

Against Human Rights

John Milbank

1. Prelude: Liberalism, Sovereignty and Political Economy

In the course of her critique of my book *Theology and Social Theory*, Jennifer Herdt has contested my view that modern political economy is incompatible with a Christian exercise of *agape*, which is necessarily a social exercise.¹ She agrees with me that political economy, the most developed form of liberalism, was, in the longest perspective, built upon two specifically modern concepts: first of all rights, and secondly sympathy. For Herdt, both of these concepts are compatible with *agape*, but tend also to encourage secular equivalents of *agape* with which Christianity can remain at ease²

Let us consider primarily the notion of 'right', which grounds the politically economic account of person, property and contract. One can claim that the idea of negative freedom and of individual natural rights was from the outset correlated with an absolutist account of the sovereign central

¹ Jennifer Herdt, 'The Endless Construction of Charity: On Milbank's Critique of Political Economy' in *Journal of Religious Ethics*, 32 (2004) 301-324

² For my detailed response to her defence of the 'Moral Sentiments School' account of sympathy, see John Milbank, 'The Invocation of Clio' in *The Future of Love* (Eugene OR/London: Wipf and Stock/SCM, 2008/2009) 175-220

power.³ In the case of the Scots, this link re-emerges with James Stewart, who gave a more honest account than Adam Smith of the role that the State, Empire and military conquest must play in processes of primacy accumulation. He explicitly stated that 'the Republic of Lycurgus represents the more perfect plan of political economy -- anywhere to be met with, either in ancient or modern times'.⁴

Herdht however argued that, while the notion of alienable natural rights is compatible with an absolutist regime, the notion of inalienable natural rights is not. But this is to miss the complex dialectic of rights and alienability. For William of Ockham, the paradigm of subjective *ius* lies in the free ownership of property, regarded as a given fact independent of questions of right *usus* and objective *fnis*. The mark, therefore, of such inalienable right to possession is paradoxically its alienability: the property may be sold.

³ See Jean Bethke Elshtain, *Sovereignty: God, State and Self* (New York: Basic Books, 2008)

⁴Sir James Stewart, *The Works* (New York: Augustus M. Kelley, 1967), Vol. I, pp. 51, 97-8, 344-6, 352. See also Michael Perelman, *Classical Political Economy: Positive Accumulation and the Social Division of Labour* (Totowa, NJ: Rowman and Allenheld, 1984).

This dialectic clearly haunts later liberalism -- how far may free subjects freely alienate to the state their original natural rights to self-protection and self-sustenance? Since the exigencies of fear are more absolute than those of comfortable living Hobbes, who focuses on the former, allows for a greater alienation of original right than does Locke who focuses on the latter. But Leo Strauss was right to assert that this does not render Locke the more clearly liberal thinker. For if it is only 'self-ownership' that is absolutely inalienable (or ownership of the will itself by itself, as Rousseau and Kant later saw) then this is compatible with more or less any actual bondage -- provided there is consent, which may well be taken to be tacit, since this is assumed to be sufficient by all known polities (to some degree). But in point of fact, even Hobbes did not think that private freedom of opinion and property entitlement could normally be alienated, since they follow directly from that self-possession upon which his contractual theory of politics is built. Hence in the case of Hobbes inalienable rights of freedom and property *are* held to support an absolutist regime, since this regime exists for Hobbes precisely to secure private freedom and property against religious enthusiasm and against any realistic metaphysics which underwrites collective ends. Much later, Fichte elaborated the first somewhat totalitarian political programme on strictly liberal premises, on the ground that absolute freedom of movement and decision can only be guaranteed by a continual and all-penetrating 'police' ensuring and protection of travel, physical safety and reliable information as regards health and other matters. For where no shared implicit agreements guarantee personal security, no tacit and embedded facts, then it can only be guaranteed by a centralist *surveillance*.⁵ And since new risks always

⁵ J.G. Fichte, *Foundations of Natural Right* trans. Michael Baur (Cambridge: CUP. 2000), 254-263

multiply, this control must become ever more precise. So when we forget the 'association' in 'free association' a perverted solipsistic freedom will always require alien enforcement.

Liberalism and absolutism are further compatible, because the right of the absolutist monarch is itself inalienable for just the same reason that individual right is inalienable. For the sake of order and security, all has been taken into his possession and therefore legality now flows from his own self-ownership. In either case, fundamental moral standing is defined in formal, voluntarist terms that sidestep any questions of normative goals or substance.

These modern, 'Hobbesian' structures and dilemmas were already articulated in William of Ockham's approach to social theory: in a monastic corporation the powers to elect a prior and to sell collectively-owned property could be alienated, but not the ownership prerogatives of non-resident by resident canons. Likewise property rights could not be alienated to the emperor but the people's power of election could be so alienated. And though the emperor's authority originally derived from the people, there were no mechanisms to ensure their continuing participation in government, even if the emperor should in theory act only for 'common utility' which includes first and foremost the protection of subjective property and contractual rights.⁶

2. Wolterstorff and the History of Rights

⁶ See Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Grand Rapids Mich: Eerdmans, 1997) 170-

