriandi* become a natural right if in the state of innocence things were possessed in common in accordance with natural equity? Ockham emphasizes that in the state of nature there was no property, neither private nor common: Natural Law II suggested the community of *possession*.[335] In responding to John XXII's argument that Adam had at first exclusive ownership over the whole world, Ockham distinguishes numerous kinds of *dominium*,[336] and asserts that the *dominium* that Adam received from God was not a power of owning but a power of ruling and governing.[337] God gave also a natural right of using things to the humankind through Adam and Eve, adds Ockham, but this right should be separated from ownership, too.[338]

After the Fall, the maintenance of the community of possession was no longer possible. In this new situation right reason dictated, on account of corrupt human nature, the introduction of property – as a distinctively human institution. More precisely, reason indicated, in conformity with natural equity, that it was expedient for persons to appropriate things for themselves.[339] In the end God also assented, at least tacitly, to this dictate of right reason.[340] Thus the natural right to appropriate things was finally born "by command or permission of God".[341] This is a perfect illustration of Ockham's conception of natural law as *tacit* or *implicit* divine command. Human reason is capable to show, in the absence of clear divine precept, what God implicitly wills. The 'legitimation' of *potestas appropriandi* by God's precept has, nevertheless, an important practical consequence. If the power of

[333] *Opus nonaginta dierum* c. 61, *Opus nonaginta dierum* c. 65.

[334] A. Brett, *Liberty, Right and Nature*, 51, 62-63.

[335] *Dialogus* 3.2.3.6.

[336] *Opus nonaginta dierum* c. 2.

[337] *Opus nonaginta dierum* c. 14.

[338] *Opus nonaginta dierum* c. 28.

[339] *Opus nonaginta dierum* c. 14, *Opus nonaginta dierum* c. 65, *Opus nonaginta dierum* c. 88, *Dialogus* 3.2.3.6, *Breviloquium* 3.7, *Breviloquium* 3.9-10.

[340] *Opus nonaginta dierum* c. 2, *Opus nonaginta dierum* c. 14, *Opus nonaginta dierum* c. 88, *Breviloquium* 3.7.

[341] *Opus nonaginta dierum* c. 89: "de voluntate Dei iubente vel permittente".

appropriating things was conferred by God on the whole humanity in the form of a command, then its exercising ought to be obligatory. Therefore Ockham adds – in defence of the Franciscan cause of evangelical poverty – that this command binds *semper, non pro semper* (always but not for always).[342] This means that it obliges only in case of necessity; otherwise it can be renounced. As regards the actual introduction of private property, Ockham emphasizes that, though the right to appropriate things precedes positive law, the institution of property itself was established by voluntary agreements and positive human laws.[343] On the other hand, once particular property rights emerged, the owners cannot be deprived of their rights without their consent even by positive law.[344]

To conclude, Ockham, in the same way as he opposed Natural Law II to Natural Law III on the basis of the difference between the states of man before and after the Fall, steadily separates present-day *dominium* from that of the state of nature (and also from the right to acquire property). As he writes in the *Opus nonaginta dierum*: “one lordship belonged to men in the state of innocence by natural or divine law; ... another lordship belongs to mankind by positive law or by human establishment”.[345] Still there is a certain link between the two. While the original sin eliminates the *potestas rationabiliter regendi ac gubernandi temporalia*, the *ius utendi* granted by God subsists even after the Fall, since it is a *ius poli* derived from nature and common to all. Moreover, this natural right is inalienable, since the use of things is necessary to sustain life (whereas the positive right of using, established by human law, can be freely renounced).[346] The law instituting private property limits it, however, to the case of extreme need. One can normally use things belonging to another person only in time of necessity, when all things are regarded as common.[347]

The right to institute government is placed by Ockham, as we have seen, in Natural Law III, that is in the zone of morally indifferent acts. His views on property rights also present an important context of his account of the establishment of government. Ockham follows here a common medieval usage which did not consistently differentiate between the two current meanings of *dominium* (property and political power) and therefore discussed

[342] *Breviloquium* 3.8.

[343] *Opus nonaginta dierum* c. 88, *Breviloquium* 3.7, *Breviloquium* 3.9-10.

[344] *Breviloquium* 3.7-8.

[345] *Opus nonaginta dierum* c. 2: “dominium humanum … est duplex. Quoddam enim competebat hominibus in statu innocentiae ex iure naturali vel divino … Aliud competit hominibus ex iure positivo, scilicet ex institutione humana”.

[346] *Opus nonaginta dierum* c. 61, *Opus nonaginta dierum* c. 65.

[347] *Opus nonaginta dierum* c. 65.

the problems of ownership and government usually together. Likewise, Ockham defines *dominium* as a power of owning (*dominium proprietatis*) at one place[348] and as a power of ruling (*dominium iurisdictionis*) at another,[349] and treats the questions concerning the origin of private property and that of coercive government mostly side by side. Moreover, as he discusses the latter questions only in his later political writings, he takes the advantage of the opportunity to adapt his theory of property developed in the *Opus nonaginta dierum* to the subject of political power.

According to Ockham's account, a fundamental characteristic of the state of nature is "the one liberty of all": in the state of innocence "all men are free".[350] In the idyllic primeval condition of mankind political power would have been contrary to the natural equality of all men; it was not needed either, since there were no evildoers to punish.[351] Thus Ockham conceives of coercive government, just as private property, as a consequence of corrupt human nature resulting from the Fall. And in this case as well it is human *recta ratio* that draws the conclusion that temporal power is "necessary and useful to the human race for living well after sin".[352] On the other hand, Ockham adopts the common medieval view, originating from Saint Paul, that the source of all power is God ("*omnis potestas a Deo est*"). Ockham asserts that the people's right to institute a ruler "was brought in by divine law, by a special grant of God",[353] and without the intermediary of the pope. In the same way as the power to appropriate temporal things was conferred on the human race by God, He "gave, without human ministry or cooperation, power to establish rulers with temporal jurisdiction".[354] This divine precept also obliges *semper, non pro semper*. From this it follows that men are bound to institute a ruler only "in a situation of necessity or of a utility

[348] *Opus nonaginta dierum* c. 2

[349] *Opus nonaginta dierum* c. 27, *Dialogus* 3.1.2.3

[350] *Dialogus* 3.2.3.6: "Isto modo loquitur Isidorus … cum dicit quod secundum ius naturale est 'communis omnium possessio et omnium una libertas'. … Ex quibus verbis colligitur quod iure naturali omnes homines sunt liberi".

[351] *Dialogus* 1.7.38, *Dialogus* 3.2.1.2

[352] *Breviloquium* 3.7: "Potestas … est inter necessaria et utilia humano generi ad bene vivere computanda post peccatum".

[353] *Ibid.*: "fuit introductum ex iure divino, quia ex speciali collatione Dei".

[354] *Ibid.*: "Potestas ergo appropriandi res temporales persone et personis aut collegio data est a Deo humano generi; et propter rationem consimilem data est a Deo absque ministerio et cooperatione humana potestas instituendi rectores habentes iurisdictionem temporalem, quia iurisdictio temporalis est de numero illorum, que sunt necessaria et utilia ad bene et politice vivere".

comparable with necessity". This means that the natural right to institute a ruler can be renounced except in a situation of necessity.[355]

Seeing the voluntarist elements of Ockham's moral theory, he could have arrived at a theocratic view of politics. In reality he maintained, on the contrary, a distinctly secular, desacralized conception of temporal government.[356] Ockham emphasizes that political power was instituted by human decisions. Discussing monarchy, for example, Ockham observes that though in principle God could have intervened in the course of human history and could have founded kingdoms, as a matter of fact, "all government existing at the present time depends on and proceeds from human ordination"[357]. Ockham insists on rulership based on election and consent of the community to be ruled. According to Natural Law III, "supposing that someone is to be set over certain persons as prelate, ruler, or rector, it is inferred by evident reason that, unless the contrary is decided on by the person or persons concerned, those whom he is to be set over have the right to elect the one to be set over them, so that no one should be given to them against their will."[358] The secular government is not only based on *ius instituendi rectores* but is in general limited by the rights of their subjects who can always assert them against it. Political power must therefore respect and also protect those rights, first of all property rights.[359]

Although the *doctor plus quam subtilis* cannot be considered "revolutionary" in a semantic sense, he proves to be an innovator in other ways. First, he is innovative, as I mentioned above, in firmly separating natural and positive subjective rights. Secondly, Ockham raises for the first time the problem of the alienability of natural rights, which will later be-

[355] *Breviloquium* 3.8: "predicte duplici potestati renuntiare possunt tam fideles, quam infideles extra articulum necessitatis et utilitatis, que necessitati debeat comparari."

[356] See e.g. *Dialogus* 3.1.1.17, *Dialogus* 3.2.1.11, *Dialogus* 3.2.1.14, *Breviloquium* 2.20. Cf. G. de Lagarde, *La naissance de l'esprit laïque*, 2nd ed., IV: 148-51; A. S. McGrade, *The Political Thought of William of Ockham*, 84-103, 197-204.

[357] *Octo quaestiones de potestate papae* 5.6: "omnis principatus qui etiam in praesentia habetur, pendeat et procedat ex ordinatione humana".

[358] *Dialogus* 3.2.3.6: "Supposito enim quod aliquibus sit aliquis praelatus vel princeps aut rector praeficiendus, evidenti ratione colligitur quod, nisi per illum vel illos cuius vel quorum interest contrarium ordinetur, illi quibus est praeficiendus habent ius eligendi praeficiendium eis, ut nullus dari debeat ipsis invitis." Certain commentators of Ockham discern even a theory of social contract in the *venerabilis inceptor*'s political thought. Cf. J. B. Morrall, 'Some Notes on a Recent Interpretation', 358, 365; M. Villey, *La formation de la pensée juridique moderne*, 216, 224. This view is obviously wrong.

[359] *Dialogus* 1.4.8-9, *Opus nonaginta dierum* c. 2, *Opus nonaginta dierum* c. 74, *Breviloquium* 3.7-8.

come of great importance for the natural rights theorists of the seventeenth century.[360] He finds – just like Hobbes – only one inalienable natural right, the right to sustain life (through the natural right of using). Thirdly, no one before Ockham places the right to institute a ruler in the context of natural rights. Fourthly, Ockham is the first in Western political thought to conceive of natural rights as limits to temporal (and spiritual) power. Finally, it is a fact of paramount importance that Ockham transposed the concept of subjective rights from technical juristic discourse to the heart of philosophical-theological debates. As Tierney underlines,

> "the old texts also acquired a new significance from the fact that Ockham was addressing an audience different from that of the Decretists, not just a narrow circle of professional canonists but the whole intellectual world of the Christian West. The language of rights continued to be used in the works of late medieval jurists but, after Ockham, it increasingly inhabited the realms of philosophy and political theory."[361]

Finally, there remains a fundamental question to answer: what is the relation of Ockham's natural rights theory to his philosophy and theology? It seems to me that Ockham's concern for natural rights is undoubtedly a reflection of his nominalist logic and ontology. His voluntarism is also present in his rights doctrine: the institution of both private property and government was commanded or sanctioned by divine will and effectuated by human will. But perhaps the most striking affinity between the *venerabilis inceptor*'s natural rights theory and his philosophy is his endeavour, both in the field of politics and ethics, to compensate or counterbalance the omnipotence of God with human freedom and autonomy.

[360] A parallel between Ockham and Locke was suggested by Alan Gewirth. — A. Gewirth, *Marsilius of Padua: The Defender of Peace*, vol. I: *Marsilius of Padua and Medieval Political Philosophy* (New York: Columbia University Press, 1951), 258. This parallel is not altogether artificial, especially as John Dunn has pointed out strong religious and theological motives in Locke's political philosophy. Cf. J. Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge: University Press, 1969).

[361] B. Tierney, *The Idea of Natural Rights*, 202.

Chapter III
The Harvest of Medieval Legal Philosophy: Francisco Suárez

Part 1: Natural Law

Suárez's natural law theory by no means raises such grave doubts as that of Ockham. Consequently it is generally accepted that he has a meaningful and coherent conception of natural law. Nevertheless, his theory is the object of extremely divergent interpretations. These differences can be traced back practically to two fundamental questions.

(1) *Thomism versus Ockhamism*: Is Suárez's natural law doctrine really faithful to Aquinas's philosophical and theological teachings, as he pretends it to be, or is it, on the contrary, influenced by Ockham's views?

(2) *Intellectualism versus voluntarism*: What position does the *doctor eximius* take in the central debate of late medieval legal philosophy between intellectualism and voluntarism?

These two questions are, of course, to a considerable extent interrelated. Those Neo-Thomists and other commentators who blame – or praise – Suárez for departing from Aquinas and adopting nominalist principles generally regard him as a voluntarist,[362] while scholars seeing in him a creative innovator inside the Thomist camp are inclined to consider him as an intellectualist (though not without qualification) who clearly rejected the voluntarism of Ockham.[363] And to further complicate the picture, there exists a third type

[362] Cf. e.g. W. Farrell, *The Natural Moral Law according to St. Thomas and Suarez* (Ditchling: St. Dominic's Press, 1930); M. Villey, *La formation de la pensée juridique moderne*; M. Bastit, *Naissance de la loi moderne*, pt. 3; P.-I. André-Vincent, 'La notion moderne de droit naturel et le volontarisme (de Vitoria et Suarez à Rousseau)', *Archives de philosophie du droit* 8 (1963), 237-59; P.-F. Moreau, 'Loi naturelle et ordre des choses chez Suarez', *Archives de philosophie* 42 (1979), 229-34; J. T. Delos, *La société internationale et les principes du droit public*, 2nd ed. (Paris: Pedone, 1950), ch. 6.

[363] Cf. e.g. M. B. Crowe, 'The "Impious Hypothesis": A Paradox in Hugo Grotius?', *Tijdschrift voor Filosofie* 38 (1976), 379-410; F. Copleston, *A History of Philosophy*, vol. III, ch. 23; O. von Gierke, *Political Theories of*

of interpretation too, according to which Suárez deviated from scholastic natural law tradition in the opposite direction, so that he prepared the way for modern rationalism and secularized natural law.[364]

1.1 The General Concept of Law

Perhaps the only point on which these conflicting interpretations agree is that basically all significant differences between Saint Thomas's and Suárez's natural law theory can be traced back to the divergence in their general concepts of *lex*.[365] As regards methodology, both Aquinas and Suárez use the essentialist type of definition, seeking to capture the nature or essence of a thing.[366] This is why Aquinas starts his treatise on law with the Question 'On the Essence of Law' (*De essentia legis*).[367] Similarly, Suárez's *De legibus*, following the order of the *Summa theologiae*, begins with a chapter entitled 'The Meaning of the Term Law' (*Quid nomine legis significetur*).[368] Suárez quotes Aquinas's first definition of *lex*: "a rule and measure of acts, whereby man is induced to act or is restrained from acting"[369] – but not with approval, as one would expect from a Thomist theologian. Searching for

---

the Middle Age, trans. F. Maitland (Cambridge: University Press, 1900), ch. 9; H. Rommen, *Die Staatslehre des Franz Suarez S.J.* (Mönchenglabdach: Volksvereins, 1926); G. Jarlot, 'Les idées politiques de Suarez et le pouvoir absolu', *Archives de philosophie* 18 (1949), 64-107; J. de Blic, 'Le volontarisme juridique chez Suarez?', *Revue de philosophie* 30 (1930), 213-30; E. Jombart, 'Le "volontarisme" de la loi d'après Suarez', *Nouvelle revue de théologie* 59 (1932), 34-44; Q. Skinner, *The Foundations of Modern Political Thought* (Cambridge: University Press, 1978), vol. II: *The Age of Reformation*, ch. 5.

364 Cf. H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 4th ed. (Göttingen: Vandenhoeck & Ruprecht, 1980), 97-99; J.-F. Courtine, 'La raison et l'empire de la loi', in *idem*, *Nature et empire de la loi: Études suaréziennes* (Paris: Vrin, 1999), 91-114; R. Wilenius, *The Social and Political Theory of Francisco Suárez* (Helsinki: Akateeminen Kirjakauppa, 1963), 56-63. Michel Villey accuses Suárez of voluntarist, positivist and modern rationalist tendencies at the same time. — M. Villey, *La formation de la pensée juridique moderne*, 376, 384-86 and 392-93.

365 See for instance W. Farrell, *The Natural Moral Law according to St. Thomas and Suarez*, 155, and J.-F. Courtine, 'La raison et l'empire de la loi', 93.

366 The fact that in defining law Jesuit theoreticians in general and Suárez in particular used the traditional, essentialist mode of definition is specially emphasized by Harro Höpfl in his *Jesuit Political Thought: The Society of Jesus and the State, c. 1540–1630* (Cambridge: University Press, 2004), 264-65.

367 *Summa theologiae* I-II q. 90.

368 *De legibus* 1.1.

369 *Summa theologiae* I-II q. 90 a. 1 co.: "quaedam regula et mensura actuum, secundum quam inducitur aliquis ad agendum, vel ab agendo retrahitur".

a strict and proper concept of law, he overtly criticizes and discards it as being too broad and general. Suárez's main reservation about Aquinas's definition is that since it does not contain the element of obligation, it does not draw a clear distinction between law and counsel.[370]

Suárez proposes instead another definition of law as "a common, just and stable precept, which has been sufficiently promulgated".[371] The most substantial difference between Aquinas's and Suárez's definition is that the Jesuit theologian replaces the Thomist notions of *regula* and *mensura* by the term 'precept' (*praeceptum*). Unlike Saint Thomas, he conceives of law not as a "rational ordination" or as an ordering principle, but as an obligatory command of a superior imposed on a subject: "law in the proper sense of the term is the order of a superior towards an inferior, in the form of a real command".[372] While in Aquinas it is the notion of ordination or regulation that is primary in the concept of law, and that of obligation is only derivative, in Suárez obligation or binding force becomes the central, constitutive element of law.[373]

[370] *De legibus* 1.1.1 and 1.1.7-8. Suárez also excludes natural inclinations and the rules of arts from the notion of law. The criticism directed against Aquinas for the lack of precise differentiation between law and counsel does not seem to be well founded, as in the Question 'On the Effects of Law', in reply to the objection that law counsels rather than commands Saint Thomas declares: "to advise is not a proper act of law". — *Summa theologiae* I-II q. 92 a. 2 arg. 2 and ad 2: "Praeterea, effectus legis est ut inducat subditos ad bonum …. Sed consilium est de meliori bono quam praeceptum. Ergo magis pertinet ad legem consulere quam praecipere. … Ad secundum dicendum quod consulere non est proprius actus legis, sed potest pertinere etiam ad personam privatam, cuius non est condere legem."

[371] *De legibus* 1.12.5: "Lex est commune praeceptum, justum ac stabile, sufficienter promulgatum per proprium imperium". Though self-sufficient community and the common good do not appear in this short definition, they are also fundamental and indispensable elements of Suárez's concept of law. See *De legibus* 1.6-7.

[372] *De legibus* 2.2.9: "lex, si proprie sumatur, est ordinatio superioris circa inferiorem per proprium imperium". It should not mislead us that Suárez uses here the word '*ordinatio*', for he does not use it in the Thomist sense of 'ordering', but to denote an 'order' or command. — J.-F. Courtine, 'La raison et l'empire de la loi', 95. To my knowledge, the first medieval thinker who defined law as a coercive command was Marsilius of Padua. See *Defensor pacis* 1.10.4-5. In his case, the concept of law as command led to a positivistic concept of law. Cf. A. Gewirth, *Marsilius of Padua*, I: 134-36.

[373] W. Farrell, *The Natural Moral Law according to St. Thomas and Suarez*, 55. This is not to say that for Aquinas obligation is not an important element of law at all. This is evident from the fact that in *Summa theologiae* I-II q. 90. a. 1 co. he derives the meaning of '*lex*' from the verb *ligare* (to bind), adding that law obliges someone to act. Nonetheless, he does not possess a detailed theory of obligation.

The emphasis on obligation changes the relation of law to reason and will. For Aquinas law is fundamentally and primarily a *rationis ordinatio*. Law pertains to reason, because reason is the rule and measure, the first principle of human acts, directing things to their ends.[374] Suárez does not agree with this rationalist conception of law. According to him, the essence of law cannot be found in the judgment of the intellect alone, since

> "law does not merely enlighten, but also provides motive force and impels; and, in intellectual processes, the primary faculty for moving to action is the will … in opposition to this opinion, we have the fact that this judgment does not possess any efficacious force for binding, or for moving in a moral sense; yet such a force is essential in law."[375]

Certain modern – especially Neo-Thomist – commentators of Suárez's legal philosophy are definitely unhappy with this conclusion. Joseph Thomas Delos blames him for substituting a voluntartist and subjectivist conception of law for Francisco de Vitoria's rationalist, objectivist approach.[376] Philippe-Ignace André-Vincent claims that in Suárez reason totally lost its normative character, and that is why it had to cede its place to the power of volition in the concept of law.[377] Finally, Michel Villey discernes an "*opposition foncière*" (a fundamental opposition) between Suárez and Aquinas, and treates him on this ground purely and simply as a traitor, an unfaithful disciple of the *doctor angelicus*.[378] These critics, however, tend to overlook two important facts (or try to minimize their importance). First, they fail to notice that Suárez is very far from undermining the rationality and morality of law. On the contrary, he insists that "the will of the prince does not suffice to make law, unless it be a just and upright will; so that it must have its source in an upright and prudent

374 *Summa theologiae* I-II q. 90 a. 1 co.: "Regula autem et mensura humanorum actuum est ratio, quae est primum principium actuum humanorum, ut ex praedictis patet, rationis enim est ordinare ad finem".

375 *De legibus* 1.4.7: "lex non tantum est illuminativa sed motiva et impulsiva; prima autem facultas movens ad opus in intellectualibus rebus est voluntas"; *De legibus* 1.5.5 : "huic tamen sententiae obstat, quia iudicium illud non habet efficaciam obligandi nec moraliter movendi."

376 J. T. Delos, *La société internationale et les principes du droit public*, 232-47.

377 P.-I. André-Vincent, 'La notion moderne de droit naturel et le volontarisme', 243: "Chez Suarez, la raison a perdu son caractère normatif: elle ne dicte pas l'ordre au Bien, elle ne peut que le connaître spéculativement. Alors la volonté prend la place de la raison pour donner à la loi sa forme normative: l'imperium devient son acte."

378 M. Villey, *La formation de la pensée juridique moderne*, 368-95; M. Villey, 'Remarques sur la notion de droit chez Suarez', *Archives de philosophie* 42 (1979), 219-27.

judgment."[379] By defining law as an act of just and upright will,[380] Suárez adopts the view of Gregory of Rimini and Gabriel Biel (represented in the Jesuit order by Luis de Molina), that law is an act of both reason and will.

> "For if one has in mind the moving force in law, so that law is said to be the power in the prince which moves and makes action obligatory, then, in that sense, it is an act of the will. If, on the other hand, we are referring to and considering that force in law which directs us towards what is good and necessary, then law pertains to the intellect."[381]

Secondly, Suárez's critics seem to forget about the fact that though consistently emphasizing the rationality of law, Aquinas in no way intends to exclude any element of will from the concept of law.[382] He describes command as an act of the reason, presupposing, however, also an act of the will,[383] and in his discussion of human law he asserts that "all law proceeds from the reason and will of the lawgiver; the Divine and natural laws from the reasonable will of God; the human law from the will of man, regulated by reason."[384] So it appears that Aquinas, too, regards law as an act of reason and an act of will at the same time.

Nevertheless, we should not relativize the fundamental difference that although both Aquinas and Suárez have a reasonably balanced view of the relationship of reason and will in law, while for Aquinas law is essentially a product of reason, for Suárez it is above all the act of will that makes law 'law' in the proper sense. While Saint Thomas, albeit admitting that reason has the power of moving from the will, stresses that in order that an act of will

[379] *De legibus* 1.5.23: "Solum enim dicunt ad legem non sufficere voluntatem principis, nisi iusta sit et recta et ideo debere oriri ex recto et prudenti iudicio".

[380] *De legibus* 1.5.24: "law … is the act of a just and upright will, the act whereby a superior wills to bind an inferior to the performance of a particular deed" [legem … esse actus voluntatis iustae et rectae, quo superior vult inferiorem obligare ad hoc vel illud faciendum].

[381] *De legibus* 1.5.21: "Nam si in lege attendatur vis movendi, et ideo lex dicatur id quod est in principe quod movet et obligat ad agendum, sic lex est actus voluntatis. Si autem spectetur ac consideretur in lege vis dirigendi ad id quod bonum et necessarium est, sic pertinet ad intellectum".

[382] J. St. Leger, *The "Etiamsi Daremus" of Hugo Grotius: A Study in the Origins of International Law* (Roma: Herder, 1962), 83.

[383] *Summa theologiae* I-II q. 17 a. 1. co.: "imperare est actus rationis, praesupposito tamen actu voluntatis".

[384] *Summa theologiae* I-II q. 97 a. 3 co.: "omnis lex proficiscitur a ratione et voluntate legislatoris, lex quidem divina et naturalis a rationabili Dei voluntate; lex autem humana a voluntate hominis ratione regulata."

may have the nature of law, it must be in accord with some rule of reason,[385] in Suárez the judgment of the intellect preceding, directing and regulating the will "is clearly not law, if it is considered in itself and as prior to the act of will."[386] And this is not merely a question of emphasis, it affects the essence of law. To conclude, it is undeniable that Suárez's general concept of law is in a sense voluntaristic, but even so, it represents a kind of 'rationalist voluntarism', which, in the final analysis, seems to be reconcilable with Aquinas's rationalist conception of law.[387]

1.2 The Eternal Law

The Second Scholasticism restored the traditional Augustinian-Thomist idea of the *lex aeterna*, formerly abandoned by most nominalist and Protestant thinkers.[388] Thus for Suárez too, eternal law is *lex per essentiam* and the source of all other laws.[389] He has, however, some serious difficulties to insert it into his system of laws.

(1) *The problem of application and promulgation*: Since the world was created by God, eternal law could not be applied and promulgated from eternity, for before the creation there were no subjects on whom it could have been imposed.

(2) *The problem of divine freedom and omnipotence*: Suárez shares with Duns Scotus and Ockham a strong concern for the integrity of divine freedom. But the existence of eternal law does not constitute in itself a potential danger to God's freedom and omnipotence?

As regards the first problem, Suárez takes over from Saint Thomas the distinction between 'law as in the lawgiver' and 'law as in the subject',[390] and on the basis of this distinc-

385 *Summa theologiae* I-II q. 90 a. 1 ad 3: "ratio habet vim movendi a voluntate … Sed voluntas de his quae imperantur, ad hoc quod legis rationem habeat, oportet quod sit aliqua ratione regulata."

386 *De legibus* 1.5.23: "Unde philosophi ibi allegati cum legem tribuunt rationi, non loquuntur de actu intellectus qui in principe sequitur ex voluntate, qua vult obligare subditos, sed de iuducio antecedente, dirigente et quasi regulante illam voluntatem … de quo iudicio constat non esse legem, si per se et ut prior voluntate spectetur."

387 G. Jarlot, 'Les idées politiques de Suarez et le pouvoir absolu', 89-90, 98, 103-4; E. Jombart, 'Le "volontarisme" de la loi d'après Suarez', 42-43.

388 The important exceptions to this rule are Gregory of Rimini, Gabriel Biel and Philipp Melanchton. For a good discussion of the legal philosophy of Gerogory of Rimini, see M. B. Crowe, 'The "Impious Hypothesis"', 396-403; for Biel, see H. A. Oberman, *The Harvest of Medieval Theology*, ch. 4; for Melanchton, M. Scattola, *Das Naturrecht vor dem Naturrecht: Zur Geschichte des ius naturae im 16. Jahrhundert (*Tübingen: Niemeyer, 1999), 28-55.

389 *De legibus* 2, Introduction.

390 *De legibus* 1.4.4. The *locus classicus* of this distinction is *Summa theologiae* I-II q. 90 a. 1 ad 1, where

tion, he differentiates between two phases of law in general and of eternal law in particular: "One is that which exists in the inner disposition of the lawmaker, in so far as the law in question has already been defined in his mind, and established by his absolute decree and fixed will. The other is that phase in which a law is externally established, and promulgated for the subjects." Since there are no eternal subjects, in the second mode eternal law does not exist from eternity.[391] As a result, a paradoxical situation arises: if eternal law is really eternal, then it exists only in God's mind, so it is not a law; if, on the other hand, it is a genuine law, it cannot be eternal.

Suárez holds with Aquinas that divine wisdom is eternal in God, but his voluntaristic concept of law excludes that the eternal reason of God has the nature of law. Therefore he rejects – courteously not mentioning by name his master – Aquinas's conception of eternal law as the divine plan of creation and providence. I find it appropriate to quote here the relevant passage of the *Summa theologiae*:

> "Just as in every artificer there pre-exists a type of the things that are made by his art, so too in every governor there must pre-exist the type of the order of those things that are to be done by those who are subject to his government. … God, by His wisdom, is the Creator of all things in relation to which He stands as the artificer to the products of his art … Moreover He governs all the acts and movements that are to be found in each single creature … so the type of Divine Wisdom, as moving all things to their due end, bears the character of law."[392]

Suárez finds this usage of *lex* purely metaphorical and hence improper:

> "According to this explanation, the law in question is not a law regulating conduct, so to speak, but one governing the creations of the Artificer; for all things made by God

---

Aquinas expounds that a law may be found in something in two ways: (1) as in that which measures and rules, and (2) as in that which is measured and ruled.

[391] *De legibus* 2.1.5.: "Distinguamos ergo in legem duplicem statum: unus est quem habet in interna dispositione legislatoris, quatenus in mente eius iam illa lex descripta est et eius absoluto decreto ac firma voluntate stabilita. Alius status est quem habet lex exterius constituta et subditis proposita. Priori modo manifestum est dari in Deo legem aeternam … Posteriori autem modo aeque certum est non habuisse legem Dei hunc secundum statum ab aeterno".

[392] *Summa theologiae* I-II q. 93 a. 1 co.: "sicut in quolibet artifice praeexistit ratio eorum quae constituuntur per artem, ita etiam in quolibet gubernante oportet quod praeexistat ratio ordinis eorum quae agenda sunt per eos qui gubernationi subduntur. … Deus autem per suam sapientiam conditor est universarum rerum, ad quas comparatur sicut artifex ad artificiata … Est etiam gubernator omnium actuum et motionum quae inveniuntur in singulis creaturis … ita ratio divinae sapientiae moventis omnia ad debitum finem, obtinet rationem legis."

> are related to Him who made them. … Consequently, the argument based on promulgation loses all force. For promulgation is necessary in the case of a law regulating conduct, but not in the case of one governing the production of works. … However, such an explanation is not satisfactory … because the terminology involved in it is highly figurative and would be unfitted to the subject-matter of law, by reason of its mere metaphorical significance".[393]

Suárez also discards the concrete solution proposed by Aquinas (this time quoting him), viz. that created beings exist from eternity in the foreknowledge of God, saying that promulgation is made not to creatures foreknown as the objects of knowledge, but to actually existing beings.[394]

From the foregoing, the conclusion seems inevitable that eternal law is not 'law' in the proper sense of the term. Still, Suárez defends the legal character of *lex aeterna*, relying on Alexander of Hales's argument that for the nature of that law it is sufficient that it should of itself have binding force (even if in fact it may not yet be binding inasmuch as it has not yet been applied).[395] In this way, however, he has to concede that promulgation to actually existing subjects does not pertain to the essence of eternal law.[396] Moreover, he asserts that the external promulgation of eternal law never takes place, or to be more precise, it is pro-

[393] *De legibus* 2.1.7: "Iuxta quam expositionem lex illa non est lex morum (ut sic dicam) sed artificiorum, nam omnia quae a Deo fiunt comparantur ad illum tanquam artefacta ad artificem … Quapropter cessat ratio de promulgatione, nam haec est necessaria in lege morum, non in lege artificiorum … Haec vero expositio non placet … quia illa appellatio valde metaphorica est et impertinens esset pro materia de legibus ratione solius metaphoricae significationis".

[394] *De legibus* 2.1.9: "Nec satisfacit quod divus Thomas … ait fuisse tunc creaturas in praecognitione divina, quia promulgatio non fit creaturis obiective praecognitis sed in se existentibus".

[395] *De legibus* 2.1.8: "Quod si instes quia lex quae non ligat non meretur nomen legis, respondet in summa ad rationem legis satis esse quod de se vim habeat ligendi, licet nondum actu liget, quia nondum est applicata." Suárez leans on Alexander of Hales's *Summa universae theologiae* 3.2.1.

[396] *De legibus* 2.1.11: "Ex hac vero doctrina divi Thomae aperte concluditur iuxta mentem eius de ratione huius legis aeternae non esse promulgationem actu factam subditis." Suárez refers here to Saint Thomas. It is true that Aquinas also does tacitly give up promulgation as a conceptual element of law in the case of eternal law in *Summa theologiae* I-II q. 91 a. 1 ad 1 and ad 2, but with the important difference that for him promulgation is by no means such an essential element of law than for Suárez.

mulgated – and binds men – only indirectly, through the promulgation of natural law (and other laws).[397] Therefore, strictly speaking, it has only a potentially binding character.[398]

As for the problem of divine freedom and omnipotence, the scholastic idea of eternal law, as interpreted in the thirteenth century, placed divine reason as a norm over God's will. It was conceived as a rational rule and measure of God's *opera ad extra* which God had voluntarily imposed on Himself. This view is not acceptable for Suárez. First, for terminological reasons: law presupposes a relationship of superior and inferior, "but God has no superior, neither can He bind Himself through precept or law, for He is not superior to Himself".[399] Secondly and more importantly, owing to theological motives: not even eternal law can abridge divine freedom. Suárez affirms, citing Aquinas, that since "God is a law unto Himself", "what He does according to His will He does justly".[400] The quotation is correct, but let us take a closer look at Aquinas's argumentation. Taken in itself, he says, God's will is not subordinate to the eternal law but is identical with it and with divine essence; however, if we consider God's will in reference to creatures, it is subject to eternal law and divine reason.[401] Thus for Aquinas God's will is always reasonable and just because "it is impossible for God to will anything but what His wisdom approves."[402]

I think it goes without saying that Aquinas arrives at the conclusion of the reasonableness and justice of God's will just from the premises that Suárez wants to avoid. Suárez has therefore to rearrange the relation of divine reason and will. He argues that in God reason and will cannot be distinguished, so the will of God is not rational but is rather reason

397 *De legibus* 2.1.11: "Unde in hac lege aeterna, per se loquendo, nulla alia publica promulgatio requiritur ut actu obliget, sed solum quod veniat in notitiam subditi. … Ordinarie autem Deus non obligat homines per legem aeternam nisi mediante aliqua exteriori lege, quae sit illius participatio et significatio. Et ita quando aliae leges promulgantur hominibus, promulgatur ad extra lex ipsa aeterna; ideoque in illa, ut aeterna est, non habet locum propria promulgatio."

398 *De legibus* 2.4.10.

399 *De legibus* 2.2.6: "Sed Deus non habet superiorem, neque se ipsum per modum praecepti et legis obligare potest, quia non est sibi superior."

400 *De legibus* 2.2.8; *Summa theologiae* I q. 21 a. 1 ad 2: "Deus autem sibi ipsi est lex", "quod secundum suam voluntatem facit, iuste facit".

401 *Summa theologiae* I-II q. 93 a. 4 ad 1: "de voluntate Dei dupliciter possumus loqui. Uno modo, quantum ad ipsam voluntatem, et sic, cum voluntas Dei sit ipsa eius essentia, non subditur gubernationi divinae neque legi aeternae, sed est idem quod lex aeterna. Alio modo possumus loqui de voluntate divina quantum ad ipsa quae Deus vult circa creaturas, quae quidem subiecta sunt legi aeternae, inquantum horum ratio est in divina sapientia. Et ratione horum, voluntas Dei dicitur rationabilis."

402 *Summa theologiae* I q. 21 a. 1 ad 2: "impossibile est Deum velle nisi quod ratio suae sapientiae habet."

itself. Consequently "just as the eternal reason of God is not regulated by law, neither is His will so regulated, even with respect to its free acts, being, on the contrary, righteous in itself".[403] Thus the dictates of divine reason – though preceding it in the logical order – do not bind or determine God's will, in relation to which they do not possess the nature of law. The will of God is in itself right and good.[404] The eternal law, emphasizes Suárez, is a law imposed on beings created and governed by God, but not superposed over God Himself or His Will. It is a free act of God, who Himself remains always exempt from law.[405] And as freedom is to be found in the divine will, eternal law consists formally in a *decretum liberum voluntatis Dei* (a free decree of the will of God).[406] To a certain extent, it can also be regarded as an act of reason, inasmuch as the intellect "preconceives within itself the law which is to be prescribed", but this does not alter the essential fact that it is the decree of God's will that constitutes, so to speak, "the very soul and virtue" of eternal law.[407]

As we have seen, Suárez substantially reinterprets the Thomist conception of eternal law. While for Aquinas eternal law is God's eternal reason that directs God's will in regard to his *opera* ad *extra*, for Suárez it is a manifestation of divine free will, not bound by the judgment of divine reason. This fundamental difference cannot be solely traced back to their

[403] *De legibus* 2.2.8: "in Deo non distinguuntur in re voluntas et ratio, propter quod dixit divus Thomas (quaest. 93, art. 4, ad primum) voluntatem Dei secundum non recte dici rationabilem, nam potius est ipsa ratio. Sicut ergo ratio Dei aeterna non mensuratur lege, ita nec voluntas etiam prout libere vult, sed per se recta est". Quentin Skinner (*The Foundations of Modern Political Thought*, II: 149-50) draws attention to the fact, mentioning Molina as another example, that it was a common Jesuit tendency to conflate God's reason and will as regards lawmaking.

[404] *De legibus* 2.2.8: "iudicium rationis in Deo solum est necessarium ex eo quod nihil potest esse volitum quin praecognitum. Non tamen habet munus quasi obligandi vel determinandi voluntatem, sed ipsa voluntas per se est honesta, et ideo dictamen rationis quod intelligitur ratione praecedere in intellectu, non potest habere rationem propriae legis respectu divinae voluntatis."

[405] *De legibus* 2.2.9: "Lex aeterna … dici potest habere rationem legis respectu rerum gubernatarum, non vero ipsiud Dei seu voluntatis eius. … Deus autem non manet illi subiectus, sed semper manet solutus legibus".

[406] *De legibus* 2.3.4, 2.3.6.

[407] *De legibus* 2.3.9: "Si quis autem iuxta ea quae diximus, voluerit hanc legem aeternam in divino intellectu considerare, non erit difficile id explicare. Oportet tamen ut eam consideret in intellectu divino ut subsequente secundum rationem dictum decretum voluntatis Dei. Negari enim non potest quin illud decretum sit veluti anima et virtus huius legis … Tamen supposito illo decreto, intelligi potest in mente Dei cognitio illius decreti, quae ad illud subsequitur et quod ratione illius iam intellectus divinus iudicat determinate, quae ratio tenenda sit in gubernatione rerum atque ita in se praeconcipere legem, quae unicuique rei suo tempore praescribenda est."

differing views on the essence of law, since voluntarism is even more present in Suárez's conception of eternal law than in his general concept of law. Suárez undertakes the difficult (if not impossible) task of their harmonization, but he is able to reconcile them only partly, and at the price of serious concessions on both sides.[408] One might be tempted to think that perhaps Suárez should have altogether dropped the idea of eternal law (together with the numerous theoretical difficulties it implies), as Ockham did. After all, eternal law and natural law are but two different aspects – 'law as in the lawgiver' and 'law as in the subject' – of the same law:

> "natural law, as we are now using the term, is looked upon as existing not in the Lawgiver, but in men, in whose hearts that Lawgiver Himself has written it, … natural law … exists in the lawgiver as none other than the eternal law".[409]

And we saw that it is only though natural law that eternal law is imposed on and promulgated to men. So Suárez could have possibly abandoned it, applying the strict methodological principle of Ockham's razor. Still, he decided to retain this idea. I think he did so not only because he respected Aquinas and the medieval tradition of natural law (or the rules of the Jesuit order),[410] but chiefly because he wanted to accentuate moral objectivism in law. But how can the eternal law be objective and immutable, if it is primarily a manifestation of God's unrestricted free will? I will return to this question later on when I will discuss the respective roles of right reason and divine will in natural law.

[408] According to the very severe criticism of Pauline C. Westerman, Suárez's concept of 'law-as-precept' is simply incompatible with the authentic idea of eternal law, rendering the latter "incomprehensible, self-contradictory and blasphemous, plus superfluous". — P. C. Westerman, *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden: Brill, 1998), 83-86. This is, of course, an exaggeration. A voluntaristic concept of law is not *a priori* irreconcilable with the idea of eternal law. This is so much so that the original, Augustinian conception of eternal law is itself partly voluntaristic. Augustine defines eternal law (*Contra Faustum* 22.27) as "the divine reason or the will of God commanding that the natural order be preserved and forbidding that it be disturbed" [ratio divina vel *voluntas* Dei ordinem naturalem conservari jubens, perturbari vetans]. Not surprisingly, this fact does not escape the attention of Suárez. See e.g. *De legibus* 2.3.1 and 2.3.9.

[409] *De legibus* 2.5.14: "Considerandum est ergo legem naturalem, prout de illa nunc loquimur, non considerari in ipso legislatore, sed in ipsis hominibus in quorum cordibus ipse illam descripsit, … ita in lege naturali, quae in legislatore non est aliud quam lex aeterna".

[410] In the Constitutions of the Society of Jesus, Ignatius of Loyola made the teachings of Aquinas obligatory for the members of the order.

1.3 The Natural Law: Lex Indicativa or Lex Praeceptiva?

Just like Aquinas, Suárez conceives of natural law as the participation of eternal law in rational beings.[411] Eternal law and natural law differ as *lex per essentiam* and *lex per participationem*, or as 'law as it exists in the lawgiver' and 'law as it is in the subject'.[412] In his discussion of the general concept of law, Suárez describes 'law as in the subject' as pertaining to the intellectual nature, asserting that only rational creatures can be governed by law, whereas irrational beings, lacking reason and free will, are not capable of participating in law.[413] Suárez applies this principle emphatically to every kind of law. In this respect, he seems to be more consistent than Saint Thomas, who willingly incorporates Ulpian's definition into his natural law theory. He is equally empathic in separating natural law from human will and attaching it to right reason. Deploying the Thomist language of *dominium sui* (self-mastery), Suárez argues that as "the exercise of dominion and the function of ruling are characteristic of law, and in man these functions are to be attributed to right reason, … the natural law must be constituted in the reason, as in the immediate and intrinsic rule of human actions."[414]

Suárez raises the question of the *ratio formalis* (formal basis) of natural law. Is it rational nature itself to which human actions may be found to be appropriate or, on the contrary, inappropriate? Or is it rather rational nature understood as the faculty of judging such conformity or lack of conformity? For Suárez only the second answer is acceptable. As both views can be justified on Thomistic grounds,[415] this question might perhaps seem purely terminological and, to be sure, somewhat artificial at first sight, but, as Michael Bertram Crowe rightly stressed, it is much more than a *lis de verbis*, inasmuch as Suárez treats this question as constituting a part of a more general and fundamental controversy, dividing intellectualists and voluntarists, as to whether natural law should be understood

[411] Cf. *Summa theologiae* I-II q. 91 a. 2 co.

[412] *De legibus* 2, Introduction.

[413] *De legibus* 1.4.2, 1.1.2, 1.3.14.

[414] *De legibus* 2.5.12: "proprium est legis dominari et regere. Sed hoc tribuendum est rectae rationi in homine ut secundum naturam recte gubernetur. Ergo in ratione est lex naturalis constituenda tanquam in proxima regula intrinseca humanarum actionum."

[415] For a good brief summary of Saint Thomas's different explanations of the formal basis of natural law, see W. Farrell, *The Natural Moral Law according to St. Thomas and Suarez*, 82-91. Farrell emphasizes that Aquinas himself did not consider these different views as mutually exclusive.

as a *lex indicativa* or a *lex praeceptiva*.[416] Suárez provides a correct summary of this complex debate, which I will quote here – for the sake of intelligibility – at full length:

> "On this point, the first opinion which we shall discuss is that the natural law is not a prescriptive law, properly so-called, since it is not the expression of the will of some superior; but that, on the contrary, it is a law indicating what should be done, and what should be avoided, what of its own nature is intrinsically good and necessary, and what is intrinsically evil. Thus many writers distinguish between two kinds of law, the one indicative, the other prescriptive, and hold that the natural law is law in the first sense, not in the second. This is the view exposed by Gregory of Rimini, who refers to Hugh of St. Victor, and who is followed by Gabriel Biel, Jacques Almain and Antonio de Córdoba.
>
> Accordingly, it seems that these authors would grant that the natural law is not derived from God as a Lawgiver, since it does not depend upon His will, and since, in consequence, God does not, by virtue of that law, act as a superior who lays down commands or prohibitions. Indeed, on the contrary, Gregory, whom the others follow, says that even if God did not exist, or if He did not make use of reason, or if He did not judge of things correctly, nevertheless, if the same dictates of right reason dwelt within man, constantly assuring him, for example, that lying is evil, those dictates would still have the same legal character which they actually possess, because they would constitute a law pointing out the evil that exists intrinsically in the object.
>
> The second opinion, diametrically opposed to the first, is that the natural law consists entirely in a divine command or prohibition proceeding from the will of God as the Author and Ruler of Nature; that, consequently, this law as it exists in God is none other than the eternal law in its capacity of commanding or prohibiting with respect to a given matter; and that, on the other hand, this same natural law, as it dwells within ourselves, is the judgment of reason, in that it reveals to us God's will as to what must be done or avoided in relation to those things which are consonant with natural reason.
>
> This is the view one ascribes to William Ockham, inasmuch as he says that no act is evil save in so far as it is forbidden by God, and which could not become good if commanded by God, and conversely; whence he assumes that the whole natural law consists of divine precepts laid down by God, and susceptible of abrogation or alteration by Him. And if someone insists that such a law would be not natural but positive, the reply is that it is called natural because of its congruity with the nature of things and not with the implication that it was not externally enacted by the command of

[416] M. B. Crowe, *The Changing Profile of the Natural Law* (The Hague, Martinus Nijhoff, 1977), 216-17.

> God. Jean Gerson also inclines to this opinion … Pierre d'Ailly, too, defends this view … The same opinion is supported at length by Andreas de Novocastro.
>
> These authorities also add that the whole basis of good and evil in matters pertaining to the law of nature is in God's will, and not in a judgment of reason, even on the part of God Himself, nor in the very things which are prescribed or forbidden by that law."[417]

The distinction between indicative law and prescriptive law can be traced back to the fourteenth century. It was introduced by the Ockhamist-Augustinian theologian Gregory of Rimini in his *Commentary on the Sentences of Peter Lombard*.[418] The others authors cited

[417] *De legibus* 2.6.3-4: "In hac re prima sententia est legem naturalem non esse legem praecipientem proprie, quia non est signum voluntatis alicuius superioris, sed esse legem indicantem quid agendum vel cavendum sit, quid natura sua intrinsece bonum ac necessarium vel intrinsece malum sit. Atque ita multi distiguunt duplicem legem: unam indicantem, aliam praecipientem, et legem naturalem dicunt esse legem priori modo, non posteriori. Ita Gregorius …, qui refert Hugonem de Sancto Victore … Sequitur Gabriel …, Almainus …, Corduba … Atque hi auctores consequenter videntur esse concessuri legem naturalem non esse a Deo ut a legislatore, quia non pendet ex voluntate Dei, et ita ex vi illius non se gerit Deus ut superior praecipiens aut prohibens. Immo ait Gregorius, quem caeteri secuti sunt, licet Deus non esset vel non uteretur ratione vel non recte de rebus iudicaret, si in homine esset idem dictamen rectae rationis dictantis v. g. malum esse mentiri, illud habiturum eandem rationem legis quam nunc habet, quia esset lex ostensiva malitiae, quae in obiecto ab intrinseco existit. Secunda sententia, huic extreme contraria, est legem naturalem omnino positam esse in divino imperio vel prohibitione procedente a voluntate Dei ut auctore et gubernatore naturae, et consequenter hanc legem, ut est in Deo, nihil aliud esse quam legem aeternam ut praecipientem vel prohibentem in tali materia. In nobis vero hanc legem naturalem esse iudicium rationis, quatenus nobis significat voluntatem Dei de agendis et vitandis circa ea quae rationi naturali consentanea sunt. Ita sumitur ex Ochamo … quatenus dicit nullum esse actum malum, nisi quatenus a Deo prohibitus est, et qui non possit fieri bonus si a Deo praecipiatur, et e converso. Unde supponit totam legem naturalem consistere in praeceptis divinis a Deo positis, quae ipse possit auferre et mutare. Quod si instet aliquis talem legem non naturalem esse sed positivam, responderet dici naturalem quia est proportionata naturis rerum, non quia non sit extrinsecus a Deo posita. Et in hanc sententiam inclinat Gerson … Et hanc sententiam defendunt late Petrus Alliacus … Idem latissime Andreas de Novo Castro". Otto von Gierke, apparently influenced by Suárez on this point, outlines the same debate in his classic *Political Theories of the Middle Age* (173 n. 256) as follows: "The older view, which is more especially that of the Realists, explained the *Lex Naturalis* as an intellectual act independent of Will – as a mere *lex indicativa*, in which God was not lawgiver but a teacher working by means of Reason – in short, as the dictate of Reason as to what is right, grounded in the Being of God but unalterable even by him. (To this effect already Hugo de S. Victore Saxo … later Gabriel Biel, Almain and others.) The opposite opinion, proceeding from pure Nominalism, saw in the Law of Nature a mere divine Command, which was right and binding merely because God was the lawgiver. So Ockham, Gerson, d'Ailly."

[418] *In II Sententiarum* dd. 34-37 q. 1 a. 2: "prohibitio potest accipi dupliciter, similiter praeceptum et lex

in the text are also fourteenth- to sixteenth-century thinkers. This is a clear sign of the fact that not only the distinction itself but also the whole intellectualist-voluntarist debate dates back only to the fourteenth century, and not before. The controversy was in effect about divine rationality and freedom, and it was the appearance of the new, voluntarist concept of law that sparked it off. While in Aquinas's conception of eternal law there could be order in God's mind without restraining divine freedom, the concept of law as command seemed to necessitate a firm choice between a determinist and an indeterminist view of God: God is either merely a teacher of the natural law, Himself subject to and bound by that law, or, just the opposite, a legislator acting as an arbitrary, omnipotent sovereign.[419] Suárez appears to think, quite rightly, that the question is not adequately posed in this manner, so he does not accept either of the two opinions, and seeks instead a *via media* founded on Saint Thomas's natural law theory.

Suárez first sets out to refute the intellectualist or essentialist view. It is important to note that practically all the theologians enumerated by Suárez in this connection were (at least partly) Ockhamists and hence (more or less) voluntarists, who adopted some essentialist points of view in order to differentiate themselves from the more robust voluntarism of Ockham, Gerson and d'Ailly.[420] Gregory of Rimini and Gabriel Biel in his wake differentiates between *lex indicativa* and *lex praeceptiva* with the purpose of counterbalancing or reconciling the voluntarist view that it is God's will that determines what is good and evil with the rationalist view of good and evil as grounded in the nature of things.[421] That is why Gregory stresses that sin is sin because it is against divine reason in so far as it is right, rather than in so far as it is divine; moreover, he adds, "if, under the impossible hypothesis (*per impossibile*) that divine reason or even God Himself did not exist, or His reason should err, still if someone were to act against angelic or human right reason, or any other possible kind of right reason, he would sin."[422] So, paradoxically enough, it was a "ratio-

… Indicativa est illa, qua tantummodo significatur aliquid non esse agendum seu aliud aliquid ex quo sequitur ipsum agendum non esse … Imperativam dico illam, qua imperatur alicui aliquid agere vel non agere; et haec exprimitur per verbum imperativi modi". Gregory refers here to Hugh of St. Victor, viz. to his distinction between *praeceptum naturae* and *praeceptum disciplinae*, but this reference is rather a simple appeal to authority than a true reference. — M. B. Crowe, 'The "Impious Hypothesis"', 397-98.

[419] P. C. Westerman, *The Disintegration of Natural Law Theory*, 85-86 and 92.

[420] For the political and legal theory of Gerson and d'Ailly, see J. B. Morrall, *Gerson and the Great Schism* (Manchester: University Press, 1960); F. Oakley, *The Political Thought of Pierre d'Ailly: The Voluntarist Tradition* (New Haven: Yale University Press, 1964).

[421] M. B. Crowe, 'The "Impious Hypothesis"', 398.

[422] *In II Sententiarum* dd. 34-37 q. 1 a. 2: "Sequitur quod quicquid est contra rectam rationem, est contra

nalist" or moderate voluntarist current inside the nominalist camp that led gradually to intellectualism and in the end to the "*etiamsi daremus*" hypothesis of Hugo Grotius.[423]

Seeing that the above-mentioned authors aim too in their own way at a synthesis of voluntarism and rationalism, their theoretical position seems by no means so far removed from that of Suárez as it might appear from the *De Legibus*. Is this to mean that Suárez is tilting at windmills? Not at all. It is generally true that the theologians of the Counter-Reformation, in contrast with the nominalist and voluntarist tendencies inherent in Protestantism, were inclined towards intellectualism. As a matter of fact, the reassertion of the predominance of reason in moral and legal philosophy was a fundamental endeavour of the sixteenth-seventeenth-century scholastic revival.[424] In this way, the Second Scholasticism played an important part in the revitalization of classical Aristotelian-Thomist natural law. However, certain Thomists, in their zeal to oppose Protestant voluntarism, leaned towards extreme objectivism and rationalism in law and morals. This tendency culminated in the *oeuvre* of Suárez's fellow Jesuit Gabriel Vázquez (not to be confused with the humanist lawyer Fernando Vázquez de Menchaca).[425] Hans Welzel points out that by incorporating

---

aeternam legem … Si quaeratur, cur potius dico absolute 'contra rectam rationem' quam contracte 'contra rationem divinam', respondeo: Ne putetur peccatum esse praecise contra rationem divinam et non contra quamlibet rectam rationem de eodem; aut aestimetur aliquid esse pecctum, non quia est contra rationem divinam inquantum est recta, sed quia est contra eam inquantum est divina. Nam, si per impossibile ratio divina sive deus ipse non esset aut ratio illa esset errans, adhuc, si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam, si qua esset, peccaret." Biel reiterates almost verbatim Gregory's view (*In II Sententiarum* d. 35 q. 1 a. 1): "Nam si per impossibile Deus non esset, qui est ratio divina, aut ratio illa divina esset errans, adhuc si quis ageret contra rectam rationem angelicam vel humanam aut aliam aliquam, si qua esset, peccaret." In the period of the Second Scholasticism, the hypothesis of God's non-existence was cited with approval by Gabriel Vázquez and Robert Bellarmine, with disapproval by Domingo de Soto and Luis de Molina.

423 J. St. Leger, *The "Etiamsi Daremus" of Hugo Grotius*, 124. Grotius formulates his famous version of the "impious hypothesis" (*De iure belli ac pacis* Prolegomena n. 11) as follows: "And indeed, all we have now said would take place, though we should even grant, what without the greatest Wickedness cannot be granted, that there is no God, or that he takes no Care of human Affairs" [Et haec quidem quae iam diximus, locum haberent etiamsi daremus, quod sine summo scelere dari nequit, non esse Deum, aut non curari ab eo negotio humana]. As Grotius's formula shows a remarkable verbal dependence on Suárez, it is very possible that he drew it from the *De Legibus*. — A.-H. Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', *The New Scholasticism* 17 (1943), 101-33 at 115.

424 J. St. Leger, *The "Etiamsi Daremus" of Hugo Grotius*, 93.

425 Jesuits were generally more inclined to extreme essentialism than Dominicans. Vitoria and Soto, for instance, were much more moderate in this respect.

the phrase "*vel non recte de rebus iudicaret*" (or if He did not judge of things correctly) in the formula of the "*etiamsi daremus*", Suárez makes an unequivocal allusion to his Jesuit rival,[426] who asserts in his Commentary on the *Prima Secundae* of the *Summa theologiae* that "if we should concede, which is indeed impossible, that *God did not judge as He does now*, and if there remained in us the use of reason, sin would remain".[427] The ground for this view is that sin is evil of itself, prior to any external prohibition, even to the judgment or will of God.[428] From this allusion it seems quite obvious that Suárez's criticism is directed as much, if not more, against Vázquez and other contemporary exponents of extreme intellectualism than against Gregory of Rimini and Biel. It is worth mentioning here that in an earlier phase of his scientific career, Suárez tended towards extreme essentialism, too.[429]

Here we have to return for a while to the problem of the *ratio formalis* of natural law. In Suárez's age, the major proponent of the view that natural law should be identified with rational nature as such was none other than Gabriel Vázquez.[430] Vázquez locates the formal basis of natural law in human rational nature itself rather than in the judgment of reason in order to eliminate all subjective elements from the concept of *ratio*.[431] This view is unacceptable for Suárez. Not that he questions the doctrine of *perseitas boni*, which assumes the intrinsic goodness (or malice) of actions. Just the contrary! He willingly accepts the idea that rational nature is the foundation of the objective goodness of moral actions; but

[426] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97. Because of their rivalry, the General of the Jesuit Order forbade Suárez and Vázquez even to quote each other. This prohibition was automatically lifted after the death of Vázqez in 1604, but Suárez partly kept his habit of referring to his views without mentioning his name. — L. Pereña, 'Metodología científica suareciana', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, ed., trans. L. Pereña and V. Abril (Madrid: Consejo Superior de Investigaciones Científicas, 1974), xix-xxxvii at xxvi.

[427] *Commentariorum ac disputationum in primam secundae Sancti Thomae* (henceforth *Commentariorum*), d. 97 c. 1 n. 3: "si concesso impossibili intelligeremus *Deum non ita iudicare*, et manere in nobis usum rationis, maneret etiam peccatum" (emphasis added). Translated by James St. Leger in his *The "Etiamsi Daremus" of Hugo Grotius*, 132.

[428] *Commentariorum* d. 97 c. 1 n. 2.

[429] P. Suñer, 'El Teocentrismo de la ley natural', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, xxxviii-lv at xlii-xlvi. Hugo Grotius made an intellectual move in the opposite direction: he first advocated a voluntarist view of natural law in the *De iure praedae*, then opted for extreme rationalism in the *De iure belli ac pacis*.

[430] See e.g. *Commentariorum* d. 150 c. 3 n. 23: "Prima igitur lex naturalis in creatura rationali est ipsamet natura, quatenus, rationalis, quia haec est prima regula boni et mali". On this point Suárez cites Vázquez by name in *De legibus* 2.5.2.

[431] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 95-96.

on the other hand he dismisses the view that for that reason it can be termed law. Suárez admits that human rational nature can be considered as a measure or standard but not that it may be spoken of as 'law': "rational nature itself, strictly viewed in its essential aspect, neither gives commands, nor makes evident the rectitude or turpitude of anything".[432]

In Suárez's view, by equating *lex naturalis* with rational nature, Vázquez defends a non-legal conception of natural law, and this holds in general of all (extreme) intellectualists. Moreover, this conception would lead to absurd conclusions. If rational nature or the judgment of right reason alone sufficed to constitute law, then God would have His own natural law, binding and obligatory on Him.[433]

> "God Himself would be subject to a natural law relating to His will; since even in God, an intellectual act of judgment logically precedes an act of His will, a judgment indicating that lying is wicked, that to keep one's promises is wholly right and necessary, and so forth; and therefore, if such an act of the intellect is sufficient to constitute the essence of law, then there will be a true natural law, even with respect to God Himself. For in such a case, the fact that God has no superior, will not serve as an objection, since the natural law is not imposed by any superior."[434]

Nevertheless, this is not the single or the biggest error that intellectualism commits in connection with natural law according to Suárez. Beside, or rather above the fact that the intellectualists undermine the legal character of natural law they also make doubtful that it is truly divine law. For the intellectualist view entails that

[432] *De legibus* 2.5.6: "non omne id quod est fundamentum honestatis seu rectitudinis actus lege praecepti vel quod est fundamentum turpitudinis actus lege prohibiti, potest dici lex. Ergo licet natura rationalis sit fundamentum honestatis obiectivae actuum moralium humanorum, non ideo dici potest lex. Et eadem ratione, quamvis dicatur mensura, non ideo recte concluditur quod sit lex, quia mensura latius patet quam lex."; *De legibus* 2.5.5: "natura ipsa rationalis praecise spectata, ut talis essentia est, nec praecipit, nec ostendit honestatem aut malitiam, nec dirigit aut illuminat, nec alium proprium effectum legis habet."

[433] *De legibus* 2.5.7: "Praeterea possumus ab inconvenientibus argumentari. Unum est, quia sequitur non minus proprie habere Deum suam legem naturalem quae ipsum liget et obliget, quam homines."

[434] *De legibus* 2.6.6: "etiam Deus haberet legem sibi naturalem respectu suae voluntatis, quia etiam in Deo ad voluntatem antecedit secundum rationem iudicium mentis, indicans mentiri esse malum, servare promissum esse omnino rectum et necessarium. Si ergo hoc satis est ad rationem legis, etiam in Deo erit vera lex naturalis. Quia tunc non obstabit quod Deus non habeat superiorem, quia lex naturalis non imponitur ab aliquo superiore." Likewise, a rational judgment of an equal, of an inferior or of a teacher showing the nature of a given action would be 'law' in the proper sense. Such a conclusion would be manifestly absurd, too.

> "the precepts of the natural law are not from God, inasmuch as they are characterized by a necessary goodness, and inasmuch as that condition of necessary goodness, which is in rational nature – by reason of which that nature is the measure of such goodness – does not depend upon God for its rational basis, although its actual existence does depend upon Him. … Hence, natural law is prior to the divine judgment and the divine will of God; and therefore, natural law does not have God for its author, but necessarily dwells within rational nature in that matter, in such fashion that it is inherently endowed with this essence, and no other."[435]

This passage, I think, clearly shows that Suárez is fully aware of the possible secularist implications of a thoroughgoing rationalist conception of natural law.[436] This is why he got so frightened of Vázquez's natural law doctrine.[437] This danger was already inherent in the "*etiamsi daremus*" hypothesis of Gregory of Rimini and Gabriel Biel, even if this was very far from their original intentions. As James St. Leger rightly stresses, they considered the supposition of the non-existence of God merely as an impossible condition, a condition contrary to fact, and "the only purpose of this hypothesis was to bring into bold relief the rational character of natural law as opposed to the voluntarism of authors who linked the natural law exclusively to a command of the divine will."[438] *Mutatis mutandis*, this is true of Grotius too, who took over this medieval commonplace with the intention of underlining the rationality and the immutability of the moral order, and not with the purpose of separating law from theology or of constructing a secularized theory of natural law.[439]

Suárez is not less critical of the voluntarist conception of natural law. In his view, if

[435] *De legibus* 2.5.7: "Deinde sequitur legem naturalem non esse legem divinam, neque esse ex Deo. Probatur sequela, quia iuxta illam sententiam praecepta huius legis non sunt ex Deo quatenus necessariam honestatem habent, et illa conditio quae est in natura rationali, ratione cuius est mensura illius honestatis, non pendet a Deo in ratione, licet pendeat in existentia. … Ergo lex naturalis praecedit iudicium et voluntatem Dei. Ergo non habet auctorem Deum, sed per se inest tali naturae eo modo quo de se habet ut sit talis essentiae et non alterius."

[436] Reijo Wilenius argues that Suárez makes natural law and the moral order "autonomous, independent of God's will." It seems to me that Wilenius here makes just the mistake he warns against a bit later: "One is easily misled in Suárez's works by the fact that he puts forth with the utmost care, and as if they were his own, opinions which he later refutes." — R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 59-60, 60 n. 3.

[437] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97.

[438] J. St. Leger, *The "Etiamsi Daremus" of Hugo Grotius*, 123.

[439] M. B. Crowe, 'The "Impious Hypothesis"', 381, 405; A.-H. Chroust, 'Hugo Grotius and the Scholastic Natural Law Tradition', 126.

intellectualism denies the prescriptive and hence the legal character of natural law, then voluntarism precludes its "naturalness", since it bases natural law on arbitrary divine fiat. For Ockham, as Suárez not altogether correctly reads him, divine volition is the sole source of good and evil.[440] The *doctor eximius* dismisses this view as "false and absurd".[441] He tackles the questions of hatred of God and adultery that after Ockham became the nerve-points of the intellectualist-voluntarist controversy, and rejects categorically the answers given to them by the nominalist theologian. He lays down as "an axiom common to the theologians that certain evils are prohibited because they are evil."[442] He traces this axiom back to Saint Augustine, saying (through Evodius) in the *De libero arbitrio* that adultery is not an evil because prohibited by law (*malum quia prohibitum*), but it is so prohibited because it is evil (*malum per se*).[443] Furthermore, he recalls the metaphysical principle that the nature of things, their essence is immutable. Some human acts are intrinsically, by their very nature good or bad. If this were not the case, then it would be possible even for hatred of God to become righteous and allowed by Him, which would be clearly nonsense.[444]

1.4 The Suárezian Via Media

I have noticed earlier that Suárez searches for a Thomist middle course that avoides both the Scylla of (extreme) intellectualism and the Charybdis of voluntarism. We have seen above his objections to these two extremes. But what does his own solution consist in? Suárez suggests, as might have been guessed from the foregoing, that the natural law is a *lex indicativa* and a *lex praeceptiva* at the same time:

> "natural law, as it exists in man, does not merely indicate what is evil, but actually obliges us to avoid the same; … it consequently does not merely point out the natural

[440] As John Kilcullen has pointed out ('Natural Law and Will in Ockham'), Suárez disregards the rationalist side of Ockham's moral philosophy. He ignores, for instance, Ockham's statement that non-positive moral science directs human acts apart from any command or precept of a superior.

[441] *De legibus* 2.15.4.

[442] *De legibus* 2.6.11: "Et quoad priorem partem colligitur ex illo communi axiomate theologorum: quaedam mala esse prohibita quia mala."

[443] *De libero arbitrio* 1.3: "*Augustinus*: Dic ergo prius, cur adulterium male fieri putes; an quia id facere lex vetat*? Evodius*: Non sane ideo malum est, quia vetatur lege; sed ideo vetatur lege quia malum est." In order to prove his thesis, in *De legibus* 2.6.18 Suárez also invokes the authority of Aquinas, according to whom (*Summa theologiae* I-II q. 71. a. 6 ad 4) a sin is contrary to the natural law "precisely because it is inordinate".

[444] *De legibus* 2.6.11, 2.15.4.

> disharmony of a particular act or object with rational nature, but is also a manifestation of the divine will prohibiting that act or object."[445]

On the one hand, the divine precept or prohibition does not constitute the whole reason of the good or evil involved in the observance or transgression of the natural law. On the contrary, God's will necessarily presupposes in the object of the act concerned the existence of an intrinsic harmony or disharmony with rational nature and with its proper end (*perseitas boni et mali*).[446] Thus the natural law is indeed "natural". On the other hand, natural reason indicates not only that something is in itself good or evil, but also that it is in conformity with the divine will that the good should be done and the evil avoided.[447] The divine volition attaches to the goodness or malice inherent in the relevant acts a special obligation derived from divine law:

> "all things which are declared evil by the natural law are forbidden by God, by a special command and by that will which binds and obliges us, through the force of His authority, to obey those natural precepts; therefore, the natural law is truly prescriptive law, that is to say, one which contains true precepts …the natural law is truly and properly divine law, of which God is the Author."[448]

[445] *De legibus* 2.6.13: "Unde tandem fit legem naturalem, prout in nobis est, non tantum esse indicantem malum, sed etiam obligantem ad cavendum illud, ac subinde non solum repraesentare naturalem disconvenientiam talus actus vel obiecti cum rationali natura, sed etiam esse signum divinae voluntatis vetantis illud."

[446] *De legibus* 2.6.11: "Haec Dei voluntas, prohibitio aut praeceptio non est tota ratio bonitatis et malitiae quae est in observatione vel transgressione legis naturalis, sed supponit in ipsis actibus necessariam quamdam honestatem vel turpitudinem".

[447] *De legibus* 2.6.8: "ratio naturalis quae indicat quid sit per se malum vel bonum homini, consequenter indicat esse secundum divinam voluntatem ut unum fiat et aliud vitetur."