Herdt's reflections, which are resistant to the above conclusions, belong to what is now a large camp of opinion within contemporary political thought. It is this camp whose views have now been masterfully summed-up and more coherently developed by Nicholas Wolterstorff in his book *Justice: Rights and Wrongs*.⁷ The camp consists mainly of American Christians who wish nonetheless to remain good Americans, and who take Americanism to imply a commitment to liberalism and to liberal democracy (rather than to 'civic republicanism' in the French style – although this difference is problematic, as I shall eventually contend). They wish, as Wolterstorff puts it, to defend the idea that justice is most fundamentally derived from subjective rights, and also to argue that this notion is entirely compatible with Christianity. In Wolterstorff's case he wants further to argue that it is *derived* from Christianity, and becomes incoherent when not grounded in Christian theology. Hence he wishes to argue that modernity, properly understood, is the consummation of Christian practice. The American Christian liberal camp, now headed by Wolterstorff, therefore oppose the idea that justice is grounded in cosmic 'right order', as it was for the ancient Greeks, John Chrysostom, Augustine and Aquinas. If Christians supposed for a long time that this was the case, then this was because their thinking was not sufficiently Biblical or de-Hellenized.

To think of justice as 'right order' is supposedly to have an insufficient sense of human personal dignity, of equality and the primacy of freedom. It follows that a just polity will be explicitly based upon the primacy of individual subjective rights which will have its concomitant in the

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⁷ Nicholas Wolterstorff, *Justice: Rights and Wrongs* (Princeton UP: Princeton

negatively free capitalist market, however tempered this may be by State welfarism that ensures equality of opportunity and therefore a level playing field for economic competition – on a roughly Rawlsian model, for which Wolterstorff indeed claims (with much plausibility) to be providing a better philosophical basis.⁸

Wolterstorff's allegation is that a polity based upon good order will tend to involve an arbitrary hierarchy and not to recognise the full personhood of all its members. The reverse allegation of proponents of good order (like myself) as already indicated, is that a foundation of politics in human rights is indissolubly linked with an augmentation of arbitrary will that applies as much to the sovereign political centre as to the individuals on the periphery who directly confront this centre, without a network of intermediary organic relationships. These individuals may be taken either one by one or *en masse*: in either case there is a logical slide of liberalism into nihilism. The Straussian version of this charge tends to see the ancient *polis* as the model of human perfection and to be half-resigned to liberalism as a second best within a modern mass society, apart from the glorious enclave of the American university campus. Wolterstorff is in more or less negative agreement concerning these two ideal types as the real alternatives.

This assumption, however, raises in a more acute form the very question which Wolterstorff himself wishes to raise about characterising the history of *ius* and so of Western justice in terms of *rupture*. The Straussians claim that objective *ius* is decisively replaced by subjective *ius* only

NJ, 2008)

⁸ Wolterstorff, *Justice*, 14-17.

with Thomas Hobbes.⁹ Michel Villey and his followers claim that this decisive shift happened earlier with the work of William of Ockham.¹⁰ The revisionists to whom Wolterstorff mainly refers claim however to discover subjective *ius* back in the 12thC canonists and even in the Justinian code itself, thereby implying that liberalism is rooted both in Christianity and in Roman thought and practice, perhaps under Stoic influence.¹¹

However *other* revisionists (tending to have merged from the Cambridge school of the History of Political Thought) to whom Wolterstorff refers less, discover a different continuity. Not the ancient roots of liberalism, but rather the persistence in mainstream legal thought and practice of ideas of justice as rooted in good order right into the 18th C.¹² Even though much more

9 For a defence of the Straussian position against Brian Tierney, see Ernest L. Fortin, 'On the Supposed Medieval Origin of Individual Rights' in *Classical Christianity and the Political Order; Reflections on the Theologico-Political Problem* (Lanham MD: Rowman and Littlefield, 1996), 243-264. Fortin rightly argues that Tierney offers no real case for considering the ascription of rights to subjects in the Middle Ages to be 'subjective rights'. On this see further below.

10 See Michel Villey, *La Formation de la pensée juridique moderne* (Paris: PUF, 2006); *Le Droit et les Droits de L'Homme* (Paris: PUF, 1983). Villey has more contemporary defenders regarding his reading of Ockham than Wolterstorff allows. See for example Michel Bastit, 'Michel Villey et les ambiguïtés d'Occam' in Michael Garcin ed. *Droit, Nature, Histoire* (Aix-en-Provence/Marseilles: Presses Universitaires D'Aix-Marseilles, 1985), 65-72; Daniel Gutmann, 'La Question du Droit Subjective Chez Guillaume D'Occam' in *Le Droit des Modernes (XIVe -XVIIIe siècles)* 11-29. There are several other examples, both French and German.

11 Besides Tierney, see mainly Charles Reid Jr., 'The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry' in *Boston College Law Review* 33 (1991), 37-92; *Power over the Body: Equality in the Family: Rights and Domestic Relations in Medieval Canon Law* (Grand Rapids Mich: Eerdmans, 2004). For a good summary of the entire debate in the wider context of the history of all notions of law in connection notions of nature see Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005)87-109.

12 For this (loosely defined) 'second group of revisionists', see Annabel S. Brett, *Liberty, Right and Nature; Individual Rights in Later Scholastic*

importance is given in the early modern period and the 18th C to the primacy of personal self-possession and ownership of property, rights still remained fundamentally located within reciprocal relationships and therefore were usually correlated with duties.¹³ This was truer, for example, with the self-theorisation of 18th C Scots law than it was with the self-theorisation of 18th C English law.¹⁴

Wolterstorff himself is not in the end denying a rupture – even if he sees this as a slow rending. For clearly he thinks that a supposedly Christian rights-grounding of the politico-economic order gradually won out over the dominance of ‘good order’.

However, this may oddly mean that Wolterstorff himself does not take continuity seriously enough, as indicated by his relative ignoring of the second group of revisionists.

What is crucial here is the history of events rather than the history of ideas. To suppose that the

Thought (Cambridge: CUP, 2003) and Knud Haakonssen, *Natural Law and Moral Philosophy; from Grotius to the Scottish Enlightenment* (Cambridge: CUP 1996)

¹³ See mainly Haakonssen, *Natural Law and Moral Philosophy*.

¹⁴ See James, Viscount Stair *The Institutions of the Law of Scotland* (1693) (Edinburgh/Glasgow, Edinburgh UP/Glasgow UP, 1981): ‘the first principles or right are obedience [to revealed and natural law], freedom and engagement [being held to voluntary contract], p. 90; ‘Obligation is that which is correspondednt to a personal right’, p.93; ‘liberty standeth in the midst betwixt obligations of obedience, which are anterior, and of engagements, which are posterior’, p.94. Contrast Sir William Blackstone, *On the Laws and Constitution of England* (1796) (London: Elibron, 2005): ‘The absolute rights of men.....may be reduced to three principal or primary articles; the right of personal security, the right of personal liberty and the right of private property’. Whereas Stair the Roman lawyer offers an eclectic mix of objective natural law and subjective natural right, stressing reciprocity of right and duty and the partial legitimation of contract by natural equity, Blackstone the Common lawyer grounds his legal hermeneutic on naked possessive individualism. This contrast is noted by Alasdair Macintyre in *Whose Justice?*

basic theoretical issue is one of foundational rights versus the ‘ancient liberty’ of the *polis* is to look at things either through American or French eyes. That is to say, through *revolutionary* eyes – and I think it is very important to point out that the two revolutions, though so different, were still variants upon the same liberal principles. But the question to be raised here is whether the revolutionary paradigm, the paradigm of explicit formal foundation of constitutional liberty upon subjective right, is the only decisive alternative to either the ancient pagan polity or to a medieval feudal variant?

One can argue that it is not, because the political practice of other countries with relatively liberal and egalitarian traditions deeply rooted in the far past – Iceland and the Scandinavian nations, Switzerland, The Netherlands, England, Scotland (plus the British imperial derivatives) parts of the Germanic world and certain Italian cities -- owe little to the liberal revolutions which they long predate, and only certain aspects to the influence of liberal ideology.¹⁵ (Even though the last five mentioned areas contributed massively to the history of this ideology, it has been heavily contested within those countries, and often does not adequately describe their own constitutional practice – which to this day often notably includes monarchy.)

In all these cases, a long-standing constitutionalism is rooted in the Middle Ages. Magna Carta is famous, but there were equivalents in Scotland and Sweden. Christian republicanism existed in

Which Rationality? (London: Duckworth, 1998), 228.

¹⁵ See Wilhelm Roepke, *The Social Crisis of our Time*, (New Brunswick: Transaction, 37-82); Augustine Thompson, *Cities of God* (University Park PA: Penn State UP, 2006)

several medieval Italian city-states. The question is, how is one to regard this continuity -- in terms of the first revisionism as the *longue durée* of liberalism, or in terms of the second revisionism as the evolving persistence of 'right order', able to develop in its own terms certain more subjective emphases, even if one would have to allow that from early modern times onwards this too often gets perverted in a truly liberal 'possessive individualist' direction?

I would argue that it is more the latter. The ancient pagan *polis* was monolithic and the social there coincided with the political. But the Medieval social polity was characterised by a plethora of complex and complexly overlapping 'free associations', as Otto von Gierke emphasised.¹⁶ In consequence, it is not surprising if both civil and canon law came to talk much more about *iura* that attached to individual subjects and groups and were rights to exercise a certain power or *facultas* in relation to other individuals and social formations.¹⁷ Nor that the law tried further to define what one person might legitimately *demand* from another --- who therefore had a reciprocal *duty* --- in certain circumstances.

On top of this one can thoroughly agree with Wolterstorff that Christianity gave a new prominence to the notion of unforced consent, which is evidenced for example in the legal consideration of marriage. However, this does *not*, as Wolterstorff and the first group of revisionists claim, mean that the Middle Ages usually possessed precisely our, liberal notion of a subjective civil right, never mind of a subjective natural right. Subjectivisation does not

¹⁶ See John Milbank, 'On Complex Space', in *The Word Made Strange: Theology, Language, Culture* (Oxford: Blackwell, 1997), 268-292.

necessarily mean subjective grounding. Michel Villey in fact never denied that even ancient Romans, but more frequently medieval Christians, ‘had rights’. Although he rightly insisted that a *ius* was anciently a ‘thing’ in the sense that it denoted justice as such, *id quod justum est*, he further stressed that the ‘object of justice’ was, according to Ulpian *ius suum cuique tribuere*. Here the *ius* is ‘owned’ in the sense that each person has a proper ‘share’ in the distribution of things (material and ideal) according to justice, in order that they can perform acts appropriate to their assigned roles (following Gaius’s tripartition of the concerns of justice into ‘persons, things, actions’), not in the sense that what ‘belongs’ to one can be known outside this architectonic act of distribution.¹⁸ Yet Villey never denied, as Wolterstorff alleges, that the share in *ius* belonged to the subject, nor that in this sense one can speak of a subject as ‘having a right’. Hence Charles Donahue’s indication, supposedly against Villey, of the 191 cases where Justinian’s *Digest* speaks of *ius habere* and the 103 where it speaks of *ius esse alicui* merely begs the question.¹⁹