[448] *Ibid.*: "omnia quae lex naturalis dictat esse mala, prohibentur a Deo speciali praecepto et voluntate, qua vult nos teneri et obligari vi auctoritatis eius ad illa servanda. Ergo lex naturalis est proprie lex praeceptiva seu insinuativa proprii praecepti"; *De legibus* 2.6.13: "dico tertio legem naturalem esse veram ac propriam legem divinam, cuius legislator est Deus." It is interesting to compare Suárez's conclusions with Hugo Grotius's well-known definition of natural law given in *De iure belli ac pacis* 1.1.10: "Natural law is the dictate of right reason indicating that an act, according as it conforms to or is in disagreement with nature, individual and social, is either morally wicked or morally necessary and in consequence such an act is commanded or forbidden by God, the author of nature." [Ius naturale est dictamen rectae rationis indicans alicui actui, ex eius convenientia aut disconvenientia cum ipsa natura naturali ac sociali inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut praecipe aut vetari.] The similarity of the phraseology adopted by Grotius with Suárez's words is,

Suárez here has to face a problem analogous to but not identical with that of the "etiamsi daremus" hypothesis: if God were not to issue the prohibitions and commands of natural law, would lying nevertheless be evil and a sin and respecting one's parents good? Suárez gives a complex answer to the question. First, disaccord with right reason is in itself, apart from its relation to law, a moral evil and a sin.[449] Secondly, a sin forbidden by God "is also characterized by a special depravity which it would not possess if the divine prohibition had not intervened, and it is in view of this depravity that the character of sin considered theologically becomes complete".[450] Thirdly, from Aquinas's dictum that God "would deny Himself if He were to do away with the very order of His own justice",[451] Suárez deduces the proposition that God cannot but prohibit what is *per se* evil: "whatever is contrary to right reason is displeasing to God, and the opposite is pleasing Him; for the will of God is supremely just, and therefore, that which is evil cannot fail to displease Him, nor can that which is righteous fail to please Him, inasmuch as God's will cannot be irrational."[452] And consequently, God cannot grant any dispensation from the precepts of natural law, in which all the ten commandments of the Decalogue are included.[453]

---

again, more than remarkable, even if substantially his views on natural law evidently differ from those of the Spanish Jesuit. Thus it would be hard to deny that Grotius – in this respect and in general – was seriously indebted to Suárez (albeit he was reluctant to acknowledge this indebtedness). — F. Copleston, *A History of Pnilosophy*, III: 380.

[449] *De legibus* 2.6.17: "Respondeo igitur in actu humano esse aliquam bonitatem vel malitiam ex vi obiecti praecise spectati, ut est consonum vel dissonum rationi rectae et secundum eam posse denominari et malum et peccatum et culpabilem secundum illos respectus, seclusa habitudine ad propriam legem."

[450] *De legibus* 2.6.18: "Quae ratio potius videtur probare esse prohibitum quia malum, quam e converso. Quod verum est loquendo de malitia moralis inordinationis, tamen ratione illius addita est lex aeterna et divina prohibitio ad quam habet tale peccatum specialem repugnantiam; et consequenter inde habet specialem deordinationem quam non haberet si prohibitio divina non intervenisset, per quam deordinationem completur ratio peccati theologice sumpti et ratio culpae simpliciter apud Deum."

[451] *Summa theologiae* I-II q. 100 a. 8 ad 2: "Negaret autem seipsum, si ipsum ordinem suae iustitiae auferret". Aquinas says that in connection with the question whether the precepts of the Decalogue are dispensable.

[452] *De legibus* 2.6.5: "Et ait Deum non posse negare seipsum, et ideo non posse ordinem suae iustitiae auferre, sentiens non posse non prohibere ea quae mala sunt et contra rationem naturalem."; *De legibus* 2.6.8: "quidquid contra rationem rectam fit, displicet Deo, et contrarium illi placet; quia cum voluntas Dei sit summe iusta, non potest illi non displicere quod turpe est, nec non placere honestum, quia voluntas Dei non potest esse irrationabilis".

[453] *De legibus* 2.15.3-12., 2.15.16, 2.15.26. Suarez emphatically discards the opinion of Ockham, d'Ailly and Gerson that God can dispense from virtually all the precepts of the Decalogue, and that of Scotus and Biel as well that only the first table of the Decalogue does not admit of dispensation.

Suárez takes great care to embed his voluntarist concept of law into an objectivist, rationalist framework based on a metaphysical view of human nature.[454] He underlines that "natural law, in all its precepts, relates to the natural qualities of man",[455] and follows Thomas Aquinas in linking natural law to the order of natural inclinations and the teleology of human nature:

> "Saint Thomas traces this variety in the natural precepts to the varied natural inclinations of man. For man is, as it were, an individual entity and as such has an inclinitaion to preserve his own being, and to safeguard his own welfare; he is also a being corruptible – that is to say mortal – and as such is inclined towards the preservation of the species, and towards the actions necessary to that end; and finally, he is a rational being and as such is suited for immortality, for spiritual perfection, and for communication with God and social intercourse with rational creatures. Hence, the natural law brings man to perfection, with regard to every one of his tendencies … all these precepts proceed, by a certain necessity, from nature, and from God as the Author of nature, and all tend to the same end, which is undoubtedly the due preservation and natural perfection or felicity of human nature".[456]

All this seems to be in perfect harmony with the spirit of Aquinas, and in direct opposition to the Ockhamist doctrine that God can command (or abstain from commanding) virtually anything. Accordingly, it would be a gross mistake to label him without qualification a voluntarist, as Villey, Farrell and some others scholars do.[457] At first sight, the inter-

[454] V. Abril, 'Perspectivas del iusnaturalismo suareciano', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, LVI-LXXXVI at LXXXI.

[455] *De legibus* 2.14.8: "naturale ius quoad omnia praecepta sua pertinet ad naturales hominis proprietates".

[456] *De legibus* 2.8.4.: "Ultimo reducit divus Thomas … varietatem hanc praeceptorum naturalium ad varias hominis inclinationes naturales. Est enim homo individuum quoddam ens et ut sic iclinatur ad conservandum suum esse ad suam commoditatem. Est etiam ens corruptibile seu mortale et ut sic inclinatur ad conservationem speciei et ad actiones propter illam necessarias. Tandem rationalis est et ut sic capax immortalitatis et spiritualium perfectionum et communicationis cum Deo ac societatis cum rationalibus creaturis. Lex ergo naturalis perficit hominem secundum omnem inclinationem suam"; *De legibus* 2.7.7.: "haec omnia praecepta necessitate quadam prodeunt a natura et a Deo quatenus auctor est naturae, et tendunt ad eundem finem, nimirum ad debitam conservationem et naturalem perfectionem seu felicitatem humanae naturae." Suárez slightly modifies Aquinas's classification of natural inclinations. At *Summa theologiae* I-II q. 94 a. 2 co., the *doctor angelicus* speaks of the inclinations of man considered as a substance, as an animal and as a rational being. A possible reason for this is that Suárez wants to avoid any comparison with animals and especially any association with Ulpian's definition of natural law.

[457] Farrell's reading of Suárez is much more nuanced in my view than that of the French legal philospher, but he too appears to me to go too far when suggesting that Suárez's idea of natural goodness and malice

pretation of Hans Welzel seems much better founded. He argues that after all, the Suárezian middle course is nothing but a compromise, for "fundamentally, the divine will remains also in Suárez [just as in Vázquez] bound to the rational nature of things. God must forbid what is intrinsically evil and against natural reason. To the self-existing good or evil God's will only appends the special obligation of divine law."[458] Jean-François Courtine goes one step further, claiming that "in spite of the tirelessly reiterated criticisms against Vázquez, it is legitimate to ask whether Suárez does not concede the essence. Certainly, he does not maintain without a corrective the radical thesis that the *dictamen naturale rectae rationis* as such has the force of law; this would be to consider that man, completely rational, is a law unto himself. However, the correction made here by Suárez, i.e. the necessity of the supplement what is the imperative as a sign of the will, does not modify in substance the underlying thesis of autonomy."[459]

Would the decree of God's will really be merely a supplement to the judgment of right reason in Suárez's natural law theory? This would imply a determinist view of God that would entirely destroy God's freedom and hence Suárez's conception of *lex aeterna* based on it. And it would contradict his deep conviction that law is an act of free will and a command of a superior (not to mention the title of his book: *On Laws and God the Law-*

---

is a contradiction in terms, which is due to his voluntarist general concept of law. Morality consists in the commensuration with a norm or rule of morality, argues Farrell, but for Suárez 'natural honesty' precedes all law: since "essences depend, not on the will, but on the intellect of God and, according to Suarez, the law is an act of the will of God, it is evident that the law as interpreted by Suarez cannot be the cause of the moral essences of human acts." — W. Farrell, *The Natural Moral Law according to St. Thomas and Suarez*, 152-153. It is quite evident that Suárez conceives of natural morality as independent from the prescriptions of law (it is much less obvious why the notion of 'natural goodness' should involve a self-contradiction), but to explain this idea with Suárez's alleged voluntarism is, I think, an oversimplification, which rests on the misconception (*ibid.*, 62) that in Suárez eternal law does not consist in any act of the intellect preceding the decree of the divine will.

[458] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 97-98.

[459] J.-F. Courtine, 'La raison et l'empire de la loi', 113. Courtine supports his view with the following quotation, taken from *De legibus* 2.5.10: "such dictates have the force of law over man, even though they may not be externally clothed in the form of written law. Therefore, these dictates constitute natural law; and accordingly, the man who is guided by them is said to be a law unto himself, since he bears law written within himself through the medium of the dictates of natural reason" [consequenter ostendit dictamen illud habere vim legis in homine, etiamsi scriptam exterius legem non habeat. Hoc ergo dictamen est lex naturalis et ratione illius dicitur homo qui illo ducitur esse sibi lex, quia in se habet scriptam legem medio dictamine naturalis rationis]. Courtine's final conclusion (at p. 114) is that Suárez made – in the wake of Vázquez – an important contribution to the rationalization and secularization of natural law.

giver). So either Suárez contradicts himself or Courtine's suggestion is wrong. Everything turns on what Suárez exactly means by the phrase "God cannot fail to prohibit that which is intrinsically evil and inordinate in rational nature".[460] And this in turn depends on the stance he takes in the old dispute concerning the absolute and ordained power of God. To be sure, Suárez disapproves Ockham's voluntarist view that God can, by virtue of His absolute power, abstain from laying down such a prohibition,[461] and he affirms that the divine will necessarily presupposes a dictate of the divine reason declaring that a given act is righteous or evil.[462] But on the other hand he repeatedly and vigorously denies that either human rational nature or the judgment of divine reason constitutes a law binding God's will. God is entirely free from law, thus what He wills is always just and fitting.[463]

> "Hence, notwithstanding any law whatsoever made by Himself for the government of Creation, God may disregard that law, making use of His absolute power, as in the distribution of rewards or punishments, and so forth; because He is not bound to the observance of law. For He is sovereign Lord and not confined within any order".[464]

So it is evident that by saying that God has to prohibit what is *per se* evil, Suárez in no wise suggests that God is legally obliged to do so or that he issues that prohibition mechanically, without deliberation. Yet He cannot but prohibit evil, but for rather different reasons (which have to be quoted at length here):

> "although the divine will is absolutely free in its external actions, nevertheless, if it be assumed that this will elicits one free act, then it may be necessarily bound, in

460 *De legibus* 2.6.21: "non potest Deus non prohibere id quod est intrinsece malum et inordinatum in natura rationali".

461 *De legibus* 2.6.20: "In quo duo possunt cogitari modi dicendi. Primus est Deum quidem posse de potentia absoluta non facere talem prohibitionem, quia non apparet implicatio contradictionis, ut videntur probare omnia quae Ocham, Gerson et alii pro sua sententia congerunt; nihilominus tamen id fieri non posse secundum legem ordinariam divinae providentiae rerum naturis consentaneam. Nam hoc ad minus probant rationes in contrarium factae pro nostra sententia et multum favent testimonia Scripturae et Patrum."

462 *De legibus* 2.6.13: "Unde probandum non est quod doctores posteriori loco allegati dicunt voluntatem divinam, qua lex naturalis sancitur, non supponere dictamen divinae rationis dictantis hoc esse honestum vel turpe".

463 *De legibus* 2.2.5: "Anselmus dicens Deum esse omnino liberum a lege et ideo quod vult, iustum et conveniens esse".

464 *De legibus* 2.2.6: "Unde non obstante quacumque lege a se posita circa rerum gubernationem, potest illam non servare, sua potentia absoluta utendo, ut circa praemia vel poenam retribuendam et similia, quia non obligatur ad servandam legem, quia est supremus Dominus et extra omnem ordinem".

> consequence, to the performance of another action. For example, if through the divine will an unconditional promise is made, that will is obliged to fulfil the promise … In like manner, if it is the divine will to create the world, and to preserve the same in such a way as to fulfil a certain end, then there cannot fail to exist a providential care over that world … Accordingly, assuming the existence of the will to create rational nature with sufficient knowledge for the doing of good and evil, and with sufficient divine co-operation for the performance of both, God could not have refrained from willing to forbid that a creature so endowed should commit acts intrinsically evil, nor could He have willed not to prescribe the necessary righteous acts. For just as God cannot lie, neither can He govern unwisely or unjustly; … absolutely speaking, God could have refrained from laying down any command or prohibition; yet, assuming that He has willed to have subjects endowed with the use of reason, He could not have failed to be their lawgiver – in those matters, at least, which are necessary to natural moral rectitude. … If rational nature were wholly abolished, then the natural law – because it is a property (so to speak) of this nature – would also be abolished in so far as its actual existence is concerned, and would endure only objectively as an essence, or potentially, in the mind of God, just as would rational nature itself."[465]

This solution is reminiscent of Ockham's conception of conditional natural law, insofar as the core of Suárez's argument is that *supposing* that God has decided to create man as a rational, free being, then he could not have abstained from commanding/forbidding him what is according/contrary to his nature and hence shown by right reason to be in itself good/evil. (He adds immediately that "this very faculty of judgment which is contained in

[465] *De legibus* 2.6.23: "Dico igitur ex Caietano divinam voluntatem, licet simpliciter libera sit ad extra, tamen ex suppositione unius actus liberi posse necessitari ad alium ut, si vult promittere absolute, necessitatur ad implendum promissum. … Et cum eadem proportione, si vult creare mundum et illum conservare in ordine ad talem finem, non potest non habere providentiam illius … Ideoque supposita voluntate creandi naturam rationalem cum sufficienti cognitione ad operandum bonum et malum et cum sufficienti concursu ex parte Dei ad utrumque, non potuisse Deum non velle prohibere tali creaturae actus intrinsece malos vel nolle praecipere honestos necessarios. Quia sicut non potest Deus mentiri, ita non potest insipienter vel iniuste gubernare. … absolute posset Deus nihil praecipere vel prohibere. Tamen ex suppositione quod voluit habere subditos ratione utentes, non potuit non esse legislator eorum saltem in his quae ad honestatem naturalem morum necessaria sunt. … non potest Deus non odisse malum rectae rationi contrarium. Habet autem hoc non tantum ut privata persona, sed etiam ut supremus gubernator. Ergo ratione huius odii vult obligare subditos, ne illud committant."; *De legibus* 2.13.2: "manente natura rationali cum usu rationis et libertatis … cum lex naturalis sit veluti proprietas huius naturae, si illa de medio tolleretur, tolleretur etiam lex naturalis quoad existentiam suam et maneret tantum secundum esse essentiae seu possibile obiective in mente Dei sicut et ipsa rationalis natura."

right reason and bestowed by nature upon men, is of itself a sufficient sign of such divine volition".)[466] But this is, I think, not more than a formal resemblance. Substantially, Suárez's argument is much closer to the Thomist view that while theoretically it is conceivable that by his absolute power God could act independently of the created order, in effect, God's will always coincides with the order which He has established.[467] Following his theory of ordered causes, Aquinas maintains that if we consider the order of nature established by God depending on the first cause, i.e. Himself,

> "God cannot do anything against this order; for, if He did so, He would act against His foreknowledge, or His will, or His goodness. But if we consider the order of things depending on any secondary cause, thus God can do something outside such order; for He is not subject to the order of secondary causes; but, on the contrary, this order is subject to Him, as proceeding from Him, not by a natural necessity, but by the choice of His own will; for He could have created another order of things."[468]

Although for the things already made no other order would be fitting and good, God could do other things, and impose upon them another order, since He is bound to nobody but Himself. But this means too that He can do nothing but what is befitting to Himself and just.[469]

So Suárez agrees with Saint Thomas (and partly with Ockham) that God could have created another moral order. The act of creation is a completely free act; the divine will can freely choose between several rational plans. And after decreeing absolutely that something is to be done or to be avoided, "God is unable to act in opposition to His own decree not on account of any prohibition which the decree carries with it, but on account of the repugnant

[466] *De legibus* 2.6.24: "dicitur ulterius ipsummet iudicium rectae rationis inditum naturaliter homini esse de se sufficiens signum talis voluntatis divinae".

[467] M. A. Pernoud, 'The Theory of the *Potentia Dei* according to Aquinas, Scotus and Ockham', 83.

[468] *Summa theologiae* I q. 105 a. 6 co.: "Si ergo ordo rerum consideretur prout dependet a prima causa, sic contra rerum ordinem Deus facere non potest, sic enim si faceret, faceret contra suam praescientiam aut voluntatem aut bonitatem. Si vero consideretur rerum ordo prout dependet a qualibet secundarum causarum, sic Deus potest facere praeter ordinem rerum. Quia ordini secundarum causarum ipse non est subiectus, sed talis ordo ei subiicitur, quasi ab eo procedens non per necessitatem naturae, sed per arbitrium voluntatis, potuisset enim et alium ordinem rerum instituere."

[469] *Summa theologiae* I q. 25 a. 5 ad 3: "licet istis rebus quae nunc sunt, nullus alius cursus esset bonus et conveniens, tamen Deus posset alias res facere, et alium eis imponere ordinem"; *Summa theologiae* I q. 25 a. 5 ad 2: "Deus non debet aliquid alicui nisi sibi. Unde, cum dicitur quod Deus non potest facere nisi quod debet nihil aliud significatur nisi quod Deus non potest facere nisi quod ei est conveniens et iustum".

nature of that act itself".[470] God could in principle rightfully do so, but this would be against His very nature. And obviously God cannot deny Himself and cannot abolish the order of His own justice:

> "granted that it implies not a physical contradiction (so to speak), but solely a moral one, for God to change His decree, and further, granted that once He has made a decree, it is contrary to due order that He should act in opposition thereto, nevertheless, these facts result not from any prohibition but from the intrinsic nature and essence of God … For just as it is unfitting that divinity should deceive, even so it is unfitting that divinity should be inconstant."[471]

The fact that Suárez formulates this point of view in his discussion of eternal law can be a perfect illustration why he holds to this traditional idea, which he conceives, in contrast with its traditional scholastic meaning, not as a norm above the divine volition but as a free expression of God's will. Eternal law and creation are absolutely free acts of God, whereas all His subsequent acts – including the precepts of natural law – are only relatively free, being bound in consequence of them.

1.5 Permissive Natural Law

Suárez further strengthens the rationalist character of Thomistic natural law theory by extending natural law to the conclusions deduced from the primary, *per se nota* principles.[472] In a loose sense, these conclusions belonged to natural law already in Aquinas,[473] but Suárez now elevates them to the same level of validity (and immutability) that the first principles

[470] *De legibus* 2.2.7: "Dices: si Deus, postquam decrevit absolute aliquid non facere, id ageret, inordinate faceret, et ideo id facere non potest. Ergo liberum decretum Dei habet vim positivae legis respectu voluntatis eius, ut non possit honeste facere quod per se ac remoto illo decreto libere facere potuisset. Responde Deum non posse facere contra suum decretum, non propter prohibitionem quam decretum inducat sed propter repugnantiam ipsius rei".

[471] *Ibid.*: "esto non implicaret contradictionem physicam (ut sic dicam) mutare Deum decretum suum, sed tantum moralem ac subinde posito uno decreto esse inordinatum agere contra illud. Nihilominus id non oriri ex prohibitione, sed ex intrinseca natura et essential Dei … Quia sicut non decet divinitatem fallere, ita nec inconstantem esse."

[472] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 98.

[473] *Summa theologiae* I-II q. 94 aa. 4-6. This is why Aquinas is so hesitating where to locate *ius gentium*: "for to the law of nations belong those things which are derived from the law of nature, as conclusions from premises" [nam ad ius gentium pertinent ea quae derivantur ex lege naturae sicut conclusiones ex principiis]. — *Summa theologiae* I-II q. 95 a. 4 co.

have.[474] And what is more, Suárez does not only say that the conclusions drawn by a necessary inference from self-evident moral principles are as eternally true as the principles themselves, but also that "the truth of the principles does not subsist apart from the truth of such conclusions",[475] and he asserts that seeing that law is a proximate rule of operation, "strictly speaking, the natural law works more through these proximate principles or conclusions than through the universal principles", which are not rules unless they are applied by specific rules to concrete acts.[476]

Suárez surpasses the rationalism of Aquinas in another aspect as well. As a consequence of the certainty and necessary truth of the conclusions derived from the general principles, he does not allow the slightest change in the precepts of natural law. He declares categorically: "The natural law cannot of itself lapse or suffer change, whether in its entirety, or in its individual precepts since it is an intrinsic property which flows of necessity from human nature as such".[477] This does not mean that contrary to Aquinas, he does not take into consideration the contingency of human affairs at all, but he conceives of the precepts of natural law as containing in themselves (at least implicitly) the conditions in which they should be applied.[478] Accordingly, he claims – referring to Aquinas's classic example of the return of a deposit – that when the circumstances change, the natural law not only refrains

474 In doing so, Suárez manifestly contradicts the opinion of Aquinas (to be found in *Summa theologiae* I-II q. 94 aa. 4-5), according to which only the general priciples of natural law are necessarily true, while the conclusions derived therefrom are variable and uncertain.

475 *De legibus* 2.13.3: "leges eius sunt necessariae et perpetuae veritatis. Complectitur enim hoc ius (ut supra dixi) principia morum per se nota et omnes ac solas conclusiones quae ex illis necessaria illatione inferuntur sive proxime sive per plures illationes. Omnia autem haec perpetuae veritatis sunt, quae veritas principiorum non subsistit sine veritate talium conclusionum et principia ipsa ex terminis necessaria sunt."

476 *De legibus* 2.7.7: "si proprie loquamur, magis exercetur lex naturalis in his principiis vel conclusionibus proximis, quam in illis principiis universalibus; quia lex est proxima regula operationis. Illa autem communia principia non sunt regulae nisi quatenus per particularia determinantur ad singulas species actuum seu virtutum."

477 *De legibus* 2.13.2: "Dico igitur proprie loquendo legem naturalem per seipsam desinere non posse vel mutari, neque in universali neque in particulari … Prout est in homine mutari non potest, quia est intrinseca proprietas necessario fluens ex tali natura, qua talis est".

478 P. C. Westerman, *The Disintegration of Natural Law Theory*, 109. This leaves a much lesser role for prudence than it has in Aquinas's natural law theory. It is generally true that the overall importance of prudence is smaller in the moral philosophy of Suárez than in that of Aquinas. Cf. J. L. Treloar, 'Moral Virtue and the Demise of Prudence in the Thought of Francis Suárez', *American Catholic Philosophical Quarterly* 65 (1991), 387-405.

from imposing the obligation to perform the act concerned but even imposes the contrary obligation to leave it undone.[479] Even so, the natural law only seemingly changes; the eventual changes occurring in the circumstances do not affect the immutability of the specific precepts, for "the natural law discerns the mutability in the subject-matter itself, and adapts its own precepts to this mutability, prescribing in regard to such subject-matter a certain sort of conduct for one condition, and another sort of conduct for another condition; so that the law in itself remains at all times unchanged".[480]

So Suárez appears to commit the "hubris" – characteristic of later seventeenth-century natural law theories – of laying down an all-encompassing, inflexible code of natural precepts. With this Suárez incurs the criticisms of Villey and Welzel, describing him as a rigid formalist. But this interpretation is only partly true, since Suárez distinguishes two fundamentally different kinds of natural law. The first he calls "positive", the second "permissive or negative or concessive" natural law;[481] elsewhere he differentiates between *ius naturale praeceptivum* and *ius naturale dominativum*.[482] And formalism is present only in the former, positive or preceptive natural law. Villey mentions at times permissive natural law in his works, and takes notice also of its significance for the foundation of subjective rights,[483] but he does not investigate the idea in detail (perhaps because this would disturb his one-sided picture of Suárez). As concerns Welzel, he gives some weight to the notion of 'permissive law' in his analysis of Suárez, still he discredits it as a "futile attempt" to hinder the fossilization of natural law.[484] It was perhaps Reijo Wilenius who first recognized the real importance of permissive natural law in Suárez.[485]

[479] *De legibus* 2.13.7: "ratio ipsa naturalis dictat hoc debere fieri tali vel tali modo et non aliter, vel concurrentibus talibus circumstanciis et non absque illis. Immo, interdum mutatis circumstantiis, non solum non obligat naturale praeceptum ad faciendum aliquid, v. g. ad reddendum depositum, sed etiam obligat ad non faciendum." Aquinas's example (in *Summa theologiae* II-II q. 120 a. 1 co.) is when a madman demands the delivery of his sword deposited in the state of madness, or someone whishing to fight against his country with it. Unlike Suárez, he discusses the problem under the heading of equity.

[480] *De legibus* 2.13.9: "Et ideo etiam non obstat quod materia sit mutabilis, nam lex naturalis discernit mutabilitatem in ipsa materia et iuxta illam accomodat praecepta; nam aliquid praecipit in illa materia pro uno statu et aliud pro alio; et ita ipsa in se manet semper immutata".

[481] *De legibus* 2.14.6, 2.14.14, 2.18.2.

[482] *De legibus* 2.14.19.

[483] See e.g. M. Villey, 'Le catholicisme et les droits de l'homme', in *idem*, *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983), 105-54 at 123.

[484] H. Welzel, *Naturrecht und Materiale Gerechtigkeit*, 98-99.

[485] Wilenius, on the other hand, somewhat overstated the significance of permissive natural law, in particu-

The *doctor eximius* inherited this concept from medieval canon law. When seeking the reasons for the absence of natural rights in Aquinas, we saw, how Rufinus and Huguccio distinguished indications of natural law from precepts and prohibitions in order to solve the problem of the origin of private property. Suárez, who studied canon law already before entering the Jesuit Order, took over this medieval idea and incorporated it into his legal philosophy:

> "there are two senses in which a matter may fall under the natural law, namely a negative and a positive sense. It is said that a given action falls negatively under the natural law because that law does not prohibit, but on the contrary permits the said action, while not positively prescribing its performance. When, however, something is prescribed by natural law, that prescription is said to be positively a part of natural law; and when any thing is prohibited thereby, the thing thus prohibited is said to be positively opposed to natural law."[486]

In fact, negative natural law implies "more than a permission" but "a kind of positive concession".[487] It comprises certain recommendations of nature, which are as valid as the commands or prohibitions of positive natural law, yet are not absolutely binding.[488] The three most important of these recommendations are community of goods, liberty[489] and democracy.[490] Unlike preceptive natural law, permissive natural law can change, and its

---

lar when he claimed that "the central part of Suárez's political and social ideology is so to speak concealed in the concept of negative natural law." — R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 63.

[486] *De legibus* 2.14.14: "Communis ergo responsio … est dupliciter aliquid esse de iure naturali, scilicet negative et positive. Negative esse dicitur quod ius naturale non prohibet sed admittit, quamvis neque illud positive praecipiat. Quando vero aliquid praecipit, dicitur id esse positive de iure naturali; et quando prohibet, dicitur esse positive contra ius naturale."

[487] *De legibus* 2.12.1: "Quod si dicatur hoc ius permittere vel indifferentia quae non prohibet vel bona quae approbat licet non praecipiat … Posterior vero est plus quam permissio, quia est quaedam positiva concessio".

[488] R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 62. This raises the question as to whether permissive natural law can fit the general definition of 'law' offered by Suárez. We remember that he criticized Aquinas's notion of law on the ground that it did not clearly distinguish law from counsel. I will return to this problem when I will discuss liberty as a natural right.

[489] *De legibus* 2.14.6, 2.14.14-16.

[490] *Defensio fidei catholicae* 3.2.9: "Quocirca potestas haec, prout a Deo immediate datur communitati, iuxta modum loquendi iurisperitorum dici potest de iure naturali negative, non positive, vel potius de iure naturali concedente, non simpliciter praecipiente."

institutions may licitly be modified or abolished by human agency.[491] Suárez gives the following explanation for this:

> "The general reason for the difference between *ius praeceptivum* and *ius dominativum* is that the former kind comprehends rules and principles for right conduct which involve necessary truth, and are therefore immutable, since they are based upon the intrinsic rectitude or perversity of their objects; whereas *ius dominativum* is merely the subject-matter of the other *ius praeceptivum*, and consists (so to speak) of a certain fact, that is, a certain condition or habitual relation of things. And it is evident that all created things, and especially those which are corruptible, are characterized through nature by many conditions that are changeable and capable of being abolished by many causes."[492]

It is evident from the foregoing that "negative" or "permissive" natural law – in direct contrast with its "positive" equivalent – defines an area of human freedom and autonomy, where Suárez does justice to the variability of human conditions. As Pauline C. Westerman puts it (with some exaggeration), "Suárez's permission to change the subject-matter of the natural law concerning *dominium* allows for an unprecedently wide scope for human intervention".[493] On the other hand, as Brian Tierney rightly stresses, permissive natural law is not a state of total licence, since the permissions of the law of nature are bounded by the precepts and prohibitions of the same law.[494] The function of permissive natural law is by no means to tolerate any intrinsically unjust conduct, nor to allow an exception to the commands of perceptive natural law.[495] The choices allowed by negative natural law

[491] *De legibus* 2.14.18: "Et in universum oritur alia difficultas, cur possit ius naturae dominativum, etiamsi positive ab ipsa natura datum sit, immutari et per homines aliquando licite et valide auferri, non autem ita possit mutari ius naturae praeceptivum."

[492] *De legibus* 2.14.19: "Ratio autem genralis differentiae inter ius praeceptivum et dominativum est quia illud prius continet regulas ac principia bene operandi quae continent necessariam veritatem, et ideo immutabilia sunt. Fundantur enim in intrinseca obiectorum rectitudine vel pravitate. Ius autem dominativum solum est materia alterius iuris praeceptivi et consistit (ut sic dicam) in facto quodam seu in tali conditione vel habitudine rerum. Constat autem res omnes creatas, praesertim corruptibiles, habere a natura multas conditiones quae mutabiles sunt et per alias causas auferri possunt."

[493] P. C. Westerman, *The Disintegration of Natural Law Theory*, 114.

[494] B. Tierney, 'Natural Law and Natural Rights', 401.

[495] *De legibus* 1.16.7: "At vero loquendo de permissione mali culpae, certum est nullo modo permitti per naturalem legem: nam lex naturalis prohibet omne malum, et quantum est ex se nullum relinquit impunitum … omne malum etiam minimum prohibetur lege naturali, et dici potest contra illam".

should be "all licit and just, not precisely indifferent but based on judgments of reason applied to different human circumstances and certainly not intrinsically unrightful."[496] And preceptive natural law sets permissive natural law in a frame also in the sense that what the latter permits or concedes to a person, the former prohibits all others from impeding it. "Permissive law always implies a precept obliging somebody in some way."[497] Thus concessive natural law, though essentially different, cannot be separated from preceptive natural law.[498]

Part 2: Natural Rights

The Spanish theologians of the Second Scholasticism inherited the idea of natural rights directly from the sixteenth-century Ockhamists John Mair, Jacques Almain and Conrad Summenhart.[499] This is unquestionably true even if owing to their Thomist allegiances they were sometimes reluctant to acknowledge this heirship. Moreover, Dominican theorists in the sixteenth century were still quite moderate in the use of the subjective notion of *ius*.[500] In his *Commentary on the Secunda Secundae*, in the Question '*De jure*' Vitoria,

[496] B. Tierney, 'Permissive Natural Law and Property', 386.

[497] *De legibus* 1.15.12: "Atque hic tandem intelligitur quod superiori capite dicebamus, legem permittentem semper includere praeceptum obligans aliquem, et aliquo modo."

[498] *De legibus* 2.18.4: "Deinde ostendo non separari ius concessivum ab omni iure praecipiente vel prohibente … Primum declaratur imprimis exemplo privilegii. Nam eo ipso quod uni conceditur, praecipitur aliis ne usum illius impediant … Secundo declaratur discurrendo per exempla iuris gentium, quae Isidorus posuit. Primum est *sedium occupatio*. Haec enim ita est licita unicuique iure gentium vel potius naturali, ut nemo iuste impedire possit alium quamvis uccupet sedem ab alio non praeoccupatam; et ita illa concessio habet annexum hoc praeceptum."

[499] For a useful survey and commentary of the texts of the representative authors of the Thomist revival (and some of their nominalist predecessors) on subjective rights, see A. Folgado, *Evolución histórica del concepto del derecho subjetivo: Estudio especial en los teólogos-juristas españoles del siglo XVI* (San Lorenzo de El Escorial: Biblioteca La Ciudad de Dios, 1960).

[500] Their moderation in this respect misled even such distinguished historians of ideas as Quentin Skinner and Richard Tuck. Skinner claimed (*The Foundations of Modern Political Thought*, II: 176) that the Dominicans were "highly suspicious" of the subjective understanding of *ius*. And Tuck suggested (*Natural Rights Theories*, 47) that "in place of a Gersonian active rights theory, the Spanish Dominicans in general put the objective sense of *ius* at the center of their concern." For a corrective to Skinner's interpretation, see A. Brett, 'Scholastic Political Thought and the Modern Concept of the State', in *idem*, J. Tully and H. Hamilton-Bleakley (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge: University Press, 2006), 130-48 at 144-46. For a well-founded criticism of Tuck's view, see D. Deckers,

the greatest authority of the Dominican Order defines *ius* in a traditional Thomist way as *obiectum iustitiae*, the object of justice,[501] and it is only later on in the same work, in the Question '*De restitutione*' (On Restitution) that he introduces Conrad Summenhart's Gersonian, subjective definition of *ius* as "a power or faculty pertaining to someone according to the laws".[502] This cautiousness of Vitoria indirectly but clearly points out serious philosophical problems for any Thomist legal thinker who accepts the subjective concept of right:

(1) Can the concept of *ius* as a moral faculty be reconciled with the authentic Thomist conception of *ius* as *id quod iustum est*?

(2) How can a meaningful relation be established between subjective natural rights and objective natural law?

These problems concern evidently not only Vitoria but also Suárez (and in general all Thomists accepting the idea of natural rights).[503] So let us turn back to the Jesuit theologian and examine what answers he can give to the above questions.

2.1 The Meanings of Ius and Their Interrelations

We have seen in the Introduction that Finnis sharply contrasts Suárez's subjective notion of *ius* with Aquinas's objective concept, and places him on the "other side" of the watershed, together with Hugo Grotius. This is one of the rare points on which Finnis appears to agree with Michel Villey. According to Villey, Suárez turns completely upside down the

---

Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546) (Freiburg: Universitätsverlag, 1991), 160-163, 175 n. 350.