For Villey’s point was *not*, as Wolterstorff imagines, after Tierney and Reid, that a *ius* was anciently a ‘thing’ on our modern model of thing as *object* that could only be shared on the model of literal partition. To the contrary, it was a ‘thing’ in the sense of an objective ideality that could be *participated* in, just as, for Plato, a good man who shares in the Good can still be good ‘in his own right’. Nor did Villey suppose that ‘objective ‘right’ meant that rights are, as Wolterstorff has it, ‘incorporeal realities attached to corporeal realities’²⁰ -- to objects, like a piece of land, rather than to subjects -- but rather that all *iura* were ‘objective’ in the sense that

¹⁷ See Ernest Fortin, ‘On the Presumed Medieval Origin of Natural Rights’.

¹⁸ Villey, *Le Droit et Les Droits de L’Homme*, 70-74.

they reflected a ‘right distribution’, a correct placing. ‘Incorporeality’ in Roman law, following the Stoic sense of this term, denotes a certain meaningful ‘interval’ between *either* different things *or* different persons, *or* again between things and persons, that binds them together with the obligatory force of the ideal, although this binding has an instantiation in material practice. Examples according to Villey would be ‘inheritance’ ‘usufruct’, ‘servitude’ ‘obligation’ or ‘ownership’.²¹

It is because (as Villey mentions, though I here elaborate) Aquinas thinks of ownership as the ownership *not* of land itself, but of an incorporeal dimension of land, that he can say first that humans in general own not the essence but merely the usage of things (ST II. II. Q. 66 a.1 resp.) and secondly, that based upon this generic sense of usage, individual humans can more specifically ‘own’ a tract of land or other objects in so far as they procure, dispense with and take care of them, but *not* as regards the usage of this property which *remains* a common possession.(ST II.II Q. 66 a.2 resp.)

Therefore individual human beings *do not own* usage, but human beings in general *only* own usage. This is because Aquinas did not think of the right to buy, sell and manage as material, ‘thingy’ processes, which the law later legitimises (after the manner of modern liberalism), but rather saw these rights as incorporeal relations in which we stand to things which are instrumentally subordinate to a more general guiding incorporeal relationship of humanity as a

¹⁹ Wolterstorff, *Justice*, 58-9;

²⁰ Wolterstorff, *Justice*, 48.

whole to corporeal things as a whole. This relationship is *auto-legitimizing* in accordance to natural law and is merely endorsed and interpreted by civil codes. Hence one can have the 'right to claim' something because of the objective relation in which one is deemed to be situated: child with respect to parent, for example. Charles Reid has rightly stressed that the Middle Ages newly developed the rights of children.²² However, they did so because they regarded such rights as the correlates of the duties of parents towards children and indeed one could argue that, precisely because children's rights are mostly a dead letter if someone else is not performing their duties, that it was *easier* for the Middle Ages to develop notions of children's rights than for modernity, whose paradigm for the possession of rights is the free, fully rational autonomous adult (and with historical precedence male) human subject.

In this instance, the foundation of the right of one party and the duty of another is in objective *ius* and not in the sheerly subjective right of the claimant. Even the right to marry freely is only the right to enter into a relational bond with certain categories of persons and not others and is furthermore the right to enter into a state of continuing reciprocal rights and duties.²³ And it is

21 Villey, *Le Droit et Les Droits de L'Homme*, 74-76.

22 Reid, *Power over the Body, Equality in the Family*, 153-210.

23 Not respect for homosexual people, but fully consistent liberalism leads many in the United States to argue that marriage must be a contract that can be enacted between any adult human being and any other. The exclusion of incestuous relationships from this view is inconsistent and probably will not survive, unless on medical grounds. By comparison, most Europeans are content with 'civil partnerships' for gay people, and a large body of gay opinion itself prefers this option, because they still have a non-liberal preparedness to make judgements about what kinds of relationships between what kinds of people in what circumstances are 'essentially' right. The European view has the advantage that it avoids creating an 'equal rights to marriage law' that is never likely to command the general assent of almost all, despite the fact that this is the necessary basis for good law. The generation of 'culture wars' around legal options in the USA is therefore a good illustration of the way in which foundational subjective rights, rejecting all essentialisms (even

only a right of self-disposal because the New Testament had deemed that marriage was one of two valid ways for the individual to deal with their own sexuality—the other being celibacy. Therefore such a right is not finally traceable to one's own subjectivity standing in isolation, or else to certain merely conventional and contractual (even 'covenantal') relationships in which one stands to other fundamentally monadic subjects. Yet this *is* what distinguishes specifically liberal subjective rights, or else the concept becomes meaningless and we are arguing about nothing.

Indeed, for all that he is a fine legal historian, Charles Reid remarkably misses the real philosophical implication of his researches concerning the right to *contract* marriage in the Middle Ages.²⁴ Such was the high sacramental view of marriage in the West as signifying the union of Christ with his Church that it was regarded as primarily a *de facto* state of free mutual union between a man and a woman. It was precisely the theologically-grounded canon law which upheld the rights of women not to be coerced and insisted (to the *chagrin* of so many noble parents) upon the legitimacy of even clandestine marriage. But in the Reformation and Counter-Reformation era clandestine marriage became mostly illegal and it may well be that that radical reactionary William Shakespeare is mounting an already nostalgically romantic protest against this bleak legal modernism in *Romeo and Juliet*. Indeed England did not follow the continental reformers here and the practice of clandestine marriage lingered on until 1753 (and beyond to the 20th C up till the 1960's, if young persecuted couples could make it to the disputed Scots-English

relatively 'liberal' ones) tend to foster irresolvable civil conflicts.
²⁴ Reid, *Power over the Body*, 55-66

border town of Gretna Green!). But if modernity here restricted the rights of the young to marry, then that was exactly because young people and especially young women came to be regarded as *more* under the quasi-possession of parents within a liberal outlook. Hence the greater medieval freedom of the individual to marry was only a freedom of two *mutually* to enter into what was regarded as an objective ontological condition. What Reid does not seem to realise is that the tolerance of clandestine marriage shows that medieval rights of the subject were *not* grounded in self-possession and therefore were not in any degree tending in the direction of ‘modern human rights’. Rather the reverse: once one has the latter, the ‘right’ of the adult over the child can cancel out the reality of a secret wedding.

Besides rights to claim and to enter into contract, the Middle Ages also recognised rights of exercise. Generally speaking, a *ius* to exercise freely a power as a manager or a judge over certain people or property was regarded, in the phrase still used by Ockham as a *potestas licita*.²⁵ But it was not, as in Ockham’s theorisation of the notion, a right *derived* from *de facto* power, constitutionally legitimated for reasons of guarding the free power of each and everyone. This is precisely the liberal model. The medieval attribution of an ‘exercise right’ was rather a grant to the right kind of person to exercise according to right judgement a certain restricted authority in specific circumstances and with respect to certain *intrinsic relationships* in which he stood to certain other people.

So as Ernest Fortin puts it, medieval rights of subjects ‘were by no means unconditional. They

were contingent on the performance of prior duties and hence forfeitable. Anyone who failed to abide by the law that guarantees them could be deprived of everything to which he was previously entitled: his freedom, his property and in extreme cases his life'. By contrast, modern subjective rights, as Fortin says, are seen as 'absolute, inviolable, imprescriptible, unconditional, inalienable or sacred'.²⁶ Even murderers now often retain their estates and some powers of disposal under the operation of civil rights, while natural rights to life, ownership, belief and welfare are regarded as non-suspendable in any circumstances whatsoever. Subjective rights now cannot be lost because they are held to derive from the very nature of the isolated subject. But such was not the practical (or normally the theoretical) case in the Middle Ages.

Ignoring these considerations, the first group of revisionists, and Wolterstorff in their wake, talk far too much as if the mere attachment of a *ius* to a person was proof of the presence of a 'subjective right' in something approaching the modern liberal sense, even if they sometimes equivocate over this assimilation.²⁷ But by contrast Villey's observation remains valid: *ius* in ancient and medieval law could betoken a valid power to claim, a permission or a right to exercise, but it could equally, when attached to a subject, denote a *restriction* on what he was allowed to do.²⁸ For *ius* up till at least the 13thC meant always the 'objectively right', that which was just, and it was linked to a notion of justice as distribution which meant always measuring the proper situation of persons and things in relation to each other. This was exactly why, as Villey also pointed out, law in this period was a branch of practical philosophy, a matter of

²⁵ Villey, *La Formation*, 257; Wolterstorff, *Justice*, 48.

²⁶ Fortin, 'On the presumed Medieval Origin', 247.

exercising *juris-prudentia* and not a matter of deduction from foundational principles or of applying positive prescriptions in the light of a rigid attachment to precedent.²⁹ It was *liberal* in the sense of exercising a generous flexibility of discernment according to both circumstances and a sense of the transcendent good. But modern liberal law by comparison is rigid both in terms of its contractualist norms and its obeisance to what has been positively prescribed by central sovereign legislation.

In opposing judgement as ‘right order’, Wolterstorff is commendably thorough. He realises that he must also oppose the notion of morality as the search for true human happiness which is equivalent to human beings finding their right way to be within the cosmos. Accordingly, he denies that the Christian imperative to love can be validly regarded as eudaimonistic. This means that charity should rather be regarded as sympathetic and benevolent concern for the other human being in their irreducible singularity and dignity of freedom. For this reason he explicitly endorses sympathy as a valid later translation of *agape* regarded as ‘compassion’ and therefore signs up to ‘sympathy’ along with ‘rights’ as the other founding dimension of modern political economy which is the essence and heart of fully-developed liberalism.³⁰ Indeed it would appear that sympathy and rights belong for him in a mutually confirming circle: through projective or imaginative sympathy with others we accord them rights; but the ‘right’ of the free other should command our compassionate concern.

²⁷ See Reid, ‘The Canonistic Contribution’, 38, n.3.