501 *De justitia* II-II q. 57 a. 1 n. 6.: "Sed contrarium videtur ex doctoribus et ex sancto Thoma, quia dicit quod jus est objectum justitiae."

502 *De justitia* II-II q. 62 a. 1 n. 5: "Conradus, qui fecit tractatum illum nobilem *De contractibus*, … dicit ergo quod jus est potestas vel facultas conveniens alicui secundum leges".

503 There is no scholarly consensus as to whether there is a meaningful connection or not between the objective notion of *ius* as "what is just" and its subjective understanding as *facultas* in Vitoria. According to Daniel Deckers (*Gerechtigkeit und Recht*, 165, 189-91), Vitoria merely juxtaposes these two semantics of *ius*, without really connecting them and perceiving their possible opposition. Brian Tierney, on the other hand, argues (*The Idea of Natural Rights*, 259-61, 304) that the two semantics are not at all isolated from each other, since Vitoria derives the subjective definition of *ius* as a moral faculty partly from Aquinas's objective conception of right and law. Annabel Brett seems to consider the whole question as rather artificial. She maintains that "Vitoria's *oeuvre* is thus split between two senses of right: not between 'objective right' and 'subjective right', but between two different senses of the latter." — A. Brett, *Liberty, Right and Nature*, 136.

legal philosophy of the *doctor angelicus*, inasmuch as "the 'just' of Saint Thomas (the just part to be awarded to everyone …) does not enter into his categories. But the subjective right, on the contrary, this *facultas*, this *potestas* recognized by law for man has a real existence for him."[504] Louis Lachance goes even further by saying that Suárez confuses 'right' in the objective sense with the faculty of using it, and in doing so he falsifies the teaching of Aquinas: "to define right as a moral faculty of the will and to set liberty as an end for it supposes that one makes human will and liberty the rule of morality … and this resembles to a great extent Kantianism, where the *autonomy* of the will is said to be the first rule."[505] René Brouillard, on the other hand, severely criticizes this latter interpretation, and claims that in associating *ius* with *facultas moralis*, Suárez "in no way intended to substitute for or oppose it to the Thomist definition … In reality, in his thought one prolonged the other: the moral faculty was founded on and regulated precisely by the objective right in the Thomist sense".[506] Likewise, Brian Tierney argues that though "Suarez arrived at a subjective understanding of *ius* as a moral faculty inhering in a right-holder", he "did not present this as an alternative definition, different from that of Aquinas. He seems to have assumed that this is what Aquinas meant all along."[507]

Let us see, finally, what Suárez himself writes in his legal works. In general, he lays great emphasis on conceptual analysis. Immediately after the first chapter of the *De legibus* discussing the essence of law, he sets out to examine the question "What *ius* means and how it is to be compared with *lex*".[508] He distinguishes between two etymological explanations of the word *ius*. The first derives the term from *iussum*, the perfect passive participle of the verb *iubere* (to command), the second from *iustitia*.[509] According to the first etymology,

[504] M. Villey, *La formation de la pensée juridique moderne*, 379, 381.

[505] L. Lachance, *Le concept de droit selon Aristote et S. Thomas*, 294-95. Lachance's views are reiterated by P. Van Overbeke in his article 'Droit et Morale: Essai de synthèse thomiste', *Revue thomiste* 58 (1958), 284-336 at 307-11.

[506] R. Brouillard, 'Suarez François: la théologie pratique', in A. Vacant, E. Mangenot and É. Amann (eds.), *Dictionnaire de théologie catholique* (Paris: Letouzey et Ané, 1903-72), vol. XIV, pt. 2, cols. 2691-2728 at 2707.

[507] B. Tierney, *The Idea of Natural Rights*, 303.

[508] *De legibus* 1.2: "Quid ius significet et quomodo ad legem comparetur". In a way, this can be considered as a detour in a genuine treatise on law, but from another point of view it shows how much importance Suárez ascribes to the problem.

[509] To be more accurate, Suárez mentions a third etymology as well, deriving *ius* from *iuxta* (close), but rejects it quickly as unconvincing. *De legibus* 1.2.1-2: "Prius vero advertere oportet tres solere iuris etymologias assignari. Prima est, ut ius dicatur quod iuxta sit … Eam enim omitto, quia mihi non probatur

ius is the same as *lex*. What is in harmony with reason is said to be '*iure fieri*' (rightfully done), as if to say, '*legi conforme fieri*' (done in conformity with law).[510] Suárez here makes explicit a long-standing scholastic linguistic practice by declaring that "*ius*, in so far as it refers to *lex*, is used interchangeably with that term, and the two words are considered as synonyms."[511] The second etymological explanation equates *ius* with '*iustum et aequum*': "according to the last-cited derivation, *ius* has the same meaning as that which is just and equitable, this being the object of justice."[512] In this sense, *ius* is nothing other than the just thing itself (*ipsum iustum*).[513] Following Aristotle, Suárez differentiates two meanings of the word 'justice'. In its generic meaning, *iustitia* stands for every moral virtue, "since every virtue in some wise is directed towards and brings about equity", whereas in its specific sense it denotes "a special virtue which renders to another that which is his due".[514] Accordingly, *ius* as the object of justice has a double meaning, too. While in the general sense it may describe anything that is fair and reasonable, in its more specific meaning it refers only to "the equity which is due to each individual as a matter of justice".[515] Suárez underlines that this latter usage of the term is more common, and this is the strict one. In support of this view, he quotes the opinion of Saint Thomas that it is justice in the specific sense that constitutes the primary basis and significance of *ius*.[516]

… Secunda, et latinis magis recepta est, ut ius dicatur a iubendo; nam *iussum* participium est verbi *iubeo*, et si a participio *iussum* secundam syllabam demamus, ius relinquitur … Tertia derivatio est ut ius a iustitia dicatur. Sic enim dixit Ulpianus (lib. 1, ff. De iustitia et iure): *Est autem ius a iustitia appellatum*."

[510] *De legibus* 1.2.6: "Iuxta aliam vero etymologiam qua ius a iubendo dicitur, proprie videtur ius legem significare, … id quod est consentaneum rationi iure fieri dicitur tanquam legi conforme."

[511] *De legibus* 1.2.7: "ius prout legem significat, cum illa convertitur et tanquam synonyma reputantur."

[512] *De legibus* 1.2.4: "iuxta ultimam etymologiam ius idem significat quod iustum et aequum, quod est obiectum iustitiae."

[513] *De legibus* 1.2.9: "nihil aliud est ius quam ipsum iustum".

[514] *De legibus* 1.2.4: "Considerandum est autem iustitiae nomen dupliciter accipi. Primo, pro omni virtute, quia omnis virtus respicit et facit aliquo modo aequitatem; secundo, pro speciali virtute tribuente alteri quod suum est." For the original Aristototelian distinction, see *Nicomachean Ethics* 1130a-b.

[515] *Ibid.*: "Utrique ergo significationi ius cum proportione respondet, nam primo ius significare potest quidquid est aequum et consentaneum rationi … Secundo, potest ius significare aequitatem, quae unicuique ex iustitia debetur".

[516] *Summa theologiae* II-II q. 57 a. 1 co.: "Respondeo dicendum quod iustitiae proprium est inter alias virtutes ut ordinet hominem in his quae sunt ad alterum. Importat enim aequalitatem quandam, ut ipsum nomen demonstrat, dicuntur enim vulgariter ea quae adaequantur iustari. Aequalitas autem ad alterum est. Aliae autem virtutes perficiunt hominem solum in his quae ei conveniunt secundum seipsum. … Et propter hoc specialiter iustitiae prae aliis virtutibus determinatur secundum se obiectum, quod vocatur

So far, this is very close to what Aquinas said on the subject in his treatise on right and justice in the *Secunda Secundae*. *Ius* is an objectively just thing or action; it is "that which is in reality just and fair with regard to its object and, accordingly, with regard to its final, or formal and extrinsic cause."[517] But now Suárez's discussion of *ius* takes a new direction. As James Tully has put it, the Aristotelian-Thomist concept of objective right "is redescribed, in two elegant steps, in terms of two subjective rights." [518] First Suárez redefines *ius* as a moral faculty by means of the juridical notions of *ius in re* and *ius ad rem*. He illustrates the latter with Aquinas's classical example of just act, the payment of the due wage for a service rendered:

> "According to the latter and strict acceptation of *ius*, this name is properly wont to be bestowed upon a certain moral faculty which every man has, either over his own property or with respect to that which is due to him. For it is thus that the owner of a thing is said to have a right in that thing, and the labourer is said to have that right to his wages by reason of which he is declared worthy of his hire. Indeed, this acceptation of the term is frequent not only in law but also in Scripture; for the law distinguishes in this wise between a right in a thing (*ius in* re) and a right to a thing (*ius ad rem*)".[519]

Then he gives a similar paraphrase of Ulpian's famous definition of justice, reinterpreting Ulpian's '*ius suum*' to mean a legal claim right (*actio*):

> "Again, it would seem that *ius* is so understood in the *Digest*, where justice is said to be the virtue that renders to every man his own right, that is to say, the virtue that renders to every man that which belongs to him. Accordingly, this right to claim, or moral power, which every man possesses with respect to his own property or with

iustum. Et hoc quidem est ius. Unde manifestum est quod ius est obiectum iustitiae."

517 *De legibus* 1.2.2: "Nam priori modo verum est iustitiam derivari a iure (id est, ab eo quod in re iustum et aequum est) in ratione obiecti, ac subinde in genere causae finalis vel formalis extrinsecae."

518 J. Tully, *A Discourse on Property: John Locke and His Adversaries* (Cambridge: University Press, 1980), 67.

519 *De legibus* 1.2.5: "Et iuxta posteriorem et strictam iuris significationem solet proprie ius vocari facultas quaedam moralis, quam unusquisque habet vel circa rem suam vel ad rem sibi debitam; sic enim dominus rei dicitur habere ius in re et operarius dicitur habere ius ad stipendium ratione cuius dicitur *dignus mercede sua*. Et haec sinificatio vocis huius frequens est non solum in iure sed etiam in Scriptura; nam in iure hoc modo distinguuntur ius in re vel ad rem". Cf. *Summa theologiae* II-II q. 57 a. 1 co.: "Rectum vero quod est in opere iustitiae, etiam praeter comparationem ad agentem, constituitur per comparationem ad alium, illud enim in opere nostro dicitur esse iustum quod respondet secundum aliquam aequalitatem alteri, puta recompensatio mercedis debitae pro servitio impenso. "

respect to a thing which in some way pertains to him is called *ius*, and appears to be the true object of justice."[520]

In Villey's interpretation, Suárez knows only two meanings of *ius*: *ius* as prescriptive law and *ius* as a subjective right.[521] This is also the opinion of Wilenius and Westerman.[522] This interpretation is partly confirmed by Suárez himself: whenever he later returns to the problem of the etymology of *ius in* the *De legibus,* or in his other works touching the subject, he always gives a twofold definition thereof. For example when he treats the question of the immutability and unchangeability of natural law, just before introducing the distinction of *ius praeciptivum* and *ius dominativum*, he states that "*ius* sometimes signifies *lex*, while at times it means *dominium* or quasi-*dominium* over a thing, that is, a claim to its use."[523] However, if we read Suárez's analysis carefully, it can hardly escape our attention that in effect, the *doctor eximius* uses *ius* in three different senses. As Tierney pertinently observes, "to a modern reader it will seem evident that Suarez gave three definitions – the original Thomist meaning, 'the just' or 'the object of justice'; his own understanding of *ius* as a

[520] *De legibus* 1.2.5: "Atque hoc modo sumi videtur ius in lege *iustitia*, ff. De iustitia et iure, cum dicitur iustitia esse virtus quae *ius suum unicuique tribuit*, id est, id tribuens unicuique quod ad illum spectat. Illa ergo actio seu moralis facultas, quam unusquisque habet ad rem suam vel ad rem ad se aliquo modo pertinentem vocatur ius, et illud proprie videtur esse obiectum istitiae."

[521] M. Villey, *La formation de la pensée juridique moderne*, 380; *idem*, 'Remarque sur la notion de droit chez Suarez', *Archives de philosophie* 42 (1979), 219-27 at 222-23.

[522] R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 45-46; P. C. Westerman, *The Disintegration of Natural Law Theory*, 113. According to Westerman, Suárez "abandons here the traditional Thomistic view of *ius* as 'giving everyone his due'. Rather, he identifies *ius* with *facultas* … *Ius* no longer refers to an overall regulative and distributive framework".

[523] *De legibus* 2.14.16: "Diximus enim ius aliquando significare legem, aliquando vero significare dominium vel quasi dominium alicuius rei seu actionem ad utendum illa." The same duality of meanings can be found in the folllowing passages: *De legibus* 7.1.9: "Ad quod intelligendum, adverto (quod in principio huius tractatus notavi) ius dupliciter dici; uno modo, de illo quod consistit in facultate utendi, quod est dominium, vel quasi dominium: nam potest includere ius in re, et ad rem, et generaliter dici potest ius dominii, vel quasi dominii, et ita in rigore spectat ad factum; alio modo dicitur ius de illo, quod vim habet obligandi et imperandi, et dici potest ius legis, seu legale."; *Defensio fidei catholicae* 4.9.11: "suppono, ex tractatu *De legibus*, hoc nomen *ius* interdum significare propriam legem, seu praeceptum; aliquando vero, et satis proprie, ac frequenter significare facultatem utendi, vel (ut ita dicam) quasi ius facti, sicut distinguuntur iura servitutis, vel ius in re, et ad rem, et similia."; *De statu perfectionis et religionis* 8.5.12: "Deinde respondeo posse esse aequivocationem in voce *iuris*; potest enim aut legem significare, quomodo distingui solet ius divinum vel humanum, etc. Alio autem modo sumitur pro morali quadam potestate ad aliquem actum vel usum."

moral faculty or subjective right; and finally *ius* as meaning law."[524] But why then has Suárez explicitly spoken of only two "principal" meanings?[525] According to Tierney's – perhaps too benign – explanation, because "he apparently regarded the first two meanings as merely different ways of saying the same thing."[526] Dario Composta comes to a somewhat similar conclusion. He argues that although Suárez does not frequently use the expression '*res iusta*', this does not mean at all that he ignores Aquinas's objective concept of *ius*, but merely that he "does not recognize it as a legal category distinct from that of the *moral faculty*".[527] Even Finnis acknowledges that although it is the subjective meaning of *ius* that becomes primary in Suárez's legal philosophy, that is to say, for him "*jus* is essentially something someone *has* … if you like, it is Aquinas's primary meaning of '*jus*', but transformed by *relating it exclusively to the beneficiary* of the just relationship".[528]

It is extremely difficult to decide between these competing interpretations, for Suárez's usage of *ius* is far from being unequivocal. He does not make it clear what is the exact relationship between objective and subjective 'right', instead he shifts from one meaning of *ius* to the other (as it was usual in medieval legal philosophy), without mentioning that he uses the term in these different senses. In general, he does not deal at length with the semantics of 'right' and 'justice'. This is comprehensible if we take into account that unlike many of his Dominican and Jesuit predecessors (among others Domingo de Soto and Luis de Molina), Suárez wrote not a *De iustitia et iure*, but a treatise *On Laws and God the Lawgiver*.[529] After

[524] B. Tierney, *The Idea of Natural Rights*, 303. Practically the same tripartite understanding of *ius* can be found in a clearer form in Hugo Grotius's *De iure belli ac pacis* (1.1.3, 1.1.4, 1.1.9). Grotius expounds the three meanings of *ius* as follows: "For *Right* in this Place signifies meerly *that which is just* … There is another Signification of the Word *Right* different from this, but yet arising from it, which relates directly to the *Person:* In which Sense *Right* is a *moral Quality* annexed to the Person, *enabling him to have, or do, something justly.* … There is also a third Sense of the Word *Right*, according to which it signifies the same Thing as *Law*, when taken in its largest Extent, as being *a Rule of Moral Actions, obliging us to that which is good and commendable.*" [Nam ius hic nihil aliud quam quod iustum est significat … Ab hac iuris significatione diversa est altera, sed ab hac ipsa veniens, quae ad personam refertur; quo sensu ius est Qualitas moralis personae competens ad aliquid iuste habendum vel agendum. … Est et tertia iuris significatio quae idem valet quod Lex, quoties vox legis largissime sumitur, ut sit Regula actuum moralium obligans ad id quod rectum est.]

[525] *De legibus* 1.2.4: "Iuxta has ergo duas vocis derivationes, nomen *ius* duas praecipuas habet significationes".

[526] B. Tierney, *The Idea of Natural Rights*, 304.

[527] D. Composta, *La "moralis facultas" nella filosofia giuridica di F. Suarez*, 26-27.

[528] J. Finnis, *Natural Law and Natural Rights*, 207.

[529] This is not to say that Suárez did not devote a special treatise to justice. He discussed justice in detail

all, I find more convincing the interpretation according to which by defining *ius* as a moral faculty Suárez intended to complement rather than to replace Aquinas's objective concept of *ius* as "the just". This reading seems to me more credible for at least two reasons. First, because, as we saw, Suárez identifies sometimes the objective, sometimes the subjective sense of *ius* with the object of justice. Secondly, and more importantly, since Suárez constantly and consistently links the subjective notion of *ius* with the argumentation and the conceptual basis of Aquinas's discussion of objective right. The following passage, I think, is a perfect textual evidence of this:

> "*ius* sometimes refers to the moral faculty to acquire or retain something, whether that faculty involve true *dominium* or merely a partial *dominium*; which is, as we learn from St. Thomas (II.-II, qu. 57, art. 1), the true object of justice. On the other hand, *ius* sometimes means law, which is the rule of righteous conduct; and in this sense it is that which establishes a certain equity in things, so that, as St. Thomas holds (*ibid.*, art. 1, ad 2), it is the basis of right, that very acceptation of *ius* which we first noted".[530]

According to Villey, the reference to Aquinas is merely rhetorical in Suárez's analysis of *ius*: he employs the Thomist terminology, but solely in order to disguise the nominalist, voluntarist elements inherent in the subjective understanding of the term.[531] The basic problem with this approach is that by Suárez's time, as Annabel Brett has shown, subjective and objective right were no longer considered at all as direct opposites in scholastic thought.[532] After Viroria, the parallel use of the objective and subjective senses of *ius* became common among the members of the school of Salamanca, who defended with the same determination moral and legal objectivism on the one hand, and the rights of the Indians on the other.[533] Certainly, to derive a subjective meaning from Aquinas's objective

– and along predominantly Aristotelian-Thomist lines – in his disputation *De iustitia Dei* and in his lectures *De iustitia et iure* delivered in the College of Rome. However, in these works he does not speak much about *ius*.

530 *De legibus* 2.17.2: "Ius enim interdum significat moralem facultatem ad rem aliquam vel in re, sive sit verum dominium, sive aliqua participatio eius; quod est proprium obiectum iustitiae, ut constat ex divo Thoma (II II, quaest. 57, art. 1). Aliquando vero ius significat legem, quae est regula honeste operandi et in rebus quamdam aequitatem constituit; et est ratio ipsius iuris priori modo sumpti, ut dixit ibidem divus Thomas (dicto art. 1, ad secundum)".

531 M. Villey, *La formation de la pensée juridique moderne*, 353. This is the view of Lachance, too. See L. Lachance, *Le concept de droit selon Aristote et S. Thomas*, 294.

532 A. Brett, *Liberty, Right and Nature*, 111-24, esp. 124.

533 There is a vast literature on the Spanish intellectual debates over the colonization of the New World

conception of *ius* is a difficult philosophical and linguistic manoeuvre. But even so, Suárez had no reason to conceal his real sources, and he did not do so (as it is evident e.g. from his reference to Johannes Driedo's Gersonian definition equating *ius* – in the manner of Summenhart and Mair – with *dominium*).[534] Especially as Vitoria already created a precedent by interpreting Aquinas's dictum that law is "*aliqualis ratio iuris*" to mean that *ius* is "what is licit by law" (*quod lege licet*), or "that which is licit in accordance with the laws" (*illud quod licitum est per leges*), that is, a subjective right.[535]

Everything considered, we have good reasons to conclude that for Suárez there is an organic relation between *ius* as a moral faculty and the two other – objective – meanings of *ius*. What one has a right to is due to him according to the principles of justice, and law is

---

and the rights of the American Indians. Here I mention only the most important studies on the topic: L. Hanke, *The Spanish Struggle for Justice in the Conquest of America*, 6th ed. (Boston: Little, Brown, 1965); J. Muldoon, *Popes, Lawyers and Infidels: The Church and the Non-Christian World*, 1250–1550 (Philadelphia: University of Pennsylvania Press, 1979), ch. 7; P.-I. André-Vincent, *Bartolomé Las Casas: Prophète du Nouveau Monde* (Paris: Tallandier, 1980); A. Pagden, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: University Press, 1982); *idem*, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians', in *idem* (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: University Press, 1987), 79-98; B. Tierney, 'Aristotle and the American Indians – Again: Two Critical Discussions', *Cristianesimo nella storia* 12 (1991), 295-322; D. Csejtei and A. Juhász, *Amerika felfedezése és az új globális rend*, 2 vols. (Máriabesnyő – Gödöllő: Attraktor, 2004).

[534] *De legibus* 1.2.4, referring to Driedo's *De libertate christiana* 1.10: "ius bifarium accipitur, nunc pro lege, veluti cum dicimus legem decalogi esse ius divinum etc., nunc pro diminio, veluti cum dicimus aliquem habere ius in possessionem vel agrum".

[535] *De justitia* II-II q. 62 a. 1 n. 5: "Jus ergo, ut ex superioribus constat, nihil aliud est nisi illud quod licet, vel quod lege licet, id est jus est quod est licitum por leges. Patet hoc ex sancto Thoma supra, q. 57, a. 1 ad secundum, ubi dicit quod lex non est proprie jus, sed est ratio juris, id est, est illud ratione cujus aliquid est licitum. Item, patet in eodem loco in corpore articuli, ubi dicit quod jus et justum idem sunt, teste Aristotele 5 *Ethicorum*; et justum illud idem est quod legibus licet: ergo jus etiam idem est, id est quod legibus licet. Dicit ergo quod jus est illud quod licitum est per leges. Et ita nos utimur illo vocabulo cum loquimur. Dicimus enim: non habeo jus faciendi hoc, id est non mihi licet; item, jure meo utor, id est licet." Vitoria's discussion of *ius* was closely followed later by his best pupil, Domingo de Soto. For a detaleid analysis of their concepts of objective and subjective right, see A. Brett, *Liberty, Right and Nature*, 124-64. As regards Jesuit theologians before Suárez, Harro Höpfl underlines (*Jesuit Political Thought*, 265-66) that albeit for them "*ius* was etymologically incapable of being permanently cut adrift from the generic notion of 'what is right' … *ius* had also long ago acquired the sense of a personal entitlement, 'faculty', a liberty, a 'subjective' right … The idea of a subjective right was, however, easily derivable from the chronologically (and ethically) primary sense of *ius* as 'what is right', or law as the source of rights." Höpfl quotes Lessius (*De iustitia et iure* 2.2.2-3) as an illustrative example in this respect.

the basis and measure not only of moral rectitude but also of rights. It is in this sense that Composta says that in Suárez "objectivity does not cease to exist in the 'moral faculty'", which remains identical with or closely related to 'the just and equitable', and conforms to the external order defined by laws.[536] Tully also accentuates that Suárez can call the moral power to or in a thing a 'right' because "the moral power cannot but be right in the objective sense. That is, the moral power is objectively right because it is a moral power with respect to what is right by definition: one's own and one's due. Thus subjective right is derived from and limited by natural law, the standard of what is objectively right."[537]

In the grounding of natural rights Suárez's conception of permissive natural law plays a primordial role. The very fact that Suárez designates this type of natural law also by the name *ius naturale dominativum* is revealing. We have seen that Suárez often associates *ius* in the subjective sense with *dominium*. This is, of course, not unprecedented in medieval legal and political thinking. Some nominalist predecessors of Suárez – especially Summenhart – went so far as to equate the two terms. Suárez, on the contrary, carefully distinguishes them: for him, *dominium* is only one form of right.[538] The other important ground of natural rights that Renaissance scholastics usually invoked in support of their right theories was the Thomist concept of *dominium sui*. This is a point I will develop in detail later when I will examine Suárez's theory of freedom.

Generally speaking, permissive natural law defines an area within which human persons can licitly exercise their inherent power of free will and free choice. More concretely, when natural law permits an otherwise intrinsically good act, "it not only does not prohibit it, but since it is good, it also grants a positive faculty or licence, or a certain right to it."[539] It should be stressed again that for Suárez there cannot be a contradiction between the permissions and the precepts of natural law: negative natural law can never permit or give right to immoral acts that are contrary to positive natural law. Thus the commands and prohibitions of natural law set bounds to the exercise of natural rights and prevent

536 D. Composta, *La "moralis facultas" nella filosofia giuridica di F. Suarez*, 27.

537 J. Tully, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: University Press, 1993), 105.

538 *De statu perfectionis et religionis* 8.5.4: "Dominium est principale ius disponendi de re aliqua in quemcumque usum lege non prohibibitum; his enim verbis recte explicatur moralis illa facultas, quam dominus habere censetur circa rem suam, omnis enim talis facultas ius appellatur, quia tamen non omne ius est dominium … , ideo illud ponitur loco generis, aliae vero particulae distinguunt dominium ab aliis iuribus minus perfectis".

539 *De legibus* 1.15.11: "Nam quando permissio dicitur de actu alias bono, non solum non prohibet illum: sed etiam cum sit bonus, dat positivam facultatem, seu licentiam, vel ius aliquod ad illum."

right-holders from abusing their rights.[540] Finally, what is perhaps even more important, preceptive natural law obliges others to respect the rights conferred by permissive natural law:

> "The right to all these things is natural, that is they are all permitted by the law of nature. And in the same way the obligation of one person not to violate such a right of another is of natural law."[541]

So Suárez attaches natural rights to natural law in at least three ways. First, it is permissive natural law that constitutes their normative basis. Secondly, the commands and prohibitions of preceptive natural law set limits to natural rights and ensure their lawful exercise. Thirdly, the same law protects natural rights against violation by others.

2.2 Property and the Natural Right of Using

According to Ockham, in the state of nature there does not exist any kind of property, neither common nor private. The Suárezian account of the state of innocence is quite different: "Ordinarily speaking, God did not give immediately to any man own and proper *dominium* of anything, but made everything immediately common".[542] Suárez uses in this context the traditional Thomist argument that dominion of man over external nature is intrinsic to human nature: though God is the supreme lord of all, human beings created in the image of God and hence endowed with rationality and free will, masters of their own acts can enjoy a subordinate dominion.[543] Moreover, he translates the Thomist concept of *dominium naturale* into the language of subjective rights, saying that

> "nature has conferred upon men in common *dominium* over all things, and consequently has given to every man a power to use these things."[544]

[540] B. Tierney, 'Natural Law and Natural Rights', 401, 405-6.

[541] *De legibus* 2.18.7: "Nam ius ad haec omnia naturale est, id est, haec omnia licita sunt iure naturae. Et eodem modo obligatio unius ad non violandum tale ius alterius, naturalis legis est."

[542] *Defensio fidei catholicae* 3.2.14: "Nam immediate non dedit Deus (ordinarie loquor) alicui homini proprium et peculiare dominium alicuius rei, sed immediate omnia fecit communia".

[543] *De voluntario et involuntario* 1.2.11, *De statu perfectionis et religionis* 8.4.10, 8.5.19.

[544] *De legibus* 2.14.16: "natura … contulit communiter dominium rerum omnium et consequenter unicuique dedit potestatem utendi."

This natural right of using is, in turn, expressed in the form of a positive precept:

> "while that condition of common ownership did exist, there was a positive precept of natural law to the effect that no one should be prohibited or prevented from making the necessary use of the common property."[545]

In this way, however, Suárez has to resolve the old problem that already the Decretist had to face: if common property is an institution of natural law, how could private property emerge without the violation of natural law precepts? He reasserts the classical argument of Rufinus and Huguccio that community of property existed in the state of innocence only by the indication or permission – and not a command – of natural law. In the most fitting sense, a thing may be spoken of as pertaining to the natural law when it is prescribed by a natural law precept.

> "According to another manner of speaking, however, a thing is said to pertain to the natural law merely in a permissive or negative or concessive sense, to put the matter thus. Under this classification many things fall which from the standpoint simply of natural law are permissible or conceded to men – such things as the holding of goods in common, human liberty and the like. With respect to these things, the natural law lays down no precept enjoining that they shall remain in that state; rather does it leave the matter to the management of men, such management to be in accord with the demands of reason. … Hence a division of property is not contrary to positive natural law; for there was no natural precept to forbid the making of such a division … ownership in common was a part of natural law in the sense that by virtue of that law all property would be held in common if men had not introduced any different provision."[546]

Suárez rejects the view of Scotus that God laid on mankind an original command ruling that all property should be owned in common, which He revoked after the Fall,[547]

545 *De legibus* 2.14.17: "durante illo statu positivum praeceptum iuris naturae erat ut nemo prohiberetur nec impediretur ab usu necessario communium rerum."

546 *De legibus* 2.14.6: "Alio vero modo dicitur aliquid esse de iure naturali solum permissive aut negative aut concessive (ut sic res explicetur). Talia sunt multa quae attento solo naturali iure licita sunt vel data hominibus, ut rerum communitas, hominum libertas et similia. De quibus lex naturae non praecipit ut in eo statu permaneant, sed hoc relinquit hominum dispositioni iuxta rationis exigentiam."; 2.14.14: "Divisio ergo rerum non est contra ius naturale positivum, quia nullum erat naturale praeceptum quod illam prohiberet … communitas rerum erat de iure naturali, quia ex vi illius res omnes essent communes nisi homines aliud introduxissent."

547 *Ordinatio IV* d. 15 q. 2 a. 1.

arguing that there is no necessary connection between the state of innocence and common property, "since, without prejudice to the rectitude of their conduct, men could in the state of innocence take possession of and divide among themselves certain pieces of property, especially those which are movables and necessary for ordinary use."[548] For instance, if someone picked fruits from a tree in order to eat them, he acquired a particular right to them, and no one could justly take them away from him against his will. In certain cases even immovables could be kept in lawful private possession. For example, a person occupying and cultivating a piece of land could not justly be deprived from its use and possession, unless he himself relinquished it.[549] Natural law does not only permit (*negative*) the occupation of a place for settlement, but it also annexes (*positive*) to this permission a prohibitive precept that "no person may justly interfere with another person who occupies in any manner whatsoever a place not previously occupied by another".[550]

[548] *De legibus* 2.14.13: "Sed haec sententia quoad illud primum praeceptum non placet, quia non video necessitatem illius praecepti. Nam si ponatur positivum, gratis asseritur cum ostendi non possit; si naturale, probanda est necessaria connexio communitatis rerum cum statu innocentiae. Nulla autem esse videtur, quia salva morum honestate possent hominess in illo statu res aliquas praesertim mobiles et ad ordinarium usum necessarias sibi usurpare et inter se dividere." Likewise, in *De opere sex dierum* 5.7.18 Suárez writes: "Nam imprimis non videtur esse datum in illo statu praeceptum prohibens hanc rerum divisionem: quia nec positivum invenitur, nec naturale colligitur ex principiis rectae rationis, quia talis divisio de se nec contra iustitiam esset, nec contra aliam virtutem, et posset esse utilis".

[549] *De opere sex dierum* 5.7.18: "Nam mobilia magis sunt subiecta divisioni, quia eo ipso, quod occupantur, seu capiuntur, fiunt accipientis. Et hoc ius videtur fuisse necessarium etiam in statu innocentiae. Nam qui colligeret fructus arboris ad comedendum, eo ipso acquireret peculiare ius in illos, ut posset illis libere uti, et non possent invito possidente auferri sine iniustitia. At vero in bonis immobilibus non esset necessaria similis divisio … Considerandum vero ulterius est, potuisse homines in eo statu operari terram, et fortasse aliquam eius partem seminare. Inde ergo necessario fieret consequens, ut postquam aliquis particulam terrae coleret, non posset iuste ab alio privari usu, et quasi possessione illius: quia ipsa naturalis ratio, et ordo conveniens hoc postulat. Potuisset etiam usu introduci, ut qui semel illam particulam terrae occuparet, tanquam propriam illam possideret, quamdiu illam non dimitteret: et idem dici potest de particula terrae ad habitationem, et quasi domicilium destinata." Vitoria goes even further in this direction when he asserts that in the state of nature *dominium* over material things did not belong only to the human community as a whole; rather each person was owner of everything, so that he could use or consume anything according to his pleasure, as long as he did not harm other people or himself. — *De justitia* II-II q. 62 a. 1 n. 16: "Non solum universitas et communitas humana habet dominium super omnia, sed etiam quilibet homo in statu naturae integrae, id est, stando in solo jure naturali, erat dominus omnium rerum creatarum et poterat uti et abuti omnibus illis … pro libito suo, dummodo non noceret aliis hominibus vel sibi."

[550] *De legibus* 2.18.4: "Primum est sedium occupatio. Haec enim ita est licita unicuique iure gentium vel

Suárez appears to come to a final conclusion very similar to that of Aquinas: natural law has not prescribed community of property, and "has not conferred private property rights" either.[551] Common property is more useful in the state of innocence, just as, conversely, private property is more appropriate to human nature in its fallen state, but none of them is absolutely necessary. Thus natural law leaves the decision about the mode of possession of material things – as a question of expediency – to human will and rationality.[552] Suárez follows Aquinas also in explaining the introduction of genuine private property with human consent through the *ius* gentium.[553] According to Quentin Skinner, this is not more than a superficial resemblance, since, unlike Aquinas, Suárez adopts a purely positivist view of the *ius gentium*.[554] It is true that for Suárez *ius gentium* "differs from the natural law" and "is in an absolute sense human and positive",[555] but he does not disagree with St. Thomas on the essential point that the precepts of *ius gentium* are conclusions drawn from the principles of natural law; he merely adds to this that the precepts of the law of nations are deduced from natural law principles not as a necessary and evident conclusion but only by a less certain inference, thus they are dependent upon the free will and consent of mankind.[556] Consequently, he describes the law of nations as a peculiar type of positive

potius naturali, ut nemo iuste impedire possit alium quamvis occupet sedem ab alio non praeoccupatam; et ita illa concessio habet annexum hoc praeceptum."

551 *De legibus* 2.14.16: "Proprietatem autem dominiorum non ita contulit".