²⁸ Villey, *Le Droit et les Droits de L’Homme*, 57-104

The coherence of all this I leave in suspense for the moment. What matters for the moment is that Wolterstorff's 'contest of narratives', or his opposition to the Strauss and Villey theses, is the very heart of his book. He is too subtle a thinker to fall into the trap of certain others in his camp of imagining that even to engage with it seriously is to fall into the supposed 'genetic fallacy'. For the question at issue is in part whether modern liberalism either depends upon, or is in hostage to certain unacknowledged theological positions. No one today would be able to see this by pure exercise of the power of reason, because this theological founding is a contingent fact, the result of people thinking in terms which are indebted to a certain religious heritage, linked to certain events, writings and claimed revelations. All the more does one require a genealogy if one claims, like Wolterstorff that we *still* require a Biblical, revealed foundation for liberalism.

Hence he commendably does not shirk the genealogical issue without quite conceding that his whole case stands or falls in relation to it. But given my above reasonings it must so stand or fall. Therefore I begin my more extensive critique of Wolterstorff and his camp with a more detailed account of his attack upon Villey's view that modern liberal subjective rights are rooted in Ockham's nominalism. I am defending Villey rather than Strauss because I agree with the former that modern subjective rights *do* have a medieval root in the Franciscan tradition and do not only emerge with Hobbes and his epoch.

29 Villey, *La Formation de la pensée juridique moderne*, 100-106, 149-176.
 30 Wolterstorff, *Justice*, 218

Wolterstorff concludes that, in the light of the evidence, Villey's account can now be said to be 'indisputably false'.³¹ Yet he never once cites Villey's (untranslated) texts and he omits or distorts several things: the fact that Villey execrates the entire Franciscan tradition of theological-jurisprudential reflection, and not just Ockham; the fact that he sees Renaissance Stoicism as also a contributing influence to liberalism alongside nominalism; the fact that he does, albeit briefly, mention the increasing recognition of 'subjectivity' in Canon Law, and finally the fact already mentioned that he did not see the objectivity of rights in quite the 'thingy' sort of way that Wolterstorff supposes.³²

More specifically: Wolterstorff, along with other critics of Villey, fails to mention that the French scholar recognised that *Aquinas*, even though clearly free of all taint of subjectivism, nonetheless learnt from the Canonical glossators to emphasise human freedom and reciprocity in a way that exceeded the Aristotelian and Roman juridical legacy.³³ Hence, for example, in their wake he allows greater religious and familial rights to slaves and allows also that the objective *ius* to food and shelter can be exercised as a subjective claim. (Wolterstorff's argument that this *ius* is in part subjectively derived even back in Chrysostom lacks any evidential and argumentative warrant.)³⁴ As Villey says, in the wake of Jacques Maritain, these developments accord with a new sense of the 'person' as irreducible to the mere part of a totality. But if the person is now 'more than the whole' then this is precisely because he is all the more seen as constituted through all the relationships in which he stands. It is the unending series of relationships tending towards

³¹ Wolterstorff, *Justice*, 62

³² Villey, *La Formation*, 132-148, 394-432

relationship with God himself which ensure the *essential* place of the individual within the whole. For if, by contrast, as with nominalism, the individual is himself a self-sufficient ‘sovereign’ entity, then he can indeed also be seen as a mere atomic part of a larger natural or artificial singularity. Once more, his merely individual sovereignty must yield before the sovereignty of God, nature or the State. In this way, Villey argued, Aquinas was already ‘modern’ and pointed towards a later increased recognition of the rights of subjects as objectively justifiable.

Therefore Villey recognised here a *third* sort of continuity in the history of right. Even though he considered that liberalism has developed greater freedom and equality in a distorted fashion (including the case of the Iberian Second Scholasticism) he still thought that such a development was inherently in keeping with the thought of Thomas himself, who had further Christianised the Aristotelian and Roman legacy in the wake of Gratian.

So Wolterstorff has badly caricatured his main academic opponent, whom he has evidently not read, despite the fact that articulating this opposition is crucial for his own enterprise. Surely, in justice, he can expect no mercy.....

3. Defence of the Villey Thesis

33 Villey, *La Formation*, 194-5.

34 Wolterstorff, *Justice*, 59-62.

Amongst the first group of revisionists, it is the work of Brian Tierney which is paramount, as Wolterstorff agrees.³⁵ Tierney has led the way in arguing that ‘subjective rights’ in something like our modern sense were already prevalent as far back as the 12thC.

³⁵ Tierney, *The Idea of Natural Rights*.

One should begin by acknowledging, in accordance with much that has already been said, that Tierney is right to say that the terminological and conceptual history here is more complex than has often been allowed. Richard Tuck originally (he has now changed his mind following Tierney's intervention) saw the crucial distinction as lying merely between passive and claim rights on the one hand, and 'active rights' (*ius ad rem*) on the other. A passive right in general is the mere inactive counterpart of someone else's duty. A claim right is more specifically a particular right correlated with a more fundamental *duty* of the community (or its appropriate representatives) to provide whatever the *ius* alludes to (property, exercise of a particular social role, etc.). It allows for active insistence by the possessor of the right but is still reciprocally-speaking passive and so objective: a legal entitlement held to be intrinsically just. An active right (*ius in re*), by contrast, is a possessed right freely to exercise a certain role, wield a certain power (*potestas*) and fulfil a certain presumed capacity (*facultas*). Tuck thought that, on the whole, the early to high Middle Ages did not speak of active or subjective rights which he linked, following Michel Villey and many others, to nominalism--voluntarism. They sometimes but rarely, according to Tuck, spoke of claim rights. (It should be clear that Tuck's position was in fact more simplistic than that of Villey.)³⁶

Against this Tierney shows that, already in the 12th C, civilian glossators linked *ius* with *potestates* and spoke of the right to election of the emperor as both a *facultas* and a *ius*; while

³⁶ Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: CUP, 1979; John Milbank, *Theology and Social Theory*, xxxii, 9-25.

Gratian himself had spoken of the *ius* of the Pope to establish laws.³⁷ They even mentioned *ius naturale* as a faculty or power inherent in human nature's rational capacity, in a manner later echoed by Nicholas of Cusa.³⁸ Tierney points out that Villey was not unaware of this, but thought that Aquinas, by confining *ius* to mean *quod iustum est*, had rectified a Patristic confusion between divinely commanded *lex* and intrinsically just *ius*. He quite rightly says that such an absolute contrast of *lex* and *ius* would have been alien to the Middle Ages -- even though one should mention that Aquinas, *contra* to John Finnis's reading, does place *ius* as dialectically arrived-at equity above *lex* seen as posited and formulated disposition expressing such equity: 'right is the object of justice' says Aquinas and 'law is not the same as right but an expression of right' (ST 2.2 q.57 a.1 resp. and ad 2).

Yet in medieval usage, in the phrases *ius civile* and *ius gentium*, *ius* itself certainly meant inscribed 'law'. And although Aquinas never spoke of *ius naturale* in a subjective sense (this is for him a question of an objectively 'fair pattern of relationships' as Tierney puts it, which the practical intellect apprehends as pertaining in terms of accordance with indemonstrable first principles of the *lex naturalis*, which is only secondarily a habitually exercised mental capacity), Tierney points out that he does speak of *ius domini* (S.T. 2.2.q.62.a.1) and *ius possendi* (S.T. 2.2.q.66.a.5).

Tierney's interpretation of all this important evidence which he has carefully disinterred is,

³⁷ Tierney, *The Idea of Natural Rights*, 13-77; Reid, 'The Canonistic Contribution'

³⁸ Tierney, 234-235.

however, confusing. Really he is involved in a common Christian-American doublethink. For in the end he wants to say that 'human rights' as understood by the United States today (or indeed much of Europe today, under French and American influence) are compatible with Catholic natural law theory. At times this seems to mean that the Canonists were really already liberals and proto-moderns (as in his false assertion that their juridical notions of rational human nature were separable from theological ideas of cosmic harmony, participation and divine grace.) But at other times this seems to mean, quite correctly, that their notion of 'right' remains a non-liberal one embedded in corporatist constitutionalist thinking. But this alternative has, for Tierney, other connotations: Ockham's version of subjective *ius* has nothing to do with his philosophy, Hobbes is a strange aberration and Locke remains loyal to the main lines of medieval constitutional thought, innocent of Hobbes's proto-nihilism. All these conclusions are demonstrably erroneous.

It seems to me that one can save the appearances of Tierney's diligent and admirable researches better than this. Tentatively I would suggest that one can discriminate four different moments regarding medieval *ius*.

First, ecclesial and political administrative anarchy somewhat forced in practice a drift towards a more formal and absolute sense of ownership which affected the meaning of 'right' — as indeed Michel Villey himself suggested.³⁹ Secondly, however, the mere presence of concepts of claim and active exercise does not amount to a fully-fledged doctrine of subjective rights, as we have already seen. It is actually obvious that one can have a power or faculty to do something that is

socially conferred for objective reasons that are still to do with *ius* as partition and the attribution of an objectively ‘incorporeal’ quality of right possession, as Villey diagnosed.⁴⁰

Thus the language of the glossators of Gratian’s *Decretals* is sometimes echoed by Aquinas himself, whom no party to this debate save John Finnis suspect of having a subjective rights doctrine.⁴¹ So, for example, because of one’s position and recognised capacity one could have a *ius* to establish laws but it would be assumed (as indeed Tierney agrees) that one would exercise this capacity according to one’s rational recognition of the law of nature. So it is not the case that free activity alone is sufficient to define subjective rights. Rather, such (modern) rights are *subjectively grounded* -- that is to say, they take their sense not from social recognition in accordance with natural equity, but rather from a natural pre-moral fact, such as the fact of self-ownership, or the contingent *de facto* circumstance of property ownership upon which legitimacy is then positively conferred. Here the right derives *solely* from the *facultus* or *potestas*, as is not the case for the glossators.

As Villey stressed, right is only subjective right when it ceases to be a *relational* matter and becomes something grounded in an isolated individual capacity. And the problem here, as he also suggested, is that such a right, precisely as non-relational, is infinite – we ascribe now a human right to health, but truly to fulfill that right for each and every person would be *impossible*. This rights doctrine tells us nothing about how health-assistance is to be allocated, even though that is

³⁹ Villey, *L Formation*, 248-251.

⁴⁰ See previous section.

the really crucial issue.