552 *De legibus* 2.14.13: "Coniecturae autem quibus utitur Scotus ad ostendendum illud praeceptum, scilicet quia communitas in illo statu esset magis accomodata ad hominum sustentationem et pacem et similes, solum probant tunc non fuisse necessariam rerum divisionem vel ad summum communitatem rerum futuram fuisse utiliorem in illo statu; non vero fuisse necesssariam. Sicut e converso congruentiae quae ostendunt divisionem rerum esse commodiorem in natura lapsa, non probant hanc divisionem esse sub praecepto naturali, sed solum esse huic statui et conditioni hominum accomodatam." Suárez's argumentation favouring private property in the present state of mankind owes much to Aristotle and Aquinas. See e.g. *De opere sex dierum* 5.7.17: "divisio rerum nunc necessaria est: tum propter vitandas rixas inter homines, pacemque servandum: tum propter sustentationem hominum, quia si bona essent communia, homines negligerent custodire, et operari illa".

553 *De legibus* 2.17.8, 2.18.3.

554 Q. Skinner, *The Foundations of Modern Political Thought*, II: 153.

555 *De legibus* 2.19.2: "Differt autem … ius gentium a iure naturali"; 2.19.3: "concludi videtur ius gentium simpliciter esse humanum ac positivum". With this view, Suárez incurred the criticism of Michel Villey, too. Cf. M. Villey, *La formation de la pensée juridique moderne*, 359-60.

556 *De legibus* 2.20.2: "intelligitur quo sensu accipiendum sit quod divus Thomas (I II, quaest. 95, art. 4) dicit praecepta iuris gentium esse conclusiones deductas ex principiis iuris naturalis … cum Soto et aliis intelligimus praecepta iuris gentium vocari conclusiones iuris naturalis non absolute et per neces-

human law, based on unwritten, universal custom and the principles of natural justice.[557] Furthermore, as we have seen, in the *Secunda Secundae* Aquinas also locates private property explicitly in positive law.[558] So the biggest difference between Suárez's and Aquinas's theory of property is that in the former *ius gentium* merely ratifies a state of affairs that has already gradually come into being before.[559]

Although private property is not prescribed by natural law, once the division of things has been made, it forbids theft.[560] This is a case of conditional natural law in Suárez.[561] Notwithstanding, the precept protecting the natural right of using and the necessary use

---

sariam illationem, sed comparatione facta ad determinationem iuris civilis et privati"; 2.17.9: "Ergo ut ius gentium a naturali distinguatur, necesse est ut etiam supposita tali materia non sequatur per evidentem consequentiam, sed per aliquam minus certam, ita ut arbitrium humanum et moralis commoditas potius quam necessitas intercedat."

[557] *De legibus* 2.19.1-7. On this point too, Suárez will be followed by Grotius. Whether Grotius or Suárez (or Vitoria or someone else) should be hailed as the founder of modern international law is an old, extremely debated and – in my view – rather artificial question. The "fatherhood" of Suárez (or Vitoria) is asserted e.g. by Ernest Nys in his *Les origines du droit international* (Bruxelles: Castaigne, 1894), 11-12, 138; by James Brown Scott in his *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford, Clarendon Press, 1934) and in his 'Introduciton' to the *Selections from Three Works of Francisco Suárez, S.J.* (New York: Oxford University Press, 1944), vol. II: *An English Version of the Texts*, trans. G. L. Williams, A. Brown and J. Waldron, 3a-41a at 15a-21a; by J. T. Delos, *La société internationale et les principes du droit public*; by M. Villey, *La formation de la pensée juridique moderne*, 348; and by Q. Skinner, *The Foundations of Modern Political Thought*, II: 154. It is denied, on the other hand, by Arthur Nussbaum in his *A Concise History of the Law of Nations* (New York: Macmillan, 1947), 71, 104-7; and by Bernice Hamilton, *Political Thought in Sixteenth-Century Spain: A Study of the Political Ideas of Vitoria, De Soto, Suárez, and Molina* (Oxford: Clarendon Press, 1963), 98. For a good brief summary of the whole controversy, see J. Muldoon, 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio* 28 (1972), 483-97.

[558] *Summa theologiae* II-II q. 66 a. 2 ad 1; see Chapter I Part 1.4. In view of this fact, Skinner's claim (*The Foundations of Modern Political Thought*, II: 153) that "the right to hold property had always been treated in the Thomist theory of political society as part of the law of nature" seems hardly sustainable.

[559] B. Tierney, *The Idea of Natural Rights*, 308.

[560] *De legibus* 2.14.17: "quamvis divisio rerum non sit praecepta iure naturae, tamen postquam facta est et applicata sunt dominia, ius naturae prohibet furtum seu indebitam acceptionem rei alienae."

[561] This fact is acknowledged by Suárez in *De legibus* 2.17.9: "Nam multa sunt de iure naturali quae non obligant, nec locum habent, nisi aliqua suppositione facta; ut praeceptum non furandi non habet locum, nisi facta divisione bonorum et dominiorum."

of the common property remains valid.[562] And in time of extreme necessity, echoes Suárez (like centuries before Ockham) the old canonistic doctrine, this precept applies to private possessions as well, for "the taking of another person's property in cases of extreme necessity is not a matter having to do with what is absolutely another's possession, since with respect to such a time all things are common property, nor is it a case in which the owner is reasonably unwilling."[563] The principle underlying this doctrine is that superfluous material goods are due by natural law to the purpose of succouring the needy, since the division of possessions is not just and reasonable unless superfluities are considered as common.[564] Not only the natural right of using but also the common good takes in certain cases priority over private property rights. Moreover, although a private good belongs primarily and essentially to its owner, in a secondary sense

> "it is also said to be a common good; either because the state has a certain higher right over the private goods of individuals, so that it may make use of these goods when it needs them, or also because the good of each individual, when that good does not redound to the injury of others, is to the advantage of the entire community, for the very reason that the individual is a part of the community."[565]

[562] *Ibid.*: "Quod praeceptum suo modo nunc durat in his rebus quae communes sunt, quamdiu non sunt divisae aliquo modo. Nemo enim potest prohiberi a communi usu illarum".

[563] *De legibus* 2.16.11: "Ut quando interpretamur per legem non furandi non prohiberi accepere ab alio necessaria ad vitam in extrema necessitate, illa non est epiikia sed propria declaratio illius legis … Acceptio autem rei alienae in extrema necessitate, nec est de re omnino aliena, quia pro illo articulo omnia sunt communia, nec est invito domino rationabiliter."

[564] *De charitate* 7.3.2: "haec bona temporalia, si superflua sint, iure naturae sunt indigentium; ergo non possunt sine peccato retineri, si aliqui indigeant … quia haec bona ex Dei institutione sunt communia: iure autem gentium sunt divisa, quae divisio non potest esse iusta, et rationi consona, nisi hac lege facta intelligatur, ut quae propriis dominis fuerunt superflua, aliis efficiantur communia". Suárez refers to *Summa theologiae* II-II q. 66 a. 7.

[565] *De legibus* 1.7.7: "Aliud vero est bonum commune solum secundario et quasi per redundantiam. Immediate autem bonum privatum est, quia sub dominio privatae personae et ad eius commodum proxime ordinatur. Dicitur autem etiam commune vel quia respublica habet ius quoddam altius in bona propria singularum personarum, ut eis uti possit quando illi fuerint necessaria, vel etiam quia eo ipso quod unaquaeque persona est pars communitatis, bonum uniuscuiusque quod in damnum aliorum non redundat est commodum totius communitatis."

2.3. Liberty and the Origins of the State

As a consequence of their resolute opposition to the theological determinism of Luther and Calvin, Jesuit theoreticians had a clear tendency to overemphasize the freedom of human will. In this respect they came near to the voluntarism of Ockham and Duns Scotus. This led inevitably to great disputes and tensions with the theologians of the Domician Order.[566]

While Suárez does not reject Peter Lombard's traditional definition of free will as *facultas voluntatis et rationis*,[567] he repudiates the view of Aquinas that the free choice is a synthesis of intellect and will in one indivisible but composed act: materially an act of will, but formally an act of reason.[568] Though the intellect has its part to play in the making of a free decision, argues Suárez, liberty cannot be attributed formally to reason, because the intellect is determined by its very nature to assent to what is true and to dissent from what is false.[569] And what is even more important, the will is not bound by the judgment of the

[566] Molina's "notorious" doctrine of *scientia media* was attacked by the Dominican theologian Bañez, and the debate between Jesuits and Dominicans became so fierce that Pope Clement VIII had to set up the so-called '*Congregatio de auxiliis*' in order to settle it. The outcome of this special congregation was that both orders' theological views were accepted, and accordingly the Dominicans were forbidden to call the Jesuits Pelagians and the Jesuits to call the Dominicans Calvinists. — F. Copleston, *A History of Philosophy*, III: 342-44. For details of this controversy and the standpoint taken by Suárez in it, see P. Dumont, *Liberté humaine et concours divin d'après Suarez* (Paris: Beauchesne, 1936) and T. U. Mullaney, '*The Basis of the Suarezian Teaching on Human Freedom*', *The Thomist* 11 (1948), 1-17, 330-69, 448-502 and 12 (1949), 48-94, 155-206.

[567] *De gratia* Prolegomenu 1 c. 1 n. 8.

[568] *De voluntario et involuntario* 6.6.5, 8.1.1, *Disputationes metaphysicae* 19.6.5. In *Summa theologiae* I-II q. 13 a. 1 co., Aquinas states that "in a sense, reason precedes the will and ordains its act, in so far as the will tends to its object according to the order of reason … that act whereby the will tends to something proposed to it as being good, through being ordained to the end by the reason, is materially an act of the will, but formally an act of the reason." [ratio quodammodo voluntatem praecedit, et ordinat actum eius, inquantum scilicet voluntas in suum obiectum tendit secundum ordinem rationis … ille actus quo voluntas tendit in aliquid quod proponitur ut bonum, ex eo quod per rationem est ordinatum ad finem, materialiter quidem est voluntatis, formaliter autem rationis.] Likewise, in *Summa* theologiae I-II q. 1 a. 1 co., Aquinas writes: „Now man is master of his actions through his reason and will; whence, too, the free-will is defined as the faculty of will and reason." [Est autem homo dominus suorum actuum per rationem et voluntatem, unde et liberum arbitrium esse dicitur facultas voluntatis et rationis.]

[569] *Disputationes metaphysicae* 19.5.13: "ostenderimus non esse in intellectu formalem libertatem … intellectus secundum se neque est liber quoad specificationem sui actus, neque quoad exercitiium; ergo nullo modo est liber"; *Disputationes metaphysicae* 19.5.14: "intellectus ex natura sua determinatus est ut assentiat vero, et dissentiat falso".

intellect. The propositions of the intellect are necessary so that the will can act rationally, but do not determine its course of action: "from the fact that the will cannot be led toward what is uncognized one may infer only that the intellect's judgment is necessary in order for the will to be able to choose; it does not follow that this judgment must determine the will to one effect."[570] If it were so that the will necessarily followed the judgment of the intellect, there would be no true liberty.[571] In a word, reason has merely a preparatory role in the process of free decision, the free choice itself is made solely by the will. The intellect makes possible the election, the will alone elects.

Until now, this is much closer to Ockham than to Saint Thomas. Aquinas establishes an intimate relation between intellect and will, hence he can deduce free will from man's rational nature, whereas in the nominalist tradition there is a radical disjunction between reason and volition: the intellect falls under the "natural", i.e. determined causes and the will under the free ones, so the explanation of liberty must be sought in the will alone.[572] But this is only one side of the coin. For in proving the existence and explaining the origin of liberty, Suárez willingly accepts the standard Thomist doctrine deriving liberty from the universal and perfect cognition of the intellect,[573] and accordingly he admits that as "the use of reason is the root of freedom", in this sense it is correct to claim that "free choice is a power of the will and of reason; for free choice belongs to will formally, whereas it belongs to reason as to a presupposition or a root."[574] And unlike Ockham, he is very far from thinking that the will can will virtually anything. On the contrary, Suárez maintains

[570] *Disputationes metaphysicae* 19.6.10: "Ex eo enim quod voluntas non potest ferri in incognitum, solum habetur, necessarium esse iudicium intellectus, ut voluntas possit eligere; non vero sequitur oportere ut illud iudicium determinet voluntatem ad unum." See also *De voluntario et involuntario* 8.1.1.

[571] *De voluntario et involuntario* 1.2.10: "Si ergo applicato obiecto, et medio sufficiente intellectus necessario iudicat, et voluntas necessario sequitur intellectum recte iudicantem, nullibi est vera libertas."

[572] W. N. Clarke, 'The Notion of Human Liberty in Suarez', *The Modern Schoolman* 19 (1942), 32-35 at 33, 35.

[573] *Disputationes metaphysicae* 19.2.17: "libertas ex intelligentia nascitur, nam appetitus vitalis sequitur cognitionem … cognitio autem intellectualis ita est universalis et perfecta, ut propriam rationem finis et mediorum percipiat; et in unoquoque expendere possit quid habeat bonitatis vel malitiae, utilitatis aut incommodi … ergo appetitus, qui hanc cognitionem sequitur, habet hanc indifferentiam seu perfectam potestatem in appetendo, ut non omne bonum, aut omne medium necessario appetat, sed unumquodque juxta rationem boni in eo iudicatam".

[574] *Disputationes metaphysicae* 19.5.21: "*Rationis usus radix est libertatis* … Quo sensu dictum est, liberum arbitrium esse facultatem voluntatis et rationis. Est enim voluntatis formaliter, rationis autem praesuppositive seu radicaliter."

with Aristotle and Aquinas that the will is not free to choose or not to choose the ultimate end or happiness.[575]

Suárez often connects this idea of freedom of choice or free will with another meaning of liberty as signifying freedom from external domination.[576] Just like Vitoria, he bases this latter understanding of liberty on the Christian conception of human dignity in general and on Aquinas's notion of *dominium sui* in particular.

> "Man is made in the image of God, exists in his own right (*sui iuris*), and is created subject to God alone, and therefore cannot justly be brought under servitude or subjection to anybody".[577]

As might have been expected from the foregoing, Suárez derives the natural right to liberty from permissive natural law.[578] Doing so, however, he has to meet a serious objection (raised by the jurist Fortunius Garcia): if liberty pertained only *negative* to natural law, then it would follow that one could licitly deprive another of his liberty and reduce him to slavery without offending against the precepts of the law of nature.[579] Suárez is much more emphatic and enthusiastic in the defence of liberty than in the case of common property. He calls liberty a natural property and a "great perfection" of man,[580] and underlines that

[575] See *Disputationes metaphysicae* 19.5.7, 19.8.7-20.

[576] In *De voluntario et involuntario* 1.3.13, Suárez explains the semantic relation between these two meanings of *libertas* as follows: „notandum est *liberum* ex primaeva impositione significare id quod est sui iuris, et alteri non est subiectum: unde videtur directe excludere relationem servitutis … Atque ita vulgari sermone homo ingenus dicitur liber, atque hinc translata est haec vox ad significandam libertatem voluntatis nostrae: in qua varii gradus considerari possunt, dicitur enim voluntas nostra libera a coactione, nam coactio est magna quaedam servitus, et ideo carentia illius, libertas dici potest, et in hoc sensu operatio perfecte voluntaria, quantumvis necessaria, potest dici libera, quia nihil coactionis habet".

[577] *Defensio fidei catholicae* 3.1.2: "… fundari forte potuit in naturali hominis dignitate. Nam homo factus ad imaginem Dei, sui iuris, solique Deo subditus creatus est, et ideo non videtur posse iuste in alicuius hominis servitutem vel subiectionem redigi".

[578] *De legibus* 2.18.2: "ita etiam dari potest ius naturale concessivum, quale est ius ducendi uxorem, ius retinendi et conservandi propriam libertatem. Hoc enim honestum est et illud ius naturae concedit, non praecipit."

[579] *De legibus* 2.14.15: "stando in iure naturae, potuisse unum hominem licite privare alium libertate et redigere in servitutem, quia nihil ageret contra paeceptum legis naturalis. Quod patet quia libertas solum negative dicitur esse de lege naturae, scilicet quia non prohibetur; non vero quia aliquo praecepto positive mandetur. Ergo actio contraria libertati non est prohibita iure naturae."

[580] *De opere sex dierum* 5.7.10: "libertas est homini naturalis, et magna eius perfectio".

> “liberty is a matter of natural law in a positive, not merely a negative sense, since nature itself confers upon man the true *dominium* of his liberty … liberty rather than slavery is a precept of the natural law, for this reason, namely, that nature has made men free in a positive sense (so to speak) with an intrinsic right to liberty”.[581]

This usage of the Thomist language of ‘dominion of self’ in the context of liberty might recall the Lockean idea of self-ownership. The parallel, however, is misleading for at least two reasons. First and foremost, because the scholastic concept of self-mastery or dominion of self, as Janet Coleman convincingly points out, must clearly be distinguished from the modern idea of self-ownership, as represented by Locke and Hobbes, for the medieval and modern understandings of the self are fundamentally different.[582] An important consequence of this is that while the Lockean self-defining, “unencumbered” self can in certain cases have recourse to suicide,[583] for Suárez a man’s life belongs solely to God, so it cannot be the object of human ownership. In writing of man’s control over his life and limbs, he never describes it in terms of ownership, but of power, use or possession.[584] As Tully rightly observes, “the refusal to apply the term *dominium* to man’s control of his life and body signifies that man is not at liberty to injure himself or to take his own life.”[585] In a passage of the *De statu perfectionis et religionis*, Suárez explicitly states: “man is not properly the owner of his own life, nevertheless he has his own right to hold and conserve it, which … he cannot renounce or divest himself of, for that is against the right and power

[581] *De legibus* 2.14.16: “verum est libertatem esse de iure naturali positive et non tantum negative, quia ipsa natura verum dominium contulit homini suae libertatis … hac ratione libertas est de iure naturae potius quam servitus, quia natura fecit homines positive (ut sic dicam) liberos cum intrinseco iure libertatis”.

[582] Coleman categorically asserts that “although there are scholastic, natural law elements in the Lockeian position … Locke has a very different understanding of the self … Despite huge differences in their political theories, both thinkers [Hobbes and Locke] tried to show that individual selves were self-defining, a view that none of the medieval texts we have discussed could endorse. … The pre-modern self was a normative self, already defined by God and the powers given to each and every member of the species … Every medieval, pre-modern self was obliged by moral rules that are *a priori* and to which men had access. Locke has some of this where Hobbes has none. — J. Coleman, ‘Are There any Individual Rights or Only Duties? On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars’, in *Transformations in Medieval and Early-Modern Rights Discourse*, 3-36 at 26, 29.

[583] See *Two Treatises of Government* bk. 2, ch. 4. I borrow the term ‘unencumbered’ from Michael Sandel.

[584] In *De legibus* 2.14.18, e.g., he writes that “natura dedit homini vitam quoad usum eius ac possessionem”.

[585] J. Tully, *A Discourse on Property*, 112.

of the principal lord."[586] The other essential difference dividing Suárez from Locke points to just the opposite direction. In contrast with many later, modern natural rights theorist (but not with his contemporaries), Suárez does not consider liberty as an inalienable, sacrosanct right;[587] paradoxically, because he takes seriously that man has property in his own liberty: "for the very reason that man is the owner of his liberty, he can sell or alienate it."[588] This view, even though it legitimizes voluntary self-enslavement, seems to be congruent not only with a "proprietorial" approach to liberty but also with the flexible and variable nature of the *ius naturale dominativum* in which the right to freedom originates. Furthermore, Suárez affirms the prevalence of the common good over individual goods.

> "Although nature has granted liberty and *dominium* of that liberty, it has nevertheless not absolutely forbidden that it should be taken away. … Accordingly, we say of liberty and of any similar lawful right, that even if such a right has been positively granted by nature, it may be changed by human agency, since it is dependent in the individual persons, either upon their own wills, or upon the state, in so far as the latter has lawful power over all private individuals and over their property, to the extent necessary for right government. … A commonwealth … may deprive a man of his liberty for a just cause (as when it does so by way of punishment)."[589]

[586] *De statu perfectionis et religionis* 8.4.2: "homo non sit proprie dominus vitae suae, habet tamen ius proprium habendi et conservandi illam; quod … nec abdicare potest, aut a se separare, quia est contra ius et potestatem principalis domini."

[587] J. Soder, *Francisco Suárez und das Völkerrecht: Grundgedanken zu Staat, Recht und internationalen Beziehungen* (Frankfurt: Metzner, 1973), 122. Harro Höpfl also stresses (*Jesuit Political Thought*, 208) that for Suárez and for other Jesuit political thinkers "natural liberty is entirely compatible with rightful subordination".

[588] *De legibus* 2.14.18: "eo ipso quod homo est dominus suae libertatis, potest eam vendere seu alienare." On the other hand, Suárez insists on he principle that human life cannot be the object of property and sale. See *De statu perfectionis et religionis* 8.4.2: "For this reason, although someone can sell himself into slavery, he cannot sell his life, nor alienate the right he has in it." [Et ideo, licet quis possit vendere se in servum, non tamen potest vendere vitam suam, nec ius, quod in illam habet, alienare.]

[589] *De legibus* 2.14.18: "quamvis natura dederit libertatem et dominium eius, non tamen absolute prohibuisse ne auferri possit. … Respublica … potest ex iusta causa (ut in poenam) hominem privare sua libertate."; *De legibus* 2.14.19: "Sic ergo dicimus de libertate et de quocumque iure civili, etiamsi positive sit a natura datum, posse per homines mutari quia in singulis personis est dependenter vel a sua voluntate vel a republica, quatenus habet legitimam potestatem in omnes privatas personas et bona earum quantum ad debitam gubernationem necessarium est."

It was customary in late scholastic political writing to draw an analogy – on the basis of the organic metaphor – between the individuals' and the community's liberty, power and self-determination. Suárez is not an exception to this rule.

> "Wherefore, even as man – by virtue of the very fact that he is created and has the use of reason – possesses power over himself and over his faculties and members for their use, and is for that reason naturally free (that is to say, he is not the slave but the master of his own actions), just so the political body of men, by virtue of the very fact that it is brought into existence in its own fashion, possesses power over itself and the faculty of self-government, in consequence whereof it also possesses power and a peculiar *dominium* over its own members."[590]

According to Suárez, the freedom of the community is analogous to individual freedom also in the sense that it can be licitly alienated: "these quasi-moral properties … can be changed by means of a contrary will, in spite of their derivation from nature."[591] From this fact Tuck draws, without hesitation, the unflattering conclusion that Suárez held the "utterly unhumanistic" view that "if voluntary slavery was possible for an individual, so it was for an entire people". In this way, "a natural rights theory defence of slavery became in Suarez's hands a similar defence of absolutism", which led ultimately to "a total and mistaken loss of liberty".[592] Another commentator, Joseph H. Fichter, in direct contrast to this interpretation, celebrates Suárez as "a champion of human liberty".[593] The truth is to be found between these two extreme opinions.

Before answering this question, however, we have first to scrutinize Suárez's account of the origins of the state. Owing to his controversy with King James I and the "hot" reception of the *Defensio fidei catholicae* in England and France,[594] Suárez was considered by his contemporaries as one of the most outspoken enemies of the theory of the divine right of

[590] *De legibus* 3.3.6: "Quocirca sicut homo eo ipso quod creatur et habet usum rationis, habet potestatem in seipsum et in suas facultates et membra ad eorum usum et ea ratione est naturaliter liber, id est, non servus sed dominus suarum actionum, ita corpus politicum hominum, eo ipso quod suo modo producitur, habet potestatem et regimen sui ipsius et consequenter habet etiam potestatem super membra sua et peculiare dominium in illa."

[591] *De legibus* 3.3.7: "hae proprietates quasi morales … mutari possunt per contrariam voluntatem, quamvis a natura sint accepta." See also *Defensio fidei catholicae* 3.2.9.

[592] R. Tuck, *Natural Rights Theories*, 56-57.

[593] J. H. Fichter, *Man of Spain: Francis Suarez* (New York: Macmillan, 1940), 243.

[594] Both James I and the French Parliament had the book burned. Cf. R. Scorraille, *François Suarez de la Compagnie de Jésus* (Paris: Lethielleux, 1911), vol. II: *Le Docteur – Le Religieux*, 194, 205.

kings. Even the non-polemical *De legibus* contains categorical statements like this: "Thus the power of political dominion or rule over men has not been granted immediately by God to any particular human individual."[595] It would be difficult to imagine a more emphatic rejection of any doctrine deriving royal sovereignty *directly* from God, be it Protestant or Catholic.[596] (That political authority is at least ultimately from God as a *causa remota* was, of course, beyond question in scholastic political philosophy). An Adamite derivation of civil power similar to Filmer's is also discarded by Suárez on the ground that the power that Adam possessed was only domestic, not political power.[597] Suárez founds his view that political rule does not reside naturally in any specific person, on the other hand, on the axiom that "man is by his nature free and subject to no one, save only to the Creator".[598]

> "In the nature of things all men are born free; so that, consequently, no person has political jurisdiction over another person, even as no person has *dominium* over another; nor is there any reason why such power should, simply in the nature of things, be attributed to certain persons over certain other persons rather than *vica versa*."[599]

The single possibility that is acceptable for Suárez is that political power exists *ex natura rei* in the whole community.[600] The Spanish thinker accentuates in the case of the power

[595] *De legibus* 3.2.3: "Potestas ergo dominandi seu regendi politice homines nulli homini in particulari data est immediate a Deo." In the *Defensio fidei catholicae* (bk. 3, ch. 2) Suárez discusses this hypothesis at length.

[596] Of course, Suárez's criticism is chiefly directed against Protestant theocratic theories. But as in his early *relectio* on civil power (*De potestate civili* n. 8) Vitoria also insists – to a certain degree – on the immediate divine origin of kingly power, he cannot escape the Jesuit theologian's criticism either. See *De legibus* 3.4.5.

[597] *De legibus* 3.2.3: "Verumtatem ex vi solius creationis et originis naturalis solum colligi potest habuisse Adamum potestatem oeconomicam, non politicam … ita non possumus cum fundamento dicere Adamum ex natura rei habuisse primatum politicum in illa communitate. Ex nullis enim principiis naturalibus id colligi potest, quia ex vi solius iuris naturae non est debitum progenitori ut etiam sit rex suae posteritatis." See also *De opere sex dierum* 5.7.14. For a full treatment of the distinction between *potestas oeconomica vel dominativa* and *potestas politica vel iurisdictionis*, see De *legibus* 1.8.4-5.

[598] *De legibus* 3.1.1: "homo natura sua liber est et nulli subiectus nisi creatori tantum".

[599] *De legibus* 3.2.3: "ex natura rei omnes homines nascuntur liberi, et ideo nullus habet iurisdictionem politicam in alium, sicut nec dominium. Neque est ulla ratio cur hoc tribuatur ex natura rei his respectu illorum potius quam e converso."

[600] *De legibus* 3.2.3: "Dicendum ergo est hanc potestatem ex sola rei natura in nullo singulari homine existere sed in hominum collectione."; *Defensio fidei catholicae* 3.2.7: "ex natura rei solum est haec potestas in communitate".

of the people as well that it results not from a special act or grant of God distinct from creation, but from nature, through a dictate of natural reason showing us that power is necessary for human welfare.[601]

Though democracy is the natural form of government, like all other institutions of permissive natural law, it is subject to change by human will and rationality.[602] Moreover, natural reason does not judge democracy to be operable in practice: the community as a whole "would scarcely be able to put this power to use", and hence "infinite confusion and trouble would result" from it.[603] Thus, as a matter of fact, the body politic always (or almost always) transfers its inherent power to a ruler.[604] Nevertheless, given the natural freedom and equality of men, this transfer can be legitimately realized only with "the intervention of the will and consent of the human beings who have assembled into this perfect community",[605] through "some sort of express or tacit agreement",[606] and a "pact or agreement between the kingdom and the king".[607] The institution of a ruler (or rulers) is made in two steps: first the political society is formed, which then confers sovereignty upon

[601] *De legibus* 3.3.5: "Deus non dat hanc potestatem per specialem actionem vel concessionem a creatione distinctam. … Ergo datur ut proprietas consequens naturam, nimirum medio dictamine rationis naturalis ostedentis Deum sufficienter providisse humano generi et consequenter illi dedisse potestatem ad suam conservationem et convenientem gubernationem necessariam."

[602] *Defensio fidei catholicae* 3.2.9: "Sic ergo perfecta communitas civilis iure naturae libera est, et nulli homini extra se subicitur, tota vero ipsa habet in se potestatem, quae si non mutaretur, democratia esset, et nihilominus, vel ipsa volente, vel ab alio habente potestatem et titulum iustum, potest tali potestate privari et in aliquam personam vel senatum transferri".

[603] *De legibus* 3.3.8: "Ratio autem naturalis dictat non esse necessarium, immo nec conveniens tali naturae habere hanc potestatem immutabilem in tota communitate. Vix enim posset illa … illa uti. Ergo ita datur a natura et eius auctore ut possit in ea mutatio fieri, prout communi bono magis fuerit expediens."; *De legibus* 3.4.1: "Nihilominus tamen ius naturae non obligat ut vel per ipsam totam communitatem immediate exerceatur vel in ipsa semper maneat. Immo quia moraliter difficillimum esset ita fieri (esset enim infinita confusio et morositas, si suffragiis omnium leges essent conditae)". See also *Defensio fidei catholicae* 3.2.9.

[604] *De legibus* 3.4.8: "Atque inde etiam constat posse hanc potestatem esse immediate ab hominibus et mediate a Deo, immo ordinarie ita esse, loquendo de potestate naturali. Quia cum immediate sit in communitate, per illam derivata est ad reges vel principes seu senatores. Raro enim aut nunquam in tota communitate retinetur, ita ut per illam immediate administretur."

[605] *De legibus* 3.3.6: "haec potestas datur communitati hominum ab auctore naturae, non tamen sine interventu voluntatum et consensuum hominum ex quibus talis communitas perfecta congregata est."

[606] *De opere sex dierum* 5.7.3: "aliqua unione politica, quae non fit sine aliquo pacto expresso, vel tacito".

[607] *De legibus* 3.4.5: "pactum vel conventionem factam inter regnum et regem".

the ruler. Many prominent scholars have interpreted Suárez's description of this two-stage process as a 'double-contract theory',[608] or compared it to John Locke's social contract doctrine.[609] Otto von Gierke even claimed that in spite of his professed corporatism, Suárez made the community in reality a simple aggregate of individuals.[610] The relevant texts, however, seem to contradict such an interpretation. First of all, Suárez makes it very clear that political society is not an association of free and equal individuals, but of lesser associations.[611] So Harro Höpfl is right in saying that the Jesuit theologian's "explanation of the coming into being of commonwealths was the familiar Aristotelian one, only now interpreted *not* as a natural process of growth, but as an artefact of will and consent."[612] Furthermore, in Suárez political authority cannot originate in the individual, because no one can transfer a right or power that he himself does not have. And individuals do not by nature have the right to punish and kill malefactors.[613] Nor they possess, *qua* individuals,

[608] A social contract theory is attributed to Suárez, among others, by J. W. Gough, *The Social Contract: A Critical Study of its Development*, 2nd ed. (Oxford: Clarendon, 1957), 69-71; F. Copleston, *A History of Philosophy*, III: 348, 396; R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 81, 114; M. Villey, *La formation de la pensée juridique moderne*, 349; J. Soder, *Francisco Suárez und das Völkerrecht*, 76, 131-32. Soder was so diligent to collect (at p. 131 n. 87) all the passages where Suárez refers to 'consent', 'contract' or 'pact'.

[609] Skinner, for example, contends (*The Foundations of Modern Political Thought*, II: 159) that Jesuit writers worked out "a method which in turn helped to lay the foundations for the so-called 'social contract' theories of the seventeenth century", adding that "the structure of Suárez's theory seems in particular to be very similar" to that of Locke's. Tierney claims that Suárez formulated a theory of the state "based solely on human will and consent", and he too makes a comparison with Locke. — B. Tierney, *The Idea of Natural Rights*, 301; *idem*, 'Dominion of Self and Natural Rights Before Locke and After', 190-91.

[610] O. von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*, trans. E. Barker (Cambridge: University Press, 1958), 46, 242-43 n. 62.

[611] *De legibus* 3.2.3: "Postquam autem coeperunt familiae multiplicari et separari, singuli homines qui erant capita singularum familiarum habebant eandem potestatem circa suam familiam. Potestas autem politica non coepit donec plures familiae in unam communitatem perfectam congregari coeperunt."; *De opere sex dierum* 5.7.18: "perfectam communitatem, quae ex multis familiis coalescit".

[612] H. Höpfl, *Jesuit Political Thought*, 251.

[613] *De legibus* 3.3.3: "haec potestas habet plures actus qui videntur excedere humanam facultatem prout est in singulis hominibus. … Primus actus est punitio malefactorum etiam usque ad mortem; nam cum solus Deus sit dominus vitae, solus ipse videtur potuisse dare hanc potestatem." According to J. P. Sommerville, "this is arguably the major difference between the Catholics and such theorists as Grotius and Locke." — J. P. Sommerville, 'From Suarez to Filmer: A Reappraisal', *The Historical Journal* 25 (1982) 525-40 at 530.

any political power. Before men unite into one political society, civil power does not exist in the individuals, whether wholly or in part.[614]

> "This power does not manifest itself in human nature until men gather together into one perfect community and are politically united … the said power resides not in individual men separately considered, nor in the mass or multitude of them collected, as it where, confusedly, in a disorderly manner, and without union of the members into one body; therefore such a political body must be constituted before power of this sort is to be found in men, since – in the order of nature at least – the agent of the power must exist prior to the existence of the power itself."[615]

Suárez makes here a very important distinction, based on medieval corporation law.[616] A multitude of man can exist in two ways: as a mere aggregation of individuals, without physical and moral union, or as a unified body politic, "a single mystical body" bound by fellowship and pursuing a common end. A self-sufficient *communitas perfecta* "capable of possessing a political government" can be established only through "special volition or common consent".[617] Once it has been constituted, however, civil power exists in it "without delay and by the force of natural reason":

[614] *De legibus* 3.3.1: "priusquam homines in unum corpus politicum congregentur, haec potestas non est in singulis, nec totaliter, nec partialiter".

[615] *De legibus* 3.3.6: "assero hanc potestatem non resultare in humana natura donec homines in unam communitatem perfectam congregentur et politice uniantur … haec potestas non est in singulis hominibus divisim sumptis, nec in collectione vel multitudine eorum quasi confuse et sine ordine et unione membrorum in unum corpus. Ergo prius est tale corpus politicum constitui quam sit in hominibus talis potestas, quia prius esse debet subiectum potestatis quam potestas ipsa, saltem ordine naturae."

[616] Brian Tierney argues in general (*The Idea of Natural Rights*, 309) that "the subtext of much early modern writing on the origin of the state was the doctrine of medieval corporation law".

[617] *De legibus* 3.2.4: "Ut autem hoc melius intelligatur, advertendum est multitudinem hominum duobus modis considerari. Primo solum ut est aggregatum quoddam sine ullo ordine vel unione physica vel morali, quomodo non efficiunt unum quid nec physice nec moraliter; et ideo non sunt proprie unum corpus politicum … Alio ergo modo consideranda est hominum multitudo, quatenus speciali voluntate seu communi consensu in unum corpus politicum congregantur uno societatis vinculo et ut mutuo se iuvent in ordine ad unum finem politicum, quomodo efficiunt unum corpus mysticum, quod moraliter dici potest per se unum"; *De legibus* 1.6.19: "declaratur ad communitatem non sufficere hominum multitudinem, nisi inter se aliquo foedere in ordine ad aliquem finem et sub aliquo capite copulentur. … Haec autem communitas distingui solet a philosophis moralibus et iurisperitis in perfectam et imperfectam. Perfecta in genere dicitur quae est capax politicae gubernationis, quae quatenus talis est, dicitur sufficiens in hoc ordine." Gierke quotes the former text, but dismisses Suárez's distinction as a mere "*jeu d'esprit*" — O. von Gierke, *Natural Law and the Theory of Society*, 242-43 n. 62, 46.

> "human will is necessary in order that men may unite in a single perfect community, but no special act of volition on their part is required to the end that this community shall possess the said power, which arises rather from the very nature of things, and from the providence of the Author of nature … by the nature of things, men as individuals possess to a partial extent (so to speak) the faculty for establishing or creating a perfect community; and by virtue of the very fact that they establish it, the power in question does come to exist in this community as a whole."[618]

Though it is human will that brings a political society into being, it does not give it its power; in Suárez's words, it is not the "efficient cause" of political authority. He illustrates his theory with the analogy of marriage: the consent of husband and wife is necessary to the existence of the marriage itself, but it does not create or explain the domestic power of the husband over the wife (and their children), which arises not from their agreement but from the very nature of things.[619]

It would be too much to say, with Georges Jarlot, that the founding contract of political society is nothing more in Suárez's eyes than a "consensual approval of a necessity of nature".[620] Human freedom is much more valuable for the *doctor eximius* than that. Thus it is more accurate to speak, as Pierre Mesnard does, of a complex interplay between nature and will in Suárez's political philosophy.[621] Johann P. Sommerville correctly summarizes the essence of the Jesuit theologian's theory of the formation of political society: "though human nature inclines men towards such a society it does not compel them."[622] Still, the emphasis on natural social instinct and the Aristotelian-Thomist notion of *animal sociale*

[618] *De legibus* 3.3.6: "Semel autem constituto illo corpore, statim ex vi rationis naturalis est in illo haec potestas … voluntas hominum solum est necessaria ut unam communitatem perfectam componant. Ut autem illa communitas habeat praedictam potestatem non est necessaria specialis voluntas hominum, sed ex natura rei consequitur et ex providentia auctoris naturae"; *De legibus* 3.4.1: "Intelligendum igitur est singulos homines ex natura rei habere partialiter (ut sic dicam) virtutem ad componendam seu efficiendam communitatem prefectam; eo autem ipso quod illam componunt, resultat in tota illa haec potestas." See also *De legibus* 3.1.4, 3.3.1, *Defensio fidei catholicae* 3.2.8.

[619] *De legibus* 3.3.2: "supposita voluntate hominum conveniendi in una politica communitate, non est in potestate eorum impedire hanc iurisdictionem. Ergo signum est proxime non provenire ex eorum voluntatibus quasi ex propria causa efficienti. Sicut un matrimonio recte colligimus virum esse caput mulieris ex dono ipsius auctoris naturae et non ex voluntate uxoris; quia licet ipsi voluntate sua matrimonium contrahant, tamen si matrimonium contrahant hanc superioritatem impedire non possunt."

[620] G. Jarlot, 'Les idées politiques de Suarez et le pouvoir absolu', 79.

[621] P. Mesnard, *L'essor de la philosophie politique au XVIe siècle*, 2n ed. (Paris: Vrin 1952), 628.

[622] J. P. Sommerville, 'From Suarez to Filmer', 527.

et politicum is very strong in Suárez's works; so that from this premise he draws the conclusion that men were leading a civil life already before the Fall. He argues, relying on the classical distinction between *potestas directiva* and *potestas coerciva*, that while coercive power is merely a consequence of sin (on this point he agrees with Ockham and Saint Augustine),

> "in so far as directive power is concerned, it would seem probable that this existed among men even in the state of innocence. For a hierarchy and a principate exists among the angels too … Our own preceding arguments may be considered as applicable to the state of innocence, since they are based not upon sin nor upon any defection from order, but in the natural disposition of man, which is to be a social animal and to demand by nature a mode of living in a community, the latter necessarily requiring to be ruled by a public authority."[623]

In a word, for Suárez political society and civil power is practically as old as humankind.[624] Already in the state of innocence and perfect freedom, where there was neither servitude nor coercive power, social existence required direction and guidance.[625] This analysis is very close to that of Aquinas.[626]

2.4. The Right of Self-Defence

The covenant concluded between the people and the ruler contains more than a mere delegation of power, but a "*quasi alienatio*", "an unlimited bestowal of the whole power which

[623] *De legibus* 3.1.12: "Intelligendus autem est quoad potestatem coercivam et exercitium eius. Nam quoad directivam, probabilius videtur futuram fuisse in hominibus, etiam in statu innocentiae. Nam etiam inter angelos est ordo et principatus … Discursus etiam factus potest ad statum innocentiae applicari, quia non fundatur in peccato vel aliqua deordinatione sed in naturali hominis conditione, quae est esse animal sociale et naturaliter postulare modum vivendi in communitate, quae necessario debet regi per potestatem publicam." See also *De opere sex dierum* 5.7.6, 5.7.18.

[624] R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 77.

[625] *De opere sex dierum* 5.7.18: "Neque subiectio respondens huic dominio esset defectus, vel imperfectio repugnans perfectioni status innocentiae: quia nec privaret hominem libertate simpliciter, et dominio suarum actionum: nec subderet eum ad serviendum alteri in eius commodum: sed ad obediendum in actibus honestis in proprium, vel commune bonum et commodum redundantibus. Nec potestas illa gubernativa tunc esset coactiva, per quam subditi poenis subicerentur, sed esset directiva ad maius bonum, et pacem communitatibus ordinata".

[626] Cf. *Summa theologiae* I q. 96 a. 4 co.

resided in the community".[627] After this total transfer of power, the prince becomes superior to his subjects not only *ut singulis* but also *ut universis*: "once the power has been transferred to the king, he is through that power rendered superior even to the kingdom which bestowed it".[628] These elements may seem to favour an absolutist reading of Suárez's political philosophy. In fact, this is the way Richard Tuck (and to some extent Quentin Skinner) reads the *doctor eximius*.[629] But there exists a radically different, constitutionalist reading of Suárez, too. Reijo Wilenius, for instance, claims that the Renaissance scholastic philosophers' "ideas concerning the rights of the people, democracy and the right of revolution were in sharp conflict with the absolutist tendencies of the age."[630] For my part, I incline to a third, sceptical view, according to which in a certain sense the whole controversy whether Suárez was an absolutist or a constitutionalist political thinker is misplaced.[631] It is well known, at least from Otto von Gierke's classic book, that the age of Suárez was generally permeated by both individualist and holistic, absolutist tendencies.[632] And as for Suárez

[627] *De legibus* 3.4.11: "translatio huius potestatis a republica in principem non est delegatio, sed quasi alienatio seu perfecta largitio totius potestatis quae erat in communitate."

[628] *De legibus* 3.4.6: "translata potestate in regem, per illam efficitur superior etiam regno quod illam dedit".

[629] R. Tuck, *Natural Rights Theories*, 56-57; Q. Skinner, *The Foundations of Modern Political Thought*, II: 178-84. See also G. Jarlot, 'Les idées politiques de Suarez et le pouvoir absolu', esp. 83-89.

[630] R. Wilenius, *The Social and Political Theory of Francisco Suárez*, 17. Similarly, J. P. Sommerville suggests ('From Suarez to Filmer', 525) that Suárez's political ideas "were far more radically constitutionalist than is usually supposed." Bernice Hamilton and Pierre Mesnard also offer a distinctly non-absolutist reading of Suárez. See B. Hamilton, *Political Thought in Sixteenth-Century Spain*, 30, 165; P. Mesnard, *L'essor de la philosophie politique au XVIe siècle*, 624-25, 655 n. 3.

[631] Perhaps the most graphic illustration of the uncertainty (or maybe, in this case, reluctance) of modern scholarship in placing Suárez clearly either in the absolutist or in the constitutionalist camp is *The Cambridge History of Political Thought, 1450–1700*, ed. J. H. Burns (Cambridge: University Press, 1991). While in one chapter of the book ('Catholic Resistance Theory, Ultramontanism, and the Royalist Response, 1580–1620', 219-53 at 238-39), J. H. M. Salmon objects against the commentators interpreting Suárez's political theory as tending to royal absolutism that "no one who reads attentively his answer to James I's *Apologie* can maintain this interpretation, and certainly those who read the *Defensio* at the time of its publication had the contrary impression", in the very next chapter ('Constitutionalism', 254-97 at 296-97), Howell A. Lloyd writes that to be sure, "Suárez' position accommodated significant elements of the constitutionalist tradition", but "in sum, the thrust of Suárez' arguments as the seventeenth century opened was towards the supremacy and licensed encroachment of the public over and upon the private sphere at the behest of the monarch's will – and so towards absolutism."

[632] O. von Gierke, *Natural Law and the Theory of Society*, esp. 44-61. Likewise, Skinner, admittedly indebted to Gierke, analyses the political theory of the Second Scholasticism from a double, 'radical' and 'absolutist' perspective.

himself, Brian Tierney rightly emphasizes that although he "has been called a voluntarist and a rationalist, an organicist and an individualist, an absolutist and a constitutionalist, the Spanish scholar himself did not think it necessary to choose between these alternatives; rather he sought to balance them against one another in an inclusive synthesis."[633]

My sceptical stance notwithstanding, I find it important to adduce some arguments against the absolutist interpretation of Suárez, which I consider fairly unconvincing, however tempting it may be. The fundamental problem with Tuck's claim about 'voluntary collective slavery' in Suárez is that in fact, the Thomist theologian never says that the whole community can give itself into slavery, and when on rare occasions he draws a parallel between the individual's and the community's surrender of liberty, he always warns his readers that this is an imperfect analogy.[634] In the passage on which Tuck grounds his argumentation, for instance, he writes that the alienability of the people's faculty of self-government can be demonstrated, among other ways, "by applying this example *in due proportion*":

> "For freedom from servitude is a natural property of man, and is therefore wont to be described as an effect of natural law; yet man can by his own volition deprive himself of this property, or can even for a just cause be deprived thereof and reduced to slavery … in like manner, a perfect human community, though by nature it may be free and may possess within itself the power to which we refer, nevertheless can be deprived of that power in one or another of the ways already mentioned."[635]

Moreover, at other places Suárez expounds in the clearest – traditional Thomist – manner that political rule (*dominium iurisdictionis*), instituted for the good of the subjects, has to be sharply distinguished from the dominion of a master over a slave (*dominium proprietatis*): "supreme power is a certain form of *dominium*, but a form of *dominium* that calls

[633] B. Tierney, *The Idea of Natural Rights*, 302.

[634] J. P. Sommerville, 'From Suarez to Filmer', 533; B. Tierney, *The Idea of Natural Rights*, 313 n. 121.

[635] *De legibus* 3.3.7: "Nunc ostenditur ex adducto exemplo seu *proportione ad illud*, nam libertas a servitute proprietas est naturalis hominis, et ideo dici solet esse de iure naturae et nihilominus per propriam voluntatem potest se homo illa privare vel etiam ex iusta causa illa privari et in servitutem redigi … simili modo communitas humana perfecta, licet ex natura rei libera sit et potestatem in se habeat, potest aliquo modo ex praedictis illa privari." A similar passage can be found in *De legibus* 3.4.6: "quia translate potestate in regem, per illam efficitur superior etiam regno quod illam dedit, quia dando illam se subiecit et priori libertate privarit, ut in exemplo de servo, *servata proportione*, constat" (my italics in both quotations).

not for a strict servitude to a despot, but for civil obedience".[636] And he consistently rejects not only tyranny and the doctrine of the divine right of kings,[637] but, *pace* Skinner, also the Roman law principle "*princeps legibus solutus est*":

> "It is appropriate for the common good that this power should be bestowed upon the prince in such a way that, although it is up to his will to make a law, once he has made it, it should have general validity extending to himself too … Aristotle very pertinently says that in the commonwealth the law must reign. … Even the prince has to subject himself to the law and to act and judge in accordance with it. … This obligation of the king and the subjects arises from the principles of natural law".[638]

Suárez's frequent appeal to the common good should not mislead us. Organic theories, accompanied by the thesis of the priority of the public good, may often tend to subordinate the individual to the state. But this is not the case with the Spanish theologians of the Second Scholasticism.[639] As Mesnard eloquently says, in Suárez "le terme *corpus* ne saurait

[636] *De legibus* 3.1.7: "Denique haec potestas superior est species cuiusdam dominii. Non est autem tale dominium hoc, ut ei respondeat propria servitus despotica, sed subiectio civilis." A full treatment of the distinction between *dominium iurisdictionis* and *dominium proprietatis* can be found in *De opere sex dierum* 5.7.9: "Responsio vero D. Thomae supra, et communis est, duplex esse dominium: unum oppositum servituti, aliud, quod ad subditum refertur. Primum vocare possumus dominium proprietatis, aliud dominium iurisdictionis, seu gubernationis … Unde primum dominium dat potestatem in personam servi, et omnes actiones eius, id est, ad utendum servo in omnem convenientem usum propter utilitatem domini. Aliud vero dominium solum confert potestatem ad gubernandum, et dirigendum subditum in suius actionibus, et principaliter propter utilitatem subditi."

[637] See *De legibus* 3.1, 3.4, *Defensio fidei catholicae* 3.1-2.

[638] *De legibus* 3.35.11: "ad huiusmodi bonum commune pertineat potestatem hanc ita esse datam principi, ut licet in voluntate eius sit legem ferre, si tamen feratur, universalis sit et ipsum comprehendat … dixit optime Aristoteles (III *Politicorum*, cap 7. circa finem) legem debere in republica dominari. … etiam ipse princeps debet illi subici et secundum illam legem vel operari vel iudicare."; *De legibus* 3.35.12: "Et hoc plane sensit Caietanus cum dixit hanc obligationem principis et subditorum sequi ex principiis legis naturalis". Skinner perspicaciously notices (*The Foundations of Modern Political Thought*, II: 183-84) that for Suárez (*De legibus* 3.35.15), as for Aquinas (*Summa theologiae* I-II q. 96 a. 5 ad 3), positive law does not bind the sovereign – having no superior – *by coercive force*; however, he overlooks the fact that the essential emphasis in both authors is on the king's subjection to the *directive force* of laws. Suárez accentuates (*De legibus* 3.35.11-12, 3.35.19) that the king's duty to obey his own laws is a natural obligation, discernable by natural reason alone, and originating in the moral nature of law, whereas "punishment is not in itself intended, nor is it necessarily required for moral rectitude" [poena non est per se intenta neque per se necessaria ad honestatem morum].

[639] B. Hamilton, *Political Thought in Sixteenth-Century Spain*, 30.

suffire à dépeindre la communauté politique, qui ordonne en son sein non des cellules inconscientes, mais des individus autonomes et doués de libre arbitre."[640] In case of conflict, of course, the common good should take precedence over that of the individual.[641] But in Suárez's medieval-rooted way of thinking, as Tierney rightly stresses, the public and the private good are seen as typically existing in harmony with one another rather than in a state of conflict.[642] In this perspective, the good of the community presupposes that of the individual, and the boundary between the two, as we saw when we treated property, is far from being impermeable. "The good of private individuals forms a part of the common good", hence it is to be fostered and protected, "in order that the common good may result from this good enjoyed by private persons".[643] And while on the one hand Suárez sets forth in a classical Aristotelian vein that promotion of good and virtuous life is an essential aim of the state,[644] on the other hand he rigorously reserves all spiritual and supernatural functions for the church and thus limits the scope of civil power to purely temporal felicity.[645]

640 Mesnard, *L'essor de la philosophie politique au XVIe siècle*, 625.

641 *De legibus* 1.7.14: "plerumque accidit ut quod communitati expedit, uni vel alteri nocumentum afferat. Quia vero commune bonum praefertur privato quando simul esse non possunt, ideo leges simpliciter feruntur pro bono communi et ad particularia non attendunt".

642 B. Tierney, *The Idea of Natural Rights*, 313.

643 *De legibus* 1.7. 3: "bonum singulorum, ut statim latius dicam, sub communi comprehenditur, quando bonum unius tale non est ut excludat commune, sed potius est tale ut in singulis requiratur ex vi talis legis, ut applicatae ad singulos, ut ita ex bonis singulorum consurgat commune bonum".

644 *De legibus* 1.13.3: "Nihilominus dicendum est finem intentum a lege esse facere subditos bonos, atque ita hunc esse quasi ultimum effectum legis"; *De legibus* 1.13.7: "quia finis humanae reipublicae est vera felicitas politica, quae sine moribus honestis esse non potest. Per leges autem civiles dirigitur in eam felicitatem, et ideo necesse est ut illae leges ad bonum morale per se tendant, quod, ut dixi, est bonum simpliciter."

645 *De legibus* 3.11.4: "Potestas civilis … est mere naturalis; ergo natura sua non tendit in finem supernaturalem."; *De legibus* 3.11.6: "Unde dico secundo potestatem civilem non solum non respicere felicitatem aeternam vitae futurae ut finem ultimum proprium, verum etiam nec per se intendere propriam spiritualem felicitatem hominum in hac vita et consequenter nec per se posse in materia spirituali disponere aut leges ferre."; *De legibus* 3.11.7: "Sed euis finem esse felicitatem naturalem communitatis humanae perfectae cuius curam gerit, et singulorum hominum ut sunt membra talis communitatis, ut in ea, scilicet in pace et iustitia vivant et cum sufficientia bonorum quae ad v itae corporalis conservationem et commoditatem spectant; et cum ea probitate morum quae ad hanc externam pacem et felicitatem reipublicae et convenientem humanae naturae conservationem necessaria est."

The element of Suárez's political philosophy that does not in the least fit an absolutist reading is his theory of resistance. The Spanish Jesuit counterbalances the natural law obligation of obedience to the ruler[646] with the inalienable right of self-preservation and self-defence, which he considers "the greatest right".[647] How, when and in which form can resistance replace obedience? Suárez answers the question along two basic distinctions. First, he separates the individual and collective right to self-defence, and secondly, he takes over the traditional medieval distinction between *tyrannus in titulo* and *tyrannus in regimine*, viz. a usurper who has seized power without just title and a "true" ruler misusing his legitimate power.

The scope of individual defence is much narrower, since unlike the community as a whole, individual persons do not possess the right to punish or avenge offences, so they can base resistance solely upon the principle "*vim vi repellere licet*".[648] This kind of just defence can take two forms: self-defence and defence of the state. As regards the former, no private person ought to kill a kingly aggressor merely on the ground of defence of his material goods, but on the other hand, "if one acts in defence of his very life, which the king is attempting to take violently from him, then to be sure, it will ordinarily be permissible for the subject to defend himself, even though the death of the prince result from such defence."[649] When the commonwealth itself is to be defended against the ruler, resistance by arms is lawful either if "the king is actually attacking the state, with the unjust intention of destroying it and slaughtering the citizens",[650] or if the king is a usurper, who is waging war against the commonwealth by the very fact of unjustly retaining royal power.[651] In both

[646] *De legibus* 3.4.6: "assuming that the said power has been transferred to the king, he is now the vicar of God, and natural law makes it obligatory that he be obeyed" [supposita translatione huius potestatis in regem, iam gerere vicem Dei et naturale ius obligare ad parendum illi]. This is once again an obvious example of conditional natural law.

[647] *Defensio fidei catholicae* 6.4.5: "ius tuendae vitae est maximum".

[648] *Defensio fidei catholicae* 6.4.4: "potestas vindicandi vel puniendi delictas non est in privatis personis sed in superiori vel in tota communitate perfecta".

[649] *Defensio fidei catholicae* 6.4.5: "Itaque distinguere oportet an quis defendat se ipsum vel rempublicam … Nam propter solam defensionem externorum bonorum non licebit regem invadentem occidere, tum quia preferenda est vita principis his bonis externis propter dignitatem eius … At vero si defensio sit propriae vitae, quam rex violenter auferre aggreditur, tunc quidem ordinarie licebit subdito se ipsum defendere, etiam si inde mors principis sequatur".

[650] *Defensio fidei catholicae* 6.4.6: "At vero si sermo sit de ipsius reipublicae defensione, haec non habet locum nisi supponatur rex actu aggrediens civitatem ut illam iniuste perdat et cives interficiat".

[651] *Defensio fidei catholicae* 6.4.13: "At vero proprius tyrannus quamdiu regnum iniuste detinet et per vim

cases, tyrannicide is permitted, under certain conditions, as a last resort.[652] To the Augustinian objection that no private person should kill without public authorization, Suárez replies that in these cases he who kills the tyrant acts "both by the authority of a tacitly consenting state, and by the authority of God, Who has granted to every man, through the natural law, the right to defend himself and his state".[653]

In all the above situations in which individuals have the right to defend the state, the whole community is engaged in a just defensive war against the tyrant.[654] Suárez emphatically affirms that "a war of the state against the prince, even if it be aggressive, is not intrinsically evil", adding that "the conditions necessary for a war that is in other respects just must nevertheless be present in order that this sort of war may be righteous."[655] But what to do if a legitimate king rules tyrannically, yet without inflicting actual violence upon the commonwealth, and consequently not offering occasion for individual defence? Suárez insists that "no subject may attack him", since "an attack upon the prince, under these cir-

---

dominatur, semper actu infert vim reipublicae"; *De charitate* 13.8.2: "tyrannus ille aggressor est, et iniqe bellum movet contra rempublicam, et singula membra".

[652] *Defensio fidei catholicae* 6.4.6: "Et tunc certe licebit principi resistere, etiam occidendo illum, si aliter fieri non possit defensio. Tum quia si pro vita propria hoc licet, multo magis pro communi bono"; *Defensio fidei catholicae* 6.4.7: "asseritur hunc tyrannum quoad titulum interfici posse a quacumque privata persona quae sit membrum reipublicae quae tyrannidem patitur, si aliter non potest rempublicam ab illa tyrannide liberare." Suárez carefully lays down the conditions of individual tyrannicide in *Defensio fidei catholicae* 6.4.5, 6.4.8-9. The slaying of a tyrannical usurper, for instance, has to be necessary for the liberation of the kingdom, the tyranny and injustice of the usurper's rule must be manifest, no just agreement shall have been passed between the tyrant and the people, and so on.

[653] *Defensio fidei catholicae* 6.4.11: "Ad Augustinum respondeo illum privatum hominem, qui huiusmodi tyrannum occidit, non id facere sine publica administratione, quia vel id facit auctoritate reipublicae tacite consentientis, vel facit auctoritate Dei qui per naturalem legem dedit unicuique potestatem defendendi se et rempublicam suam".

[654] *Defensio fidei catholicae* 6.4.6: "civitas ipsa seu respublica tunc habet iustum bellum defensivum contra iniustum invasorem, etiam si proprius rex sit"; *Defensio fidei catholicae* 6.4.13: "ita ipsa semper gerit cum illo actuale seu virtuale bellum, non vindicativum, ut sic dicam, defensivum."

[655] *De charitate* 13.8.2: "bellum reipublicae contra principem, etiamsi sit aggressivum, non est intrinsece malum; habere tamen debet conditiones iusti alias belli, ut honestetur." In the beginning of the Disputation '*De bello*' (*ibid.*, 13.1.7), Suárez sets forth that for a war to be just, it must be declared by a legitimate authority, must be fought for a just cause, and should be carried out in a proper manner, with due proportion observed. Not only the sovereign prince has the legitimate power to declare war, he adds (*ibid.*, 13.2.1), but also the commonwealth, "for it is always regarded as retaining this power within itself, if the prince fails in his duty" [quia semper censetur apud se retinere eam potestatem, si princeps officio suo desit].

cumstances, would be tantamount to the waging of war upon him on private authority; and such warfare is in nowise licit".[656] This question throws light again on the significance of the fact that in Suárez civil power emerges together with the formation of the body politic. As J. P. Sommerville very pertinently remarks: "If it were the case that the original community was a non-political body at the time when it consented to the admission of a ruler, it would follow that the community would have no rights of resistance to its ruler that it members did not possess as individuals." [657] But this is obviously not the case.

> "Bellarmine said – after Azpilcueta – that the people never transfers its power to the prince without retaining it potentially (*in habitu*), so that it can use it in certain circumstances. This does not contradict our thesis … Therefore, if the people has transferred power to the king while reserving it to itself for some grievous causes and affairs, in such cases it can rightfully make use of it and preserve its right. … For the same reason, if the king abuses his just power and turns it into a tyranny, manifestly pernicious to the commonwealth, the people can make use of its natural power of self-defence; for the community has never renounced this right."[658]

Furthermore, as natural law gave political power to the people in order to secure, not to subvert the public interest, and the community could not transfer such an authority to the ruler that itself did not have, the prince cannot employ the civil sword against the common good. If the people still authorized the king to act against the public good, this contract would be unjust, and hence void.[659] On the other hand, if the prince breaches the original contract by ruling in a tyrannical way,

[656] *Defensio fidei catholicae* 6.4.13: "Nam rex licet tyrannice gubernet, quamdiu non movet actuale bellum iniustum contra rempublicam sibi subditam, non infert illi actualem vim, et ideo respectu illius non habet locum defensio, neque ullus subditus potest hoc titulo illum aggredi aut bellum contra ipsum movere."; *Defensio fidei catholicae* 6.4.6: "tunc aggredi principem esset bellum contra illum movere privata auctoritate, quod nullo modo licet".

[657] J. P. Sommerville, 'From Suarez to Filmer', 531.

[658] *Defensio fidei catholicae* 3.3.3: "Quod vero Bellarminus ex Navarro dixit populum nunquam ita suam potestatem in principem transferre, quin eam in habitu retineat, ut ea in certis casibus uti possit, neque contrarium est … Et ideo si populus transtulit potestatem in regem, reservando eam sibi pro aliquibus gravioribus causis aut negotiis, in eis licite poterit illa uti, et ius suum conservare. … Et eadem ratione, si rex iustam suam potestatem in tyrannidem verteret, illa in manifestam civitatis perniciem abutendo, posset populus naturali potestate ad se defendendum uti; haec enim nunquam se privavit."

[659] J. P. Sommerville, 'From Suarez to Filmer', 534.

> "the state as a whole may rise in revolt against such a tyrant; and this uprising would not be a case of sedition in the strict sense … under the circumstances described the state, as a whole, is superior to the king, for the state, when it granted him his power, is held to have granted it upon these conditions: that he should govern in accord with the public weal, and not tyrannically; and that, if he did not govern thus, he might be deposed from that position of power." [660]

Thus the right to depose a tyrannical ruler is grounded both on the community's inherent right of self-defence and on the contract of government between king and kingdom.[661] Following Aquinas, Suárez maintains that resistance to a "legitimate tyrant" ought to be carried out in a lawful and prudent manner, with moderation, and in conformity with "the conditions of the original contract" and "the requirements of natural justice".[662] Above all, the act of deposition must be preceded by and based on the decision of a public council:

> "If, then, a lawful king is ruling in tyrannical fashion, and if the state finds at hand no other means of self-defence than the expulsion and deposition of this king, the said state, acting as a whole, and in accordance with the public and general deliberations of its citizens and leading men, may depose him. This would be permissible both by virtue of natural law, which renders it licit to repel force with force, and also by virtue of the fact that such a situation, calling for measures necessary to the very preservation of the state, is always understood to be excepted from that original agreement by which the state transferred its power to the king."[663]

[660] *De charitate* 13.8.2: "At vero tota respublica posset bello insurgere contra eiusmodi tyrannum, neque tunc excitaretur propria seditio … tunc tota respublica superior est rege; nam cum ipsa dederit illi potestatem, ea conditione dedisse censetur, ut politice, non tyrannice regeret, alias ab ipsa posse deponi."

[661] B. Tierney, *The Idea of Natural Rights*, 314.

[662] *Defensio fidei catholicae* 6.4.15: "hoc modo accipiendum est quod ait divus Thomas (II II quaest. 42, art. 2 et 3) non esse seditiosum resistere regi tyrannice gubernanti, utique si legitima potestate ipsius communitatis et prudenter sine maiori populi detrimento fiat."; *Defensio fidei catholicae* 3.3.3: "Bellarminus non simpliciter dixit retinere populum potestatem in habitu, ad quoscumque actus pro libito, et quoties velit exercendos, sed cum magna limitatione et circumspectione dixit, in certis casibus, etc. Qui casus intelligendi sunt, vel iuxta conditiones prioris contractus, vel iuxta exigentiam naturalis iustitiae, nam pacta et conventa iusta servanda sunt."

[663] *Defensio fidei catholicae* 6.4.15: "Ideoque si rex legitimus tyrannice gubernet et regno nullum aliud subsit remedium ad se defendendum nisi regem expellere ac deponere, poterit respublica tota, publico et communi consilio civitatum et procerum, regem deponere, tum ex vi iuris naturalis quo licet vim vi repellere, tum quia semper hic casus ad propriam reipublicae conservationem necessarius intelligitur exceptus in primo illo foedere, quo respublica potestatem suam in regem transtulit."

Besides, not only the people but also the pope can depose a king, for spiritual crimes like heresy, or for a grave temporal fault that constitutes a sin.[664] Finally, the sentence of deposition (even if including a death penalty) does not entitle private individuals to kill the tyrant, unless the deposed monarch "should persist in his obstinacy and forcibly retain the royal power", thus becoming a mere usurper.[665]

We can conclude from the foregoing that Suárez's theory of resistance is much more consistent and radical (under the political circumstances of his age) than it is often supposed to be. And it is difficult not to agree with Harro Höpfl's conclusion: "Despite Suárez's claims about the possibility of an unconditional transfer of *potestas*, an irreducible sovereignty therefore *did* remain with the community", in the form of the residual and inalienable right to self-defence. "In the end, then, Suárez … could not resist Mariana's logic that the public assembly of the commonwealth is the appropriate agent for disciplining kings, and that tyrannicide was the *ultima ratio*."[666] On the other hand, it seems evident that against all appearances, Suárez escaped the "totalitarian" temptation of a total transfer of power, let alone of "a total and mistaken loss of liberty".

[664] *Defensio fidei catholicae* 6.4.16.

[665] *Defensio fidei catholicae* 6.4.18: "dicendum est … post sententiam condemnatoriam regis de regni privatione latam per legitimam potestatem … posse quidem eum qui sententiam tulit vel cui ipse commiserit, regem privare regno etiam illum interficicendo … Non tamen statim posse regem depositum a qualibet privata persona interfici"; *Defensio fidei catholicae* 6.4.14: "si rex talis post depositionem legitimam in sua pertinacia perseverans regnum per vim retineat, incipit esse tyrannus in titulo".

[666] H. Höpfl, *Jesuit Political Thought*, 257.

Conclusion

Chapter I, examining certain aspects of Thomas Aquinas's legal philosophy, was intended as a sort of "second introduction". Although Aquinas's *oeuvre*, strictly speaking, preceded the period of our study, it constituted a fundamental point of reference which all later scholastic theologians had to take into account – either in a positive or in a negative way. In Part 1 I presented a kind of 'conceptual algebra', describing Aquinas's different usages of the terms '*ius*' and '*dominium*' and their conceptual interrelations. I have chosen to analyse these two fundamental notions partly because they both played a central role in scholastic natural rights theories, and partly because this offered me the occasion of pointing out some crucial aspects of Aquinas's natural law theory and moral philosophy. The *doctor angelicus* understands *ius* fundamentally and primarily as the *iustum*, i.e. right action. Secondly, he often uses *ius* to replace *lex*, which he conceives as a *rationis ordinatio*, a rational rule of human actions. The concepts of *ius* and *lex* are connected to each other in a relation of mutual causation. Thirdly, Saint Thomas sometimes uses *ius* – besides the above two objective meanings – in the subjective sense as well.

Dominium is closely connected in Aquinas with human rationality. The logically primary sense of *dominium* implies rule of reason over man's other capacities and *dominium sui* or self-mastery. The second sense of *dominium* extends this primary meaning by way of analogy to animals and material goods. Finally, Aquinas's understanding of *dominium* covers the relations of dominion or rule between man and man, too.

As regards the conceptual relation of *ius* and *dominium* as the rule of reason, the rationalism of Aquinas's moral philosophy clearly manifests itself both in connection with the primary and secondary senses of *ius*. As to the conceptual relation of *ius* and *dominium* as property, in Aquinas's view natural law professes a 'benevolent neutrality' on the question of the mode of possession of material things, and private property is not a matter of natural right but belongs to the *ius gentium*.

In Part 2 I treated the complex – and only seemingly anachronistic – question as to whether Aquinas had or could have the concept of natural rights. The first level of the

question is whether the fact in itself that at times Aquinas did use *ius* in a subjective sense is enough to prove that Aquinas possessed the concept of natural rights. I answered this question, together with the great majority of historians of ideas, emphatically in the negative, and found John Finnis's ambitious attempt of reinterpretation of Aquinas's treatise on right and justice, in the final analysis, unconvincing. On a second level, it is undeniable that Aquinas's ideas are not incompatible with a subjective concept of right, and that consequently the Dominican master could have complemented his natural law theory with a doctrine of natural rights. Still, he deliberately avoided to translate his conception of natural law and justice into the language of natural rights. This can be explained by the fact that there are essential elements of his system of thought, above all his consistent rationalism and Aristotelian holism, that seem to resist this translation. On the other hand, Aquinas could have significantly mitigated or eliminated the potential tension between *ius* as a subjective right and *ius* as the right action with the adoption of the canonistic doctrine of 'permissive natural law', but he did not assimilate this idea into his legal philosophy.

⋆

Chapter II entitled 'The Nominalist "Revolution"' was devoted to William Ockham. The 'revolutionary' character of Ockham's thinking should be understood primarily in the context of natural law, and it is perhaps more accurate to speak of a 'voluntarist revolution', which started already with Duns Scotus, who was very far from being nominalist; on the contrary, he advocated a realist metaphysics. Part 1 sought the philosophical-theological grounds of Ockham's legal philosophy. Part 1.1 discussed the fairly problematic relationship between his philosophical and political thought. This problem can be considered as a watershed dividing the two fundamental interpretative approaches to Ockham's legal theory. To answer this awkward question, first, it is evident that there is no strong break or strict discontinuity between Ockham's two intellectual periods. Secondly, already in his early philosophical and theological works, Ockham sometimes related his nominalist metaphysical views to social and political phenomena. Thirdly, although Ockham rarely referred to his nominalist philosophical and theological doctrines in his political works, his metaphysical individualism, his peculiar, logician's way of thinking and some of his ethical and theological concepts are manifestly present in his political writings.

The fundamental difficulty in the interpretation of Ockham's moral philosophy, discussed in Part 1.2, lies in the fact that it contains both voluntarist and rationalist elements: a divine command ethics and a non-positive moral science, which seem to be hard (if not impossible) to reconcile. On the one hand, following his own interpretation of the classical

distinction between *potentia Dei absoluta* and *potentia Dei ordinata*, Ockham makes the moral order wholly contingent on God's will, and radicalizes the freedom of human will; on the other hand, he emphasizes the role of right reason which "in no case fails" and can discern *per se nota* (self-evident) moral principles. While the voluntarist elements of Ockham's moral philosophy seem to undermine the rationality and stability of natural law, a non-positive moral science appear to provide an adequate base for a natural law doctrine. Thus it is a fundamental question whether or not he is able to reconcile the voluntarist and rationalist elements of his theory. Ockham succeeds to achieve a certain unity in his "system" of ethics only by deciding all conflicts between will and reason in favour of the will: for instance, he maintains that it is always rational to obey a divine command, and affirms that human will may freely choose or reject whatever object the intellect presents to it.

In Part 2 I examined Ockham's theories of natural law and natural rights. In Part 2.1 I pointed out that as in his polemical works Ockham appears to exclude any 'operationalization' of the absolute power of God, and derives each of the three modes of natural law he differentiates from an underlying assumption of human rationality, he is capable to give a more or less solid foundation to natural law. On the other hand, Ockham does not speak of eternal law, and equates natural law with divine law founded on the unrestricted free will of God. Furthermore, he denies that moral norms can be read off of human natural tendencies, and emphasizes that acts are good and just, or bad and unjust, not of their own nature or essence, but simply because God has prescribed or forbidden them. Taking everything into account, it can be concluded that by detaching natural law from the essence or nature of things and attaching it to divine law Ockham renders it ultimately positive. So, after all, for Ockham natural law is nothing but a particular manifestation of God's will. He seems to find a peculiar solution to reconcile divine will with human rationality: he conceives of natural law as a *tacit* or *implicit* divine command. If a natural law is not contained explicitly in the Scripture, it pertains to right reason to show us what God wills. The third mode of *ius naturale* described by Ockham is particularly important, since it constitutes a conditional, changing natural law, defines a zone of human autonomy, and involves a tacit but significant shift of meaning from the objective to the subjective sense of *ius*.

In Part 2.2 I discussed Ockham's doctrine of natural rights. Ockham cannot be regarded as the "father" of the theory of subjective right, since the association of *ius* and *potestas* first occurred long before Ockham, in twelfth-century canonistic discourse, and appeared later in the Franciscan literature on evangelical poverty, too. On the other hand, it is a highly significant change that in the *venerabilis inceptor*'s legal philosophy we can find but two meanings of *ius*. For Ockham *ius* can have either the objective meaning of prescriptive law

or the subjective meaning of a licit power; the classical Aristotelian-Thomist concept of *ius* as right action thus vanishes.

Although the *doctor plus quam subtilis* cannot be considered "revolutionary" in a semantic sense, he proves to be an innovator in other ways. First, he is innovative in distinguishing carefully between *ius naturale* and *ius positivum* in the subjective sense. Secondly, Ockham raises for the first time the problem of the alienability of natural rights, which will later become of great importance for the natural rights theorists of the seventeenth century. He finds only one inalienable natural right, the right to sustain life (through the natural right of using). Thirdly, no one before Ockham places the right to institute a ruler in the context of natural rights. Fourthly, Ockham is the first in Western political thought to conceive of natural rights as limits to both temporal and spiritual power. Finally, it is a fact of paramount importance that Ockham transposed the concept of subjective rights from technical juristic discourse to the heart of philosophical-theological debates. Ockham lays particular stress on two natural rights, the right to appropriate things and the right to elect a ruler.

Ockham's concern for natural rights seems undoubtedly to be a reflection of his nominalist logic and ontology. His voluntarism is also present in his rights doctrine: the institution of both private property and government is commanded or sanctioned by divine will and effectuated by human will. But perhaps the most striking affinity between the *venerabilis inceptor*'s natural rights theory and his philosophy is his endeavour, both in the field of politics and ethics, to compensate or counterbalance the omnipotence of God with human freedom and autonomy.

⋆

In Chapter III I scrutinized Francisco Suárez's legal philosophy, who was one of the last great representatives of the medieval tradition of natural law and natural rights. His far more read than quoted encyclopedic synthesis serves as an important stepping-stone between scholastic and modern theories. Part 1 discussed Suárez's general concept of law (1.1) and his conceptions of eternal law (1.2) and natural law (1.3-5). The most substantial difference between Aquinas's and Suárez's general definition of law is that the Jesuit theologian replaces the Thomist notions of *regula* and *mensura* by the term *praeceptum*, and conceives of law not as a "rational ordination", but as an obligatory command of a superior imposed on a subject. On the other hand, although both Aquinas and Suárez have a reasonably balanced view of the relationship of reason and will in law, while for Aquinas

law is essentially a product of reason, for Suárez it is above all the act of will that makes law 'law' in the proper sense.

Suárez has some serious difficulties (viz. the problem of promulgation and the problem of divine freedom) in inserting eternal law into his system of laws. Suárez holds with Aquinas that divine wisdom is eternal in God, but his voluntaristic concept of law excludes that the eternal reason of God has the nature of law. Therefore he substantially reinterprets the Thomist conception of eternal law: while for Aquinas eternal law is God's eternal reason directing God's will, in Suárez it becomes an expression of divine free will, not bound by the judgment of divine reason. In order to sustain the legal character of *lex aeterna*, Suárez has to give up promulgation as a conceptual element of law in the case of eternal law.

Suárez conceives of natural law, just like Aquinas, as the participation of eternal law in rational beings. He seeks a Thomist or rather Suárezian *via media* between the (extreme) intellectualist and voluntarist conceptions of natural law. In his view, intellectualism denies the prescriptive and hence legal character of natural law, whereas voluntarism precludes its "naturalness", for it bases natural law on arbitrary divine fiat. Suárez suggests that natural law is a *lex indicativa* and a *lex praeceptiva* at the same time, inasmuch as it "does not merely indicate what is evil, … but is also a manifestation of the divine will prohibiting that act or object." The *doctor eximius* takes great care to embed his voluntarist concept of law into an objectivist, rationalist framework based on a metaphysical view of human nature. He follows Thomas Aquinas in linking natural law to the order of natural inclinations and the teleology of human nature. Consequently, he asserts that God cannot but forbid what is intrinsically evil and against natural reason. From the perspective of divine freedom, while eternal law and creation are absolutely free acts of God, all His subsequent acts, including the precepts of natural law, are only relatively free, being bound in consequence of them.

Suárez differentiates two distinct kinds of natural law, preceptive and permissive. The latter comprises certain recommendations of nature, which are as valid as the commands or prohibitions of preceptive natural law, yet are not absolutely binding. The three most important of these recommendations are community of goods, liberty and democracy. Unlike preceptive natural law, permissive natural law can change, and its institutions may licitly be modified or abolished by human agency.

Part 2 scrutinized Suárez's doctrine of natural rights. In Part 2.1 I compared Suárez's different usages of *ius* and examined their interrelations. Suárez first distinguishes between two etymological explanations of the word *ius*. According to the first etymology, *ius* is the same as *lex*, and the second etymological explanation equates *ius* with the just thing itself (*ipsum iustum*). Then he redescribes the Aristotelian-Thomist concept of objective right in

terms of subjective rights. In Michel Villey's interpretation, Suárez knows only two meanings of *ius*: *ius* as law and *ius* as a moral faculty. However, I found more convincing the interpretation according to which by defining *ius* as a moral faculty Suárez intended to complement rather than to replace Aquinas's objective concept of *ius*. For Suárez, there is an organic relation between *ius* as a moral faculty and the two other – objective – meanings of *ius*. What one has a right to is due to him according to the principles of justice, and law is the basis and measure not only of moral rectitude but also of rights. Suárez attaches natural rights to natural law in at least three ways. First, permissive natural law plays a primordial role in their grounding, thus creating an area of free choice and autonomy. Secondly, the commands and prohibitions of preceptive natural law set limits to natural rights and ensure their lawful exercise. Thirdly, the same law protects natural rights against violation by others.

In Part 2.2 I discussed property and the natural right of using. Suárez follows Aquinas in asserting that natural law leaves the decision about the mode of possession of material things to human will and rationality. Although private property is not prescribed by natural law, once the division of things has been made, it forbids theft. Notwithstanding, the natural law precept protecting the natural right of using remains valid.

Part 2.3 treated liberty and the origins of the state. Just like Ockham, Suárez argues that the explanation of liberty must be sought in the will alone, but unlike him, he is very far from thinking that the will can will virtually anything. He considers liberty as signifying freedom from external domination a natural property of man, but not an inalienable right: since man is the owner of his liberty, he can alienate it. According to Suárez, the freedom of the community is analogous to individual freedom in the sense that it can be licitly alienated, too. This problem leads us to the question of the origins of the state. Suárez gives an Aristotelian explanation of the coming into being of the state, but combined with the elements of will and consent.

In Part 2.4 I analyzed Suárez's theory of resistance and adduced some arguments against an absolutist interpretation of his political philosophy. The Spanish Jesuit counterbalances the natural law obligation of obedience to the ruler with the inalienable right of self-preservation and self-defence, which he calls "the greatest right". He grounds the right to depose a tyrannical ruler both on the community's inherent right of self-defence and on the contract of government between king and kingdom.

*

By way of evaluation, it is plain that Ockham's natural law theory is very different from, e.g., Aristotle's, Ulpian's, Augustine's or Aquinas's. It seems also evident that the *venerabilis inceptor*'s voluntarism, so to speak, "denaturalizes" natural law. His strict contraposition of the orders of nature and liberty makes him eliminate the teleology of human nature from the notion of *ius naturale,* which he makes ultimately contingent upon the arbitrary will of an inscrutable deity. This caused a strong break in the history of the idea of natural law, and initiated what Michael Oakeshott calls the tradition of "Will and Artifice". As it is well known, this tradition reached its peak with Thomas Hobbes in the seventeenth century, namely with his "unnatural" natural law and his famous dictum "*auctoritas, non veritas facit legem*". On the other hand, his conception of 'suppositional' or 'conditional' natural law gives free play to human will and autonomy, and thereby forms an important bridge between nature and liberty, *ius naturale* and *iura naturalia.* However, if we think it over, we find that, owing to its ultimate dependence on contingent facts and positive law, in reality, it can neither ground, nor limit, nor protect natural rights. So while on the one hand Ockham's nominalism and voluntarism strengthened – both divine and human – liberty and natural rights, on the other hand it weakened natural law, thus endangering the meaningful relationship between the two. From this point of view, the structure of Ockham's legal and moral thought is not dissimilar to that of modern, seventeenth-eighteenth-century theories of natural law and natural rights.

As regards Suárez, the Jesuit master faced the intriguing but difficult challenge of accommodating the late medieval voluntarist concept of law, together with all the problems it implies, into his predominantly Thomist legal philosophy. As it seems to me, he succeeds in elaborating an equilibrated synthesis of essentialism and voluntarism and in restoring the "naturalness" and rationalism of natural law on the basis of the teleology and *perseitas moralis* of human acts. This way he is able to avoid the trap of both voluntarism and extreme rationalism, into which most of modern natural law theorists will fall – Thomas Hobbes, John Locke and Samuel Pufendorf on the voluntarist side; Hugo Grotius, Gottfried Wilhelm Leibniz and Christian Wolff on the rationalist. Besides harmonizing reason and will in natural law, Suárez consistently links the subjective notion of *ius* with the traditional concept of objective right, and by means of the idea of permissive or negative natural law he establishes an organic relationship between natural law and natural rights.

⋆

What are the general historical conclusions to be drawn from all this? In the Introduction and throughout my work I hope I have made some significant objections to Finnis's 'wa-

tershed' thesis asserting a rupture to have happened in the history of the concept of right "somewhere between" Aquinas and Suárez. As concerns, however, the evolution of the idea of natural law, it seems perfectly justified to speak of a watershed. As Francis Oakley elegantly and, I think, rightly argues,

> "so far, at least, as the last thousand years are concerned, the most important break, shift, or discontinuity in the understanding of natural law, though not, interestingly enough, of natural rights, was that which occurred in the fourteenth and fifteenth centuries. That shift involved changes in the understanding of both the nature of nature and of the essence of law, and it was concerned with the very metaphysical grounding of natural law. It ensured that not one but two principal traditions of natural law thinking would be transmitted to the thinkers of early modern Europe."[667]

Oakley calls these two competing conceptions of *ius naturale* natural law perceived as 'immanent' and natural law conceived of as 'imposed'. Off course, labels are always open to criticism, but beyond doubt, it was Ockham whose voluntarist natural law doctrine caused this fundamental break, and the Second Scholasticism that returned to the prior rationalist doctrine of natural law. On the other hand, in the medieval evolution of the idea of natural rights no such dramatic discontinuity can be discerned. Here the decisive break happened only in the seventeenth or eighteenth century (its precise date is being fiercely debated), when natural rights were finally liberated from the "tutelage" of natural law. Notwithstanding, a kind of duality of traditions exists in scholastic natural rights theories, too. As the individualism-collectivism distinction cannot be consistently applied in medieval context, I propose instead to adopt the differentiation, introduced by Charles Taylor, between atomist and holist ontologies. Again, Ockham and Suárez represent the two opposing camps.

In the end of our investigation in the history of the ideas of natural law and natural rights we can arrive at the final conclusion that not only is there no necessary organic relationship between the ideas of natural law and natural rights, there is also no necessary conceptual opposition. While the tension between these two ideas was palpable in the modern, seventeenth- and eighteenth-century doctrines of natural law, it was essentially absent from the earlier scholastic theories. On the whole, their historical encounter can be regarded as ultimately accidental, for it is possible to found a coherent theory of natural law merely on natural obligations, nevertheless, under certain conditions they can complement each other favourably.

[667] F. Oakley, *Natural Law, Laws of Nature, Natural Rights*, 25-26.

Bibliography

Primary Literature

Original texts

Aquinas, Saint Thomas, *Scriptum super libros sententiarum magistri Petri Lombardi*, ed. P. Mandonnet and M. F. Moos, 4 vols. (Paris: Lethielleux, 1929-47).

———, *Sententia libri Ethicorum*, ed. Fratres Praedicatores, 2 vols. (Roma: San Tommaso, 1969).

———, *Sententia libri Politicorum; Tabula libri Ethicorum*, ed. Fratres Praedicatores (Roma: San Tommaso, 1971).

———, *Summa theologiae*, ed. P. Caramello, 3 vols. (Torino: Marietti, 1952-56).

Augustine, Saint, *Contra Faustum Manichaeum*, in *idem*, *De utilitate credendi; De duabus animabus; Contra Fortunatum; Contra Adimantum; Contra epistulam fundamenti; Contra Faustum*, ed. J. Zycha (Vienna: Tempsky, 1891), 249-797.

Biel, Gabriel, *Collectorium circa quattuor libros Sententiarum*, ed. W. Werbeck *et al.*, 4 vols. (Tübingen: Mohr Siebeck, 1973-92).

Gratian, *Concordia discordantium canonum*, in *Corpus iuris canonici*, ed. E. Friedberg (Leipzig: Tauchnitz, 1879, repr. Graz: Akademische, 1959), vol. I.

Gregory of Rimini, *Lectura super primum et secundum Sententiarum*, ed. A. D. Trapp and V. Marcolino, 7 vols. (Berlin: de Gruyter, 1979-87).

Grotius, Hugo, *De jure belli ac pacis libri tres* (Paris, 1625, repr. Hildesheim: Olms, 2006).

Hobbes, Thomas, *Leviathan*, ed. C. B. MacPherson (Harmondsworth: Penguin, 1982).

Locke, John, *Essays on the Law of Nature: The Latin Text with a Translation, Introduction and Notes*, ed., trans. W. von Leyden (Oxford: Clarendon Press, 1970).

———, *Two Treatises of Government*, ed. P. Laslett (Cambridge: University Press, 1988).

Marsilius of Padua, *Defensor pacis*, ed. R. Scholz (Hannover: Hahn, 1932).

Ockham, William, *An princeps pro suo succursu, scilicet guerrae, possit recipere bona ecclesiarum, etiam invito papa*, ed. H. S. Offler and R. S. Snape, in *idem*, *Opera politica*, vol. I, ed. J. G Sikes (Manchester: University Press, 1940), 230-271.

———, *Breviloquium de principatu tyrannico*, in R. Scholz, *Wilhelm von Ockham als politischer Denker und sein Breviloquium de principatu tyrannico* (Leipzig: Hiersemann, 1944).

———, *Contra Benedictum*, ed. H. S. Offler, in *idem*, *Opera politica*, vol. III, ed. R. F. Bennett and H. S. Offler (Manchester: University Press, 1956), 157-322.

———, *De connexione virtutum*, in R. Wood, *Ockham on the Virtues* (West Lafayette: Purdue University Press, 1997), 62-186.

———, *De imperatorum et pontificum potestate*, ed. C. K. Brampton (Oxford: Clarendon, 1927).

———, *Dialogus: Latin Text and English Translation*, ed., trans. J. Kilcullen *et al.* (in progress), www.britac.ac.uk/pubs/dialogus/ockdial.html.

———, *Dialogus inter magistrum et discipulum de imperatorum et pontificum potestate, in Monarchia Sancti Romani imperii*, ed. M. Goldast, vol. II (Frankfurt, 1614, reprinted Graz: Akademische, 1960), 392-957.

———, *Octo quaestiones de potestate papae*, ed. J. G. Sikes, in *idem*, *Opera politica*, vol. I, ed. J. G. Sikes (Manchester: University Press, 1940), 13-221.

———, *Opus nonaginta dierum*, cc. 1-6, ed. R. F. Bennet and J. G. Sikes, in *idem*, *Opera politica*, vol. I, ed. J. G. Sikes (Manchester: University Press, 1940), 293-374, cc. 7-124, ed. J. G. Sikes and H. S. Offler, in *idem*, *Opera politica*, vol. II, ed. R. F. Bennet and H. S. Offler (Manchester: University Press, 1963), 375-858.

———, *Quaestiones in libros II-IV Sententiarum* (*Reportatio*), in *idem*, *Opera theologica*, vol. V, ed. G. Gál and R. Wood, vol. VI, ed. G. I. Etzkorn and F. E. Kelly, vol. VII, ed. R. Wood and G. Gál (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1981-84).

———, *Quaestiones variae*, in *idem*, *Opera theologica*, vol. VIII, ed. G. I. Etzkorn, F. E. Kelly and J. C. Wey (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1984).

———, *Quodlibeta septem*, in *idem*, *Opera theologica*, vol. IX, ed. J. C. Wey (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1980).

———, Scriptum in librum primum Sententiarum (Ordinatio), in idem, Opera theologica, vol. I, ed. G. Gál and S. Brown, vol. II, ed. S. Brown and G. Gál, vol. III, ed. G. I. Etzkorn, vol. IV, ed. G. I. Etzkorn and F. E. Kelly (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1967-79).

———, *Summa logicae*, in *idem*, *Opera philosophica*, vol. I, ed. P. Boehner, G. Gál and S. Brown (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1974).

———, *Tractatus minor et elementarium logicae*, ed. E. M. Buytaert, G. Gál and J. Giermek, in *idem*, *Opera philosophica*, vol. VII (St. Bonaventure: St. Bonaventure University, Franciscan Institute, 1984), 1-304.

Rufinus, *Summa decretorum*, in H. Singer (ed.), *Die Summa decretorum des Magister Rufinus* (Paderborn: Schöningh, 1902, repr. Aalen: Scientia, 1963).

Scotus, John Duns, *Lectura*, in *idem*, *Opera omnia*, vol. XVI-XXI, ed. C. Balić et al. (Vatican: Typis Vaticanis, 1960-2004).

———, *Ordinatio*, in *idem*, *Opera omnia*, vol. I-XII, ed. C. Balić et al. (Vatican: Typis Vaticanis, 1950-2010).

Suárez, Francisco, *De bonitate et malitia humanorum actuum*, in *idem*, *Opera omnia*, vol. IV, ed. D. M. André (Paris: Vivès, 1856), 274-454.

———, *De charitate*, in *idem*, *Opera omnia*, vol. XII, ed. C. Berton (Paris: Vivès, 1858), 634-763.

———, *De gratia*, in *idem*, *Opera omnia*, vols. VII-X, ed. C. Berton (Paris: Vivès, 1857-58).

———, *De iuramento fidelitatis*: *Documentacion fundamental*, ed. L. Pereña, V. Abril and C. Baciero (Madrid: Consejo superior de investigaciones científicas, 1978).

———, *De iustitia et iure*, in J. Giers, *Die Gerechtigkeitslehre des jungen Suárez: Edition und Untersuchung seiner römischen Vorlesungen De iustitia et iure* (Freiburg: Herder, 1958), 29-122.

———, *De iustitia Dei*, in *idem*, *Opera omnia*, vol. XI, ed. C. Berton (Paris: Vivès, 1858), 515-82.

———, *De legibus*, ed. L. Pereña *et al.*, 8 vols. (Madrid: Consejo superior de investigaciones científicas, 1971-81).

———, *De opere sex dierum*, in *idem*, *Opera omnia*, vol. III, ed. D. M. André (Paris: Vivès, 1856), 1-447.

———, *De statu perfectionis et religionis*, in *idem*, *Opera omnia*, vol. XV, ed. C. Berton (Paris: Vivès, 1859).

———, *De ultimo fine hominis*, in *idem*, *Opera omnia*, vol. IV, ed. D. M. André (Paris: Vivès, 1856), 1-156.

———, *De voluntario et involuntario*, in *idem*, *Opera omnia*, vol. IV, ed. D. M. André (Paris: Vivès, 1856), 157-274.

———, *Defensio fidei III*, ed. E. Elorduy and L. Pereña (Madrid: Consejo superior de investigaciones científicas, 1965).

———, *Defensio fidei catholicae*, in *idem*, *Opera omnia*, vol. XXIV, ed. C. Berton (Paris: Vivès, 1859).

———, *Disputationes metaphysicae*, in *idem*, *Opera omnia*, vols. XXV-XXVI, ed. C. Berton (Paris: Vivès, 1861).

———, *Tractatus de Legibus ac Deo legislatore*, in *idem*, *Opera omnia*, vols. V-VI, ed. C. Berton (Paris: Vivès, 1856).

Summenhart, Conrad, *Opus septipartitum de contractibus pro foro conscientiae et theologico* (Hagenau: H. Gran, 1513).

Vázquez, Gabriel, *Commentariorum ac disputationum in primam secundae Sancti Thomae*, 2 vols. (Lyon: Cardon, 1631).

Vitoria, Francisco de, *Comentarios a la Secunda secundae de Santo Tomás*, ed. V. Beltrán de Heredia, 6 vols. (Salamanca: Dominicos de la Provincias de España, 1932-52), vol. III: *De justitia (qq. 57-66).*

———, *De potestate civili*, in T. Urdanoz (ed.), *Obras de Francisco de Vitoria: Relecciones teologicas* (Madrid: Biblioteca de autores cristianos, 1960), 149-95.

English translations

Aristotle, *Nicomachean Ethics of Aristotle*, trans. Sir D. Ross (London: Oxford University Press, 1969).

———, *The Politics of Aristotle*, trans. E. Barker (Oxford: Clarendon Press, 1968).

Aquinas, Saint Thomas, *Commentary on Aristotle's Nicomachean Ethics*, trans. C. I. Litzinger (Notre Dame: Dumb Ox, 1993).

———, *Commentary on the Politics*, trans. R. J. Regan (Indianapolis: Hackett, 2006).

———, *The Summa Theologica of Saint Thomas Aquinas*, trans. Fathers of the English Dominican Province, rev. D. J. Sullivan, 2 vols. (Chicago: Encyclopaedia Britannica, 1952).

Augustine, Saint, *Answer to Faustus, a Manichean*, ed. B. Ramsey, trans. R. Teske (New York: New City Press, 2007).

Grotius, Hugo, *The Rights of War and Peace*, ed. R. Tuck (Indianapolis: Liberty Fund, 2005).

Marsilius of Padua, *The Defender of Peace*, ed., trans. A. Brett (Cambridge: University Press, 2005).

Ockham, William of, *A Dialogue* (selections), in *idem*, *A Letter to the Friars Minor and Other Writings*, ed. A. S. McGrade and J. Kilcullen, trans. J. Kilcullen (Cambridge: University Press, 1995), 117-298.

———, *A Short Discourse on the Tyrannical Government*, ed. A. S. McGrade, trans. J. Kilcullen (Cambridge: University Press, 1992).

———, *A Translation of William of Ockham's Work of Ninety Days*, ed., trans. J Kilcullen and J. Scott, 2 vols. (Lewiston: Mellen, 2001).

———, *Demonstration and Scientific Knowledge in William of Ockham: A translation of Summa Logicae III-II: De syllogismo Demonstrativo, and Selections from the Prologue to the Ordinatio*, trans. J. L. Longeway (Notre Dame: University of Notre Dame Press, 2007).

———, *Dialogus: Latin Text and English Translation*, ed., trans. J. Kilcullen *et al.* (in progress), www.britac.ac.uk/pubs/dialogus/ockdial.html.

———, *Eight Questions on the Power of the Pope* (excerpt), in *idem*, *A Letter to the Friars Minor and Other Writings*, ed. A. S. McGrade and J. Kilcullen, trans. J. Kilcullen (Cambridge: University Press, 1995), 299-333.

———, *Ockham's Theory of Propositions: Part II of the Summa logicae*, trans. A. J. Freddoso and H. Schuurman (Notre Dame: University of Notre Dame Press, 1980).

———, *Ockham's Theory of Terms: Part I of the Summa logicae*, trans. M. J. Loux (Notre Dame: University of Notre Dame Press, 1974).

———, *On the Connection of the Virtues*, in R. Wood, *Ockham on the Virtues* (West Lafayette: Purdue University Press, 1997), 63-187.

———, *On the Power of Emperors and Popes*, ed., trans. A. Brett (Bristol: Thoemmes, 1998).

———, *Philosophical Writings: A Selection*, ed., trans. P. Boehner (Indianapolis: Hackett, 1990).

———, *Quodlibetal Questions*, trans. A. J. Freddoso and F. E. Kelley, 2 vols. (New Haven: Yale University Press, 1991).

———, *The Work of Ninety Days* (selections), in *idem*, *A Letter to the Friars Minor and Other Writings*, ed. A. S. McGrade and J. Kilcullen, trans. J. Kilcullen (Cambridge: University Press, 1995), 17-115.

———, *Whether a Prince Can Receive the Goods of the Church for His Own Needs, Namely, in Case of War, Even Against the Wishes of the Pope*, in *Political Thought in Early Fourteenth-Century England: Treatises by Walter of Milemete, William of Pagula, and William of Ockham*, ed., trans., C. J. Nederman (Tempe: Arizona Center for Medieval and Renaissance Studies, 2002), 153-97.

Scotus, John Duns, *Duns Scotus on the Will and Morality*, ed., trans. A. B. Wolter (Washington: The Catholic University of America Press, 1986).

Suárez, Francisco, *A Defence of the Catholic and Apostolic Faith* (selections), in *Selections from Three Works of Francisco Suárez, S.J.*, vol. II: *An English Version of the Texts*, trans. G. L. Williams *et al.* (Oxford: Clarendon Press, 1944), 647-725.

———, *Francis Suarez on Formal and Universal Unity*, trans. J. F. Ross (Milwaukee: Marquette University Press, 1964).

———, *On Charity* (excerpt), in *Selections from Three Works of Francisco Suárez, S.J.*, vol. II: *An English Version of the Texts*, trans. G. L. Williams *et al.* (Oxford: Clarendon Press, 1944), 800-65.

———, *On Efficient Causality: Metaphysical Disputations 17, 18 and 19*, trans. A. J. Freddoso (New Haven: Yale University Press, 1994).

———, *On Laws and God the Lawgiver* (selections), in *Selections from Three Works of Francisco Suárez, S.J.*, vol. II: *An English Version of the Texts*, trans. G. L. Williams *et al.* (Oxford: Clarendon Press, 1944), 1-646.

———, *On the Essence of Finite Being as Such, on the Existence of That Essence and Their Distinction*, trans. N. J. Wells (Milwaukee: Marquette University Press, 1983).

———, *Suarez on Individuation: Metaphysical Disputation V: Individual Unity and Its Principle*, trans. J. J. E. Gracia (Milwaukee: Marquette University Press, 1982).

———, *The Metaphysics of Good and Evil according to Suárez: Metaphysical Disputations X and XI and Selected Passages from Disputation XXIII and Other Works*, ed., trans. J. J. E. Gracia and D. David (München: Philosophia, 1989).

Vitoria, Francisco de, *On Civil Power*, in *idem*, *Political Writings*, ed., trans., A. Pagden and J. Lawrance (Cambridge: University Press, 1991), 1-44.

Secondary Literature

Abril, V., 'Perspectivas del iusnaturalismo suareciano', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, ed., trans. L. Pereña and V. Abril (Madrid: Consejo Superior de Investigaciones Científicas, 1974), lvi-lxxxvi.

———, 'L'obligation politique chez Suarez: Bilan et perspectives', *Archives de philosophie* 42 (1979), 179-203.

Adams, M. M., 'The Structure of Ockham's Moral Theory', *Franciscan Studies* 46 (1986), 1-34.

———, *William Ockham*, 2 vols. (Notre Dame: University of Notre Dame Press, 1989).

———, 'Ockham's Individualisms', in W. Vossenkuhl and R. Schönberger (eds.), *Die Gegenwart Ockhams* (Weinheim: VCH, 1990), 3-24.

———, 'Ockham on Will, Nature, and Morality', in P. V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: University Press, 1999), 245-71.

André-Vincent, P.-I., 'La notion moderne de droit naturel et le volontarisme (de Vitoria et Suarez à Rousseau)', *Archives de philosophie du droit* 8 (1963), 237-59.

———, *Bartolomé Las Casas: Prophète du Nouveau Monde* (Paris: Tallandier, 1980).

Aubert, J.-M., *Le droit romain dans l'oeuvre de saint Thomas* (Paris: Vrin 1955).

———, *Loi de Dieu, loi des hommes* (Tournai: Desclée, 1964).

———, 'Aux origines théologiques des droits de l'homme', in *Le supplément: Revue d'éthique et théologie morale*, n. 160: *Las Casas et Vitoria: Le droit des gens dans l'âge moderne* (Paris: Cerf, 1987), 111-22.

Åkerlund, E., 'Suárez's Ideas on Natural Law in the Light of His Philosophical Anthropology and Moral Psychology', in V. Mäkinen (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy* (Helsinki: Philosophical Society of Finland, 2010), 165-96.

Bastit, M., *Naissance de la loi moderne: La pensée de la loi de Saint Thomas à Suarez* (Paris: Presses universitaires de France, 1990).

Baudry, L., 'Le philosophe et le politique dans Guillaume d'Ockham', *Archives d'histoire doctrinale et littéraire du Moyen Age* 12 (1939), 209-30.

———, *Guillaume d'Occam: Sa vie, ses oeuvres, ses idées sociales et politiques* (Paris: Vrin, 1949), vol. I: *L'homme et les oeuvres* (only published).

Berman, H. J., *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, Mass.: Harvard University Press, 1983).

Black, A., 'The Individual and Society', in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought* (Cambridge: University Press, 1988), 588-606.

———, *Political Thought in Europe, 1250–1450* (Cambridge: University Press, 1993).

Blasi, F. Di, *God and the Natural Law: A Rereading of Thomas Aquinas*, trans. D. Thunder (South Bend: St. Augustine's Press, 2006).

Blic, J. de, 'Le volontarisme juridique chez Suarez?', *Revue de philosophie* 30 (1930), 213-30.

Bobbio, N., *Thomas Hobbes and the Natural Law Tradition*, trans. D. Gobetti (Chicago: University of Chicago Press, 1993).

Boehner, P., *Medieval Logic: An Outline of Its Development from 1250 to c. 1400* (Manchester: University Press, 1952).

———, 'Ockham's Political Ideas', in *idem*, *Collected Articles on Ockham*, ed. E. M. Buytaert, (St. Bonaventure: Franciscan Institute, 1958), 442-68.

———, 'Ockham's Theory of Supposition and the Notion of Truth', in *idem*, *Collected Articles on Ockham*, ed. E. M. Buytaert, (St. Bonaventure: Franciscan Institute, 1958), 232-67.

Bourke, V. J., *History of Ethics*, 2 vols. (Garden City: Doubleday, 1970), vol. I: *Graeco-Roman to early-Modern Ethics*.

Böckenförde, E.-W., *Geschichte der Rechts- und Staatsphilosophie: Antike und Mittelalter* (Tübingen: Mohr Siebeck, 2002).

Brett, A., *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: University Press, 1997).

———, 'Politics, Right(s) and Human Freedom in Marsilius of Padua', in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 95-116.

———, 'Scholastic Political Thought and the Modern Concept of the State', in *idem*, J. Tully and H. Hamilton-Bleakley (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge: University Press, 2006), 130-48.

Brink, G. van den, *Almighty God: A Study of the Doctrine of Divine Omnipotence* (Kampen: Kok Pharos, 1993).

Brouillard, R., 'Suarez François: la théologie pratique', in A. Vacant, E. Mangenot and É. Amann (eds.), *Dictionnaire de théologie catholique* (Paris: Letouzey et Ané, 1903-72), vol. XIV, pt. 2, cols. 2691-2728.

Carlyle, R. W. and Carlyle, A. J, *A History of Mediaeval Political Theory in the West*, 4th impr., 6 vols. (Edinburgh – London: Blackwood, 1962), vol. V: *The Political Theory of the Thirteenth Century*, vol. VI: *Political Theory from 1300 to 1600.*

Castellote Cubells, S., *Die Anthropologie des Suarez: Beiträge zur spanischen Anthropologie des XVI. und XVII. Jahrhunderts* (Freiburg: Alber, 1962).

Chroust, A.-H., 'Hugo Grotius and the Scholastic Natural Law Tradition', *The New Scholasticism* 17 (1943), 101-33.

——— and Affeldt, R. J., 'The Problem of Private Property according to St. Thomas Aquinas', *Marquette Law Review* 34 (1950-51), 151-82.

———, 'A Summary of the Main Achievements of the Spanish Jurist-Theologians in the History of Jurisprudence', *American Journal of Jurisprudence* 26 (1981), 112-24.

Clark, D. W., 'Voluntarism and Rationalism in the Ethics of Ockham', *Franciscan Studies* 31 (1971), 72-87.

———, 'William of Ockham on Right Reason', *Speculum* 48 (1973), 13-36.

———, 'Ockham on Human and Divine Freedom', *Franciscan Studies*, 38 (1978), 122-60.

Clarke, W. N., 'The Notion of Human Liberty in Suarez', *The Modern Schoolman* 19 (1942), 32-35.

Coing, H., 'Zur Geschichte des Begriffs "subjektives Recht"', in *idem*, F. H. Lawson and K. Grönfors, *Das subjektive Recht und der Rechtsschutz der Persönlichkeit* (Frankfurt: Metzner, 1959), 7-23.

Coleman, J., 'Property and Poverty', in J. H. Burns (ed.), *The Cambridge History of Medieval Political Thought* (Cambridge: University Press, 1988), 607-48.

———, 'The Individual and the Medieval State', in *idem* (ed.), *The Individual in Political Theory and Practice* (Oxford: Clarendon Press, 1996), 1-34.

———, *A History of Political Thought: From the Middle Ages to the Renaissance* (Oxford: Blackwell, 2000).

———, 'Are There any Individual Rights or Only Duties? On the Limits of Obedience in the Avoidance of Sin according to Late Medieval and Early Modern Scholars', in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 3-36.

Composta, D., *La "moralis facultas" nella filosofia giuridica di F. Suarez* (Torino, Società Editrice Internazionale, 1957).

Copleston, F., *A History of Philosophy* (London: Continuum, 2003), vol. II: *Medieval Philosophy*, vol. III: *Late Medieval and Renaissance Philosophy.*

Coujou, J.-P., 'Introduction: La politique ontologique de Suárez', in Francisco Suárez, *Des lois et du dieu législateur*, ed., trans. J.-P. Coujou (Paris: Dalloz, 2003), 1-81.

———, *Philosophie politique et ontologie: Remarques sur la fonction de l'ontologie dans la constitution de la pensée politique* (Paris: L'Harmattan, 2006), vol. I: *Platon – Aristote – Suárez – Hobbes – Spinoza.*

Corcoran, J. and Swiniarski, J., 'Logical Structures of Ockham's Theory of Supposition', *Franciscan Studies* 38 (1978), 161-83.

Courtenay, W. J., 'The Dialectic of Omnipotence in the High and Late Middle Ages', in T. Rudavsky (ed.), *Divine Omniscience and Omnipotence in Medieval Philosophy: Islamic, Jewish and Christian Perspectives* (Dordrecht: Reidel 1984), 243-69.

———, *Capacity and Volition: A History of the Distinction of Absolute and Ordained Power* (Bergamo: Lubrina, 1990).

Courtine, J.-F., *Suárez et le système de la métaphysique* (Paris: Presses universitaires de France, 1990).

———, 'La raison et l'empire de la loi', in *idem*, *Nature et empire de la loi: Études suaréziennes* (Paris: Vrin, 1999), 91-114.

———, 'Vitoria, Suárez et la naissance du droit naturel moderne', in *idem*, *Nature et empire de la loi: Études suaréziennes* (Paris: Vrin, 1999), 115-61.

Crowe, M. B., 'St. Thomas and Ulpian's Natural Law', in A. A. Maurer (ed.), *St. Thomas Aquinas, 1274–1974: Commemorative Studies* (Toronto: Pontifical Institute of Medieval Studies, 1974), vol. I, 261-82.

———, 'The "Impious Hypothesis": A Paradox in Hugo Grotius?', *Tijdschrift voor Filosofie* 38 (1976), 379-410.

———, *The Changing Profile of the Natural Law* (The Hague, Martinus Nijhoff, 1977).

Cruz Cruz, J., 'The Formal Fundament of Natural Law in the Golden Age: The case of Vázquez and Suárez', in A. M. González (ed.), *Contemporary Perspectives on Natural Law: Natural Law as a Limiting Concept* (Aldershot: Ashgate, 2008), 43-65.

Csejtei D. and Juhász A., *Amerika felfedezése és az új globális rend* [The Discovery of America and the New Global Order], 2 vols. (Máriabesnyő – Gödöllő: Attraktor, 2004).

Dabin, J., 'Droit subjectif et subjectivisme juridique', *Archives de philosophie du droit* 9 (1964), 17-35.

Deckers, D., *Gerechtigkeit und Recht: Eine historisch-kritische Untersuchung der Gerechtigkeitslehre des Francisco de Vitoria (1483–1546)* (Freiburg: Universitätsverlag, 1991).

Delos, J. T., *La société internationale et les principes du droit public*, 2nd ed. (Paris: Pedone, 1950).

Duffel, S. van, 'From Objective Right to Subjective Rights: The Franciscans and the Interest and Will Conceptions of Rights', in V. Mäkinen (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy* (Helsinki: Philosophical Society of Finland, 2010), 63-91.

Dufour, A., *Droits de l'homme, droit naturel et histoire: Droit, individu et pouvoir de l'école du droit naturel à l'école du droit historique* (Paris: Presses universitaires de France, 1991).

Dumont, L., *Essays on Individualism: Modern Ideology in Anthropological Perspective* (Chicago: University of Chicago Press, 1986).

Dumont, P., *Liberté humaine et concours divin d'après Suarez* (Paris: Beauchesne, 1936).

Dunn, J., *The Political Thought of John Locke: An Historical Account of the Argument of the 'Two Treatises of Government'* (Cambridge: University Press, 1969).

Dworkin, R. '"Natural" Law Revisited', *University of Florida Law Review* 34 (1982), 165-88.

d'Entrèves, A. P., *Natural Law: An Historical Survey* (New York: Harper, 1951).

———, *The Medieval Contribution to Political Thought: Thomas Aquinas, Marsilius of Padua, Richard Hooker* (New York: Humanities Press, 1959).

Farrell, W., *The Natural Moral Law according to St. Thomas and Suarez* (Ditchling: St. Dominic's Press, 1930).

Fernández-Santamaria, J. A., *The State, War and Peace: Spanish Political Thought in the Renaissance, 1516–1559* (Cambridge: University Press, 1977).

Fichter, J. H., *Man of Spain: Francis Suarez* (New York: Macmillan, 1940).

Figgis, J. N., *The Theory of the Divine Right of Kings* (Cambridge: University Press, 1896).

———, *Studies of Political Thought from Gerson to Grotius, 1414–1625* (Cambridge: University Press, 1907).

Finnis, J., 'Un ouvrage récent sur Bentham', *Archives de philosophie du droit* 17 (1972), 423-27.

———, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

———, 'Natural Inclinations and Natural Rights: Deriving "Ought" from "Is" according to Aquinas', in L. J. Elders and K. Hedwig (eds.), *Lex et libertas: Freedom and Law according to St. Thomas Aquinas* (Vatican City: Pontificia Accademia di S. Tommaso e di religione cattolica, 1987), 43-55.

———, *Aquinas: Moral, Political, and Legal Theory* (Oxford: University Press, 1998).

———, 'Aquinas on *Ius* and Hart on Rights: A Response to Tierney', *The Review of Politics* 64 (2002), 407-10.

Folgado, A., *Evolución histórica del concepto del derecho subjetivo*, vol. I: *Estudio especial en los teólogos-juristas españoles del siglo XVI* (San Lorenzo de El Escorial: Biblioteca La Ciudad de Dios, 1960).

Freppert, L., *The Basis of Morality according to William Ockham* (Chicago: Franciscan Herald Press, 1988).

Frivaldszky J., *Természetjog: Eszmetörténet* [Natural Law: History of the Idea] (Budapest: Szent István Társulat, 2001).

Gelinas, E. T., '*Ius* and *Lex* in Thomas Aquinas', *American Journal of Jurisprudence* 15 (1970), 154-70.

Gewirth, A., *Marsilius of Padua: The Defender of Peace*, vol. I: *Marsilius of Padua and Medieval Political Philosophy* (New York: Columbia University Press, 1951).

Gérard, P., *L'esprit des droits: Philosophie des droits de l'homme* (Brussels: Facultés universitaires Saint-Louis, 2007).

Gilson, É., *La philosophie au Moyen Age: Des origines patristiques à la fin du XIVe siècle*, 2nd, rev. ed. (Paris: Payot, 1947).

———, *L'être et l'essence*, 2nd, rev. ed. (Paris: Vrin, 1962).

Gierke, O. von, *Political Theories of the Middle Age*, trans. F. Maitland (Cambridge: University Press, 1900).

———, *Natural Law and the Theory of Society, 1500 to 1800*, trans. E. Barker (Cambridge: University Press, 1958).

Goyard-Fabre, S., *Pufendorf et le droit naturel* (Paris: Presses universitaires de France, 1994).

Gough, J. W., *The Social Contract: A Critical Study of its Development*, 2nd ed. (Oxford: Clarendon, 1957).

Gray, C. B., 'Ockham on Trusts', *Franciscan Studies* 46 (1986), 141-59.

Grisez, G., 'The First Principle of Practical Reason: A Commentary on the *Summa Theologiae*, 1-2 Question 94, Article 2', *Natural Law Forum* 10 (1965), 168-201.

Grossi, P., 'Usus facti. La nozione di proprietà nella inaugurazione dell' età nuova', *Quaderni fiorentini per la storia del pensiero giuridico moderno* 1 (1972), 287-355.

———, 'La proprietà nel sistema privatistico della seconda scolastica', in *idem* (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (Milano: Giuffrè, 1973), 117-222.

Haakonssen, K., 'From Natural Law to the Rights of Man: A European Perspective on American Debates', in M. J. Lacey and *idem* (eds.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law – 1791 and 1991* (Cambridge: University Press, 1993), 19-61.

———, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: University Press, 1996).

Haggenmacher, P., *Grotius et la doctrine de la guerre juste* (Paris: Presses universitaires de France, 1983).

———, 'Droits subjectifs et système juridique chez Grotius', in L. Foisneau (ed.), *Politique, droit et théologie chez Bodin, Grotius et Hobbes* (Paris: Kimé, 1997).

Hamilton, B., *Political Thought in Sixteenth-Century Spain: A Study of the Political Ideas of Vitoria, De Soto, Suárez, and Molina* (Oxford: Clarendon Press, 1963).

Hanke, L., *The Spanish Struggle for Justice in the Conquest of America*, 6th ed. (Boston: Little, Brown, 1965).

Hart, H. L. A., 'Are There any Natural Rights?', *The Philosophical Review* 64 (1955), 175-91.

Hering, H. M., 'De iure subiective sumpto apud S. Thomam', *Angelicum* 16 (1939), 295-97.

Hochstrasser, T. J., *Natural Law Theories in the Early Enlightenment* (Cambridge: University Press, 2000).

Holopainen, T. M., *William Ockham's Theory of the Foundation of Ethics* (Helsinki: Luther-Agricola-Society, 1991).

Horváth, A., *Eigentumsrecht nach dem hl. Thomas von Aquin* (Graz: Moser, 1929).

Höpfl, H., *Jesuit Political Thought: The Society of Jesus and the State, c. 1540–1630* (Cambridge: University Press, 2004).

———, 'Scholasticism in Quentin Skinner's *Foundations*', in A. Brett, J. Tully and H. Hamilton-Bleakley (eds.), *Rethinking the Foundations of Modern Political Thought* (Cambridge: University Press, 2006), 113-29.

Jarlot, G., 'Les idées politiques de Suarez et le pouvoir absolu', *Archives de philosophie* 18 (1949), 64-107.

Jombart, E., 'Le "volontarisme" de la loi d'après Suarez', *Nouvelle revue de théologie* 59 (1932), 34-44.

Kalapurackal, K., *Natural Law according to Gabriel Vazquez* (Ranchi: Catholic Press, 1983).

Kalinowski, G., 'Logique et philosophie du droit subjectif', *Archives de philosophie du droit* 9 (1964), 37-43.

———, 'Le fondement objectif du droit d'après la "Somme théologique" de saint Thomas d'Aquin', *Archives de philosophie du droit* 18 (1973), 59-75.

———, 'Sur l'emploi métonymique du terme "ius" par Thomas d'Aquin et sur la muabilité du droit naturel selon Aristote', *Archives de philosophie du droit* 18 (1973), 331-39.

Kantorowitz, E. H., *The King's Two Bodies: A Study in Medieval Political Theology* (Princeton: University Press, 1957).

Kilcullen, J., 'Natural Law and Will in Ockham', *History of Philosophy Yearbook* 1 (1993), 1-25, republished on the webpage http://www.humanities.mq.edu.au/Ockham/wwill.html.

———, 'The Political Writings', in P. V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: University Press, 1999), 302-25.

———, 'Medieval and Modern Concepts of Rights: How Do They Differ?', in V. Mäkinen (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy* (Helsinki: Philosophical Society of Finland, 2010), 31-62.

King, P., 'Ockham's Ethical Theory', in P. V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: University Press, 1999), 227-44.

Knysh, G., 'Biographical Rectifications concerning Ockham's Avignon Period', *Franciscan Studies* 46 (1986), 61-91.

Korolec, J. B., 'Free Will and Free Choice', in N. Kretzmann *et al.* (eds.), *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100–1600* (Cambridge: University Press, 1982), 629-41.

Kölmel, W., 'Das Naturrecht bei Wilhelm Ockham', *Franziskanische Studien* 35 (1953), 39-85.

———, *Wilhelm Ockham und seine kirchenpolitischen Schriften* (Essen: Ludgerus, 1962).

Kriechbaum, M., *Actio, ius und dominium in den Rechtslehren des 13. und 14. Jahrhunderts* (Ebelsbach: Aktiv, 1996).

Lachance, L., *Le concept de droit selon Aristote et S. Thomas*, 2nd ed. (Ottawa: Lévrier, 1948).

———, *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1959).

Lagarde, G. de, *La naissance de l'esprit laïque au déclin du Moyen Age*, 6 vols. (Paris: Béatrice, 1934-46).

———, *La naissance de l'esprit laïque au déclin du Moyen Age*, 2nd, rev. ed., 5 vols. (Louvain – Paris: Nauwelaerts – Béatrice, 1956-70).

Lambert, M. D., *Franciscan Poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210–1323* (London: SPCK, 1961).

Larrainzar, C., *Una introducción a Francisco Suárez* (Pamplona: Ediciones Universidad de Navarra, 1977).

Leff, G., *William of Ockham: The Metamorphosis of Scholastic Discourse* (Manchester: University Press, 1975).

———, 'The Bible and Rights in the Franciscan Disputes over Poverty', in K. Walsh and D. Wood (eds.), *The Bible in the Medieval World: Essays in Memory of Beryl Smalley* (Oxford: Blackwell, 1985), 225-35.

———, 'Ockham and Natural Rights', in *idem*, *Heresy, Philosophy and Religion in the Medieval West* (Aldershot: Ashgate, 2002), XIX: 1-9.

Lisska, A. J., *Aquinas's Theory of Natural Law: An Analaytic Reconstruction* (Oxford: Clarendon Press, 1996).

Lottin, O., *Le droit naturel chez saint Thomas d'Aquin et ses prédécesseurs* (Bruges: Beyaert 1931).

———, *Principes de morale* (Louvain: Abbaye du Mont César, 1946), vol. II: *Compléments de doctrine et d'histoire*.

Lloyd, H. A., 'Constitutionalism', in J. H. Burns (ed.), *The Cambridge History of Political Thought, 1450–1700*, (Cambridge: University Press, 1991), 254-97.

MacIntyre, A., *Three Rival Versions of Moral Inquiry: Encyclopedia, Genealogy and Tradition* (Notre Dame: University of Notre Dame Press, 1990).

MacPherson, C. B., *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Clarendon Press, 1962).

Mahieu, L., *François Suarez: Sa philosophie et les rapports qu'elle a avec sa théologie* (Paris: Desclée de Brouwer, 1921).

Maritain, J., *Les droits de l'homme et la loi naturelle* (New York: Maison française, 1942).

———, *Man and the State* (Chicago: University of Chicago Press, 1951).

Matthews, G. B., 'Ockham's Supposition Theory and Modern Logic', *The Philosophical Review* 73 (1964), 91-99.

May, W. E., 'The Meaning and Nature of the Natural Law in Thomas Aquinas', *American Journal of Jurisprudence* 22 (1977), 168-89.

Mäkinen, V., *Property Rights in the Late Medieval Discussion of Franciscan Poverty* (Leuven: Peeters, 2001).

———, 'Rights and Duties in Late Scholastic Discussion of Extreme Necessity', in *idem* and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 37-62.

———, 'The Evolution of Natural Rights, 1100-1500', *Collegium* 4 (2008), available at http://www.helsinki.fi/collegium/e-series/volumes/volume_4/06_makinen_2008_4.pdf.

———, 'Self-Preservation and Natural Rights in Late Medieval and Early Modern Political Thought', in *idem* (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy* (Helsinki: Philosophical Society of Finland, 2010), 93-108.

McGrade, A. S., *The Political Thought of William of Ockham: Personal and Institutional Principles* (Cambridge: University Press, 1974).

———, 'Ockham and the Birth of Individual Rights', in B. Tierney and P. Linehan (eds.), *Authority and Power. Studies on Medieval Law and Government Presented to Walter Ullmann* (Cambridge: University Press, 1980), 149-65.

———, 'Natural Law and Moral Omnipotence', in P. V. Spade (ed.), *The Cambridge Companion to Ockham* (Cambridge: University Press, 1999), 273-301.

———, 'What Aquinas Should Have Said? Finnis's Reconstruction of Social and Political Thomism', *American Journal of Jurisprudence* 44 (1999), 125-49.

———, 'Right(s) in Ockham: A Reasonable Vision of Politics, in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 63-94.

McInerny, R., *Aquinas on Human Action: A Theory of Practice* (Washington: The Catholic University of America Press, 1992).

Mesnard, P., *L'essor de la philosophie politique au XVIe siècle*, 2n ed. (Paris: Vrin 1952).

Miethke, J., *Ockhams Weg zur Sozialphilosophie* (Berlin, de Gruyter, 1969).

———, 'Wilhelm von Ockham', in M. Greschat (ed.), *Gestalten der Kirchengeschichte*, vol. 4: *Mittelalter II* (Stuttgart: Kohlhammer, 1983), 155-75.

———, 'Der Abschluß der kritischen Ausgabe von Ockhams akademischen Schriften', *Deutsches Archiv für Erforschung des Mittelalters* 47 (1991), 175-85.

Miller, F. D., *Nature, Justice, and Rights in Aristotle's Politics* (Oxford: University Press, 1995).

Moreau, P.-F., 'Loi naturelle et ordre des choses chez Suarez', *Archives de philosophie* 42 (1979), 229-34.

Morrall, J. B., 'Some Notes on a Recent Interpretation of William of Ockham's Political Philosophy', *Franciscan Studies* 9 (1949), 335-69.

———, *Gerson and the Great Schism* (Manchester: University Press, 1960).

Muldoon, J., 'The Contribution of the Medieval Canon Lawyers to the Formation of International Law', *Traditio* 28 (1972), 483-97.

———, *Popes, Lawyers and Infidels: The Church and the Non-Christian World, 1250–1550* (Philadelphia: University of Pennsylvania Press, 1979).

Mullaney, T. U., 'The Basis of the Suarezian Teaching on Human Freedom', *The Thomist* 11 (1948), 1-17, 330-69, 448-502 and 12 (1949), 48-94, 155-206.

Muralt, A. de, *L'Unité de la philosophie politique: De Scot, Occam et Suárez au libéralisme contemporain* (Paris: Vrin, 2002).

Nörr, K. W., 'Zur Frage des subjektiven Rechts in der mittelalterlichen Rechtswissenschaft', in D. Medicus *et al.* (eds.), *Festschrift für Hermann Lange zum 70. Geburtstag am 24. Januar 1992* (Stuttgart: Kohlhammer, 1992), 193-204.

Nussbaum, A., *A Concise History of the Law of Nations* (New York: Macmillan, 1947).

Nys, E., *Les origines du droit international* (Bruxelles: Castaigne, 1894).

Oakeshott, M., 'Introduction to Leviathan', in *idem*, *Rationalism in Politics and Other Essays* (Indianapolis: Liberty Press, 1991), 221-94.

Oakley, F., 'Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition', *Natural Law Forum* 6 (1961), 65-83.

———, *The Political Thought of Pierre d'Ailly: The Voluntarist Tradition* (New Haven: Yale University Press, 1964).

———, 'Jacobean Political Theology: The Absolute and Ordinary Powers of the King', *Journal of the History of Ideas* 29 (1968), 323-46.

———, *Natural Law, Conciliarism and Consent in the Late Middle Ages: Studies in Ecclesiastical and Intellectual History* (London: Variorum, 1984).

———, *Omnipotence, Covenant, and Order: An Excursion in the History of Ideas from Abelard to Leibniz* (Ithaca: Cornell University Press, 1984).

———, 'The Absolute and Ordained Power of God in Sixteenth- and Seventeenth-Century Theology', *Journal of the History of Ideas* 59 (1998), 437-61.

———, *Politics and Eternity: Studies in the History of Medieval and Early-Modern Political Thought* (Leiden: Brill, 1999).

———, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York – London: Continuum, 2005).

Oakley, J., 'John XXII and Franciscan Innocence', *Franciscan Studies* 46 (1986), 217-26.

Oberman, H. A., 'Some Notes on the Theology of Nominalism with Attention to its Relation to the Renaissance', *Harvard Theological Review* 53 (1960), 48-76.

———, *The Harvest of Medieval Theology: Gabriel Biel and Late Medieval Nominalism* (Cambridge, Mass.: Harvard University Press, 1963).

———, '*Via Antiqua* and *Via Moderna*: Late Medieval Prolegomena to Early Reformation Thought', *Journal of the History of Ideas* 48 (1987), 23-40.

Offler, H. S., 'The Three Modes of Natural Law in Ockham: A Revision of the Text', *Franciscan Studies* 37 (1977), 207-18.

———, 'The "Influence" of Ockham's Political Thinking: The First Century', in W. Vossenkuhl and R. Schönberger (eds.), *Die Gegenwart Ockhams* (Weinheim: VCH, 1990), 338-65.

Overbeke, P. Van, 'Saint Thomas et le droit. Commentaire de IIa-II, q. 57', *Revue thomiste* 55 (1955), 519-64.

———, 'Droit et Morale: Essai de synthèse thomiste', *Revue thomiste* 58 (1958), 284-336.

Pagden, A., 'The Preservation of Order: The School of Salamanca and the "*Ius Naturae*"', in F. W. Hodcroft *et al.* (eds.), *Mediaeval and Renaissance Studies on Spain and Portugal in Honour of P. E. Russell* (Oxford: Society for the Study of Mediaeval Languages and Literature, 1981) 155-66.

———, *The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology* (Cambridge: University Press, 1982).

———, 'Dispossessing the Barbarian: The Language of Spanish Thomism and the Debate over the Property Rights of the American Indians', in *idem* (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: University Press, 1987), 79-98.

Pennington, K., *The Prince and the Law, 1200–1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993).

Pereña, L., 'Metodología científica suareciana', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, ed., trans. L. Pereña and V. Abril (Madrid: Consejo Superior de Investigaciones Científicas, 1974), xix-xxxvii.

Pernoud, M. A., 'Innovation in William of Ockham's References to the *Potentia Dei*', *Antonianum* 45 (1970), 65-97.

———, 'The Theory of the *Potentia Dei* according to Aquinas, Scotus and Ockham', *Antonianum* 47 (1972), 69-95.

Péteri Z., 'Az emberi jogok a történelemben' [The Human Rights in History], in M. Katonáné Soltész (ed.), *Emberi jogok hazánkban* [Human Rights in Hungary] (Budapest, ELTE Jogi Továbbképző Intézet, 1988), 21-49.

Pinckaers, S.-T., *Les sources de la moral chrétienne: Sa méthode, son contenu, son histoire* (Fribourg: Éditions Universitaires, 1985).

Price, R., 'William of Ockham and *suppositio personalis*', *Franciscan Studies* 30 (1970), 131-40.

Randi, E., 'Ockham, John XXII and the Absolute Power of God', *Franciscan Studies* 46 (1986), 205-16.

Reid, C. J., 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry', *Boston College Law Review* 33 (1991), 37-92.

Renoux-Zagamé, M.-F., *Origines théologiques du concept moderne de propriété* (Genève: Droz, 1987).

———, *Du droit de Dieu au droit de l'homme* (Paris: Presses universitaires de France, 2003).

Romeyer, B., 'La théorie suarézienne d'un état de nature pure', *Archives de philosophie* 18 (1948), 37-63.

Rommen, H., *Die Staatslehre des Franz Suarez S.J.* (Mönchenglabdach: Volksvereins, 1926).

———, 'The Genealogy of Natural Rights', *Thought* 29 (1954), 403-25.

———, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. T. R. Hanley (St. Louis: Herder, 1964).

Salmon, J. H. M., 'Catholic Resistance Theory, Ultramontanism, and the Royalist Response, 1580–1620', in J. H. Burns (ed.), *The Cambridge History of Political Thought, 1450–1700*, (Cambridge: University Press, 1991), 219-53.

Samuel, G., 'Epistemology, Propaganda and Roman Law: Some Reflections on the History of the Subjective Right', *The Journal of Legal History* 10 (1989), 161-79.

Scattola, M., *Das Naturrecht vor dem Naturrecht: Zur Geschichte des ius naturae im 16. Jahrhundert* (Tübingen: Niemeyer, 1999).

Schneewind, J. B., *The Invention of Autonomy: A History of Modern Moral Philosophy* (Cambridge: University Press, 1998).

Schüßler, R., 'Moral Self-Ownership and *Ius Possessionis* in Scholastics', in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 149-72.

Scorraille, R., *François Suarez de la Compagnie de Jésus*, 2 vols. (Paris: Lethielleux, 1911).

Scott, J. B., *The Spanish Origin of International Law: Francisco de Vitoria and his Law of Nations* (Oxford, Clarendon Press, 1934).

———, 'Introduction', in Francisco Suárez, *Selections from Three Works of Francisco Suárez, S.J.* (New York: Oxford University Press, 1944), vol. II: *An English Version of the Texts*, trans. G. L. Williams, A. Brown and J. Waldron, 3a-41a.

Sève, R., *Leibniz et l'École moderne du droit naturel* (Paris: Presses universitaires de France, 1989).

Shogimen, T., *Ockham and Political Discourse in the Late Middle Ages* (Cambridge: University Press, 2007).

Simmons, A. J., *The Lockean Theory of Rights* (Princeton: University Press, 1992).

Skinner, Q., *The Foundations of Modern Political Thought*, 2 vols. (Cambridge: University Press, 1978), vol. II: *The Age of Reformation*.

Soder, J., *Francisco Suárez und das Völkerrecht: Grundgedanken zu Staat, Recht und internationalen Beziehungen* (Frankfurt: Metzner, 1973).

Sommerville, J. P., 'From Suarez to Filmer: A Reappraisal', *The Historical Journal* 25 (1982) 525-40.

St. Leger, J., *The "Etiamsi Daremus" of Hugo Grotius: A Study in the Origins of International Law* (Roma: Herder, 1962).

Strauss, L., *The Political Philosophy of Hobbes: Its Basis and Its Genesis*, trans. E. M. Sinclair (Chicago: University of Chicago Press, 1952).

———, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

Suñer, P., 'El Teocentrismo de la ley natural', in Francisco Suárez, *De legibus (II 1-12): De lege naturali*, ed., trans. L. Pereña and V. Abril (Madrid: Consejo Superior de Investigaciones Científicas, 1974), xxxviii-lv.

Tierney, B., 'Ockham, the Conciliar Theory and the Canonists', *Journal of the History of Ideas* 15 (1954), 40-70.

———, 'Tuck on Rights: Some Medieval Problems', *History of Political Thought* 6 (1983), 429-41.

———, 'Natural Law and Canon Law in Ockham's *Dialogus*', in J. G. Rowe (ed.), *Aspects of Late Medieval Government and Society: Essays Presented to J. R. Lander* (Toronto: University of Toronto, 1986), 3-24.

———, 'Villey, Ockham and the Origin of Natural Rights', in J. Witte and F. S. Alexander (eds.), *The Weightier Matters of the Law: Essays on Law and Religion* (Atlanta: Scholars Press, 1988), 1-31.

———, 'Origins of Natural Rights Language: Texts and Contexts, 1150-1250', *History of Political Thought*, 10 (1989), 615-46.

———, 'Aristotle and the American Indians – Again: Two Critical Discussions', *Cristianesimo nella storia* 12 (1991), 295-322.

———, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Atlanta: Emory University Press, 1997).

———, 'Permissive Natural Law and Property: Gratian to Kant', *Journal of the History of Ideas* 62 (2001), 381-99.

———, 'Natural Law and Natural Rights: Old Problems and Recent Approaches', *The Review of Politics* 64 (2002), 389-406.

———, 'Dominion of Self and Natural Rights Before Locke and After', in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 173-203.

Treloar, J. L., 'Moral Virtue and the Demise of Prudence in the Thought of Francis Suárez', *American Catholic Philosophical Quarterly* 65 (1991), 387-405.

Truyol y Serra, A., *Historia de la Filosofía del Derecho y del Estado, vol. II: Del Renacimiento a Kant* (Madrid, Alianza, 1995).

Tuck, R., *Natural Rights Theories: Their Origin and Development* (Cambridge: University Press, 1979).

———, 'The "Modern" Theory of Natural Law', in A. Pagden (ed.), *The Languages of Political Theory in Early-Modern Europe* (Cambridge: University Press, 1987), 99-119.

———, *Philosophy and Government, 1572–1651* (Cambridge: University Press, 1993).

———, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: University Press, 1999).

Tully, J., *A Discourse on Property: John Locke and His Adversaries* (Cambridge: University Press, 1980).

———, *An Approach to Political Philosophy: Locke in Contexts* (Cambridge: University Press, 1993).

Ullmann, W., *A History of Political Thought: The Middle Ages* (Harmondsworth: Penguin, 1965).

Varkemaa, J., 'Summenhart's Theory of Rights: A Culmination of the Late Medieval Discourse on Individual Rights', in V. Mäkinen and P. Korkman (eds.), *Transformations in Medieval and Early-Modern Rights Discourse* (New York: Springer, 2006), 119-47.

———, 'Individual Right as Power: From Dominion to Agency', in V. Mäkinen (ed.), *The Nature of Rights: Moral and Political Aspects of Rights in Late Medieval and Early Modern Philosophy* (Helsinki: Philosophical Society of Finland, 2010), 109-28.

Veatch, H. B., *Human Rights: Fact of Fancy?* (Baton Rouge, Louisiana State University Press, 1985).

Vignaux, P., 'Nominalisme' and 'Occam', in A. Vacant, E. Mangenot and É. Amann (eds.), *Dictionnaire de théologie catholique* (Paris: Letouzey et Ané, 1903-72), vol. XI, pt. 1, cols. 717-78 and 863-903.

Villey, M., 'Abrégé du droit naturel classique', *Archives de philosophie du droit* 6 (1961), 27-72.

———, 'Les origines de la notion du droit subjectif', in idem, Lecons d'histoire de la philosophie du droit (Paris: Dalloz, 1962), 221-49.

———, 'La genèse du droit subjectif chez Guillaume d'Occam', *Archives de philosophie du droit* 9 (1964), 97-127.

———, *La formation de la pensée juridique moderne: Cours d'histoire de la philosophie du droit*, 4th ed. (Paris: Montchrestien, 1975).

———, 'Sur les essais d'application de la logique déontique au droit', *Archives de philosophie du droit* 17 (1972), 407-12.

———, 'Si la théorie générale du droit, pour saint Thomas, est une théorie de la loi', *Archives de philosophie du droit* 17 (1972), 427-31.

———, 'La promotion de la loi et du droit subjectif dans la seconde scolastique', in P. Grossi (ed.), *La seconda scolastica nella formazione del diritto privato moderno* (Milano: Giuffrè, 1973), 53-71.

———, ‘Déformations de la philosophie du droit d’Aristote entre Vitoria et Grotius’, in J.-C. Margolin and M. Gandillac (eds.), *Platon et Aristote à la Renaissance* (Paris: Vrin, 1976), 201-15.

———, ‘Remarque sur la notion de droit chez Suarez’, *Archives de philosophie* 42 (1979), 219-27.

———, *Le droit et les droits de l’homme* (Paris: Presses universitaires de France, 1983).

Weigand, R., *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (München: Hueber, 1967)

Weinreb, L. L., ’Natural Law and Rights’, in R. P. George (ed.), *Natural Law Theory: Contemporary Essays* (Oxford: Clarendon Press, 1992), 278-305.

Welzel, H., *Naturrecht und Materiale Gerechtigkeit*, 4th ed. (Göttingen: Vandenhoeck & Ruprecht, 1980).

Westerman, P. C., *The Disintegration of Natural Law Theory: Aquinas to Finnis* (Leiden: Brill, 1998).

Wilenius, R., *The Social and Political Theory of Francisco Suárez* (Helsinki: Akateeminen Kirjakauppa, 1963).

Wilks, M. J., *The Problem of Sovereignty in the Later Middle Ages: The Papal Monarchy with Augustinus Triumphus and the Publicists* (Cambridge: University Press, 1963).

Wood, R., *Ockham on the Virtues* (West Lafayette: Purdue University Press, 1997).

Wulf, M. de, *Histoire de la philosophie médiévale*, 6th, rev. ed., 3 vols. (Louvain: Institut supérieur de philosophie, 1933-47).

Zuckerman, C., ‘The Relationship of Theories of Universals to Theories of Church Government in the Midddle Ages: A Critique of Previous Views’, *Journal of the History of Ideas* 36 (1975), 579-94.

Zuckert, M., ‘Do Natural Rights Derive from Natural Law?’, *Harvard Journal of Law and Public Policy* 20 (1997), 695-731.