And once one projects a right from an individual to humanity as a whole, then the question becomes – who does humanity have rights against? The answer must be either a voluntarist, covenanting God, which helps no-one save religious fanatics, or else (and *always* in practical terms) humanity itself. Humanity itself has the obligation, or rather the collective right to fulfill an in principle infinitely expanding number of rights – rights to education, work, holidays, leisure, access to the countryside, even ‘rights to sunshine’ as Villey laconically noted – infinitely in all perpetuity. So this notion of human rights clearly provides us with no practical ethical guidance. In reality it leads to a state of anarchy which is only ended by an authoritarian power which will arbitrarily promote one set of rights over another – liberal capitalist states the right of property; State socialist authorities the rights to food, health, work and culture. The former will be at the expense of majority economic well-being; the latter at the expense of people’s rights of free association and free choosing of roles and an order of existential priorities.

In the third place, there is the question of theological influence prior to the nominalists. Here Tierney cites links of earlier realist Franciscan theology and the Franciscan-linked thought of Godfrey of Fontaines and Henry of Ghent with subjective rights theory in order to qualify the nominalist link. He does not however seem to realise that the counter to this would be an argument, which indeed Villey already put forward, locating Ockham, etc. within a longer term legacy of Franciscan drift towards voluntarism, logicism and individualism, all undergirded by

41 John Finnis, *Natural Law and Natural Rights* (Oxford: OUP, 1980)

notions of the univocity of being which allow a perfect rational grasp of finite realities in their now supposedly replete reality as finite.

Hence somewhat like Abelard already in the 12thC, Franciscan theologians did tend to stress the conscience in ethics and to regard motivation and intention as private possessions of the conscience. Bonaventure, for example, as Georges de Lagarde noted, reduced the Aristotelian doctrine of distributive justice to an assignment of what is due to each individual *according to their merits*.⁴² He thereby 'de-juridified' the notion of distribution itself, which for the Aristotelian-Roman tradition was at the very heart of the definition of justice. This already opened up the way to regarding 'right' as a matter of obedience to divine precept and after that merely to the obligations consequent upon the agreements which human beings have artificially entered into with each other. And indeed Bonaventure saw human society as a work of art *rather than* a work of nature, in a manner that is quite different from the spirit of Aquinas who rather saw it as both at once.⁴³

The Franciscans had a similarly subjective approach to the question of economic needs, seeing these more as divinely legitimated 'private usages' than did the Dominicans. For the latter, since poverty was a socially-recognised state, and all ownership was derived from socially legitimated *usus*, the Dominican minimal and collective use of material goods was a certain form of ownership which therefore entered into public exchanges and could be considered a legal *ius*.

⁴² Georges de Lagarde, *L Naissance de L'Esprit Laique a Déclin du Moyen Age, III Secteur Social de la Scolastique* (Paris: Éditions Beatrice, 1942), 116-145

The Dominican friar's poverty was not simply 'his', since it was made possible by certain social allowances for certain socio-religious purposes and was moreover not so much a closed univocal finite achievement as a 'way' that opened up the participation of the finite in the infinite. Nor was it a poverty entirely without property, since, as we have just pointed out, following Aristotle and Roman law, any legalised usage is a form of *ius* as *dominium*. Jesus in a minimal way owned the bread he ate and the things he was temporarily lent, while the disciples collectively owned the purse which Judas carried.

But by contrast, the Franciscan friar's mere punctual usage was paradoxically, even though it was a refusal of 'possession', more purely 'his own', according to a supposedly direct divinely mediated grant, since it was regarded as his minimal self-provision for his material needs – outside all social, political and so juridical allocation. Just as, later for Ockham, a *de facto* property owner might 'claim' the recognition of the law as to licit usage,⁴⁴ so, already for Bonaventure, the friar might 'claim' from the Pope a right to material support, since he already, through self-ownership under God, possesses this quasi-right prior to ecclesial recognition.

For this reason Bonaventure, unlike Aquinas, did not regard such bare *usus* as a mode of legal *dominium* (= ownership). Everything the Franciscans apparently owned had to be nominally defined as lent, according to their novel idea of a *simplex usus facti*, a merely factual, rather than legally sanctioned usage. But this apparently more radical dispossession conceals an assumption

43 Lagarde *loc. cit.*

44 Gutmann, 'La Question du Droit Subjective'

that they absolutely owned in a directly and unmediated supernatural way by divine grant, outside social exchange, themselves, their bodies, and their own dispossession or poverty.

As many have noted, the dialectical development of Franciscanism is utterly bizarre and perhaps the most extreme example one could give of the fate of Hegel's beautiful soul, who wrongly imagines that it is 'ethical' to set up an ideal too divorced from reality. Francis taught that his followers should be uneducated and own nothing whatsoever, refusing all power and domination. But when those followers entered the schools, they perforce had to deploy reasoning in favour of gospel simplicity and they perforce had to settle down in one place and therefore required property in order to do so.

This led them into fantastic depths of double hypocrisy. An extreme rationalist reductionism is used to prove the absolutism of the will, in such a way that undoes all classical Christian ideas of metaphysical participation and objective natural law. Equivalently, the dubious idea that poverty is the absolute Christian virtue and proof of love (rather than being a way into charity as Aquinas taught) is only upheld through the ruse that really the Pope owns the Franciscans' property which is not after all property since they merely use it.

Clearly this fiction is an incitement to corruption – for if poverty is guaranteed not by measured teleological use but merely by using what is not your own, one can deceive oneself that one is poor even if the friaries get ever more commodious and luxurious and the meals more and more sumptuous. And that is in part what happened.

But much more crucial than this is the full dialectical twist in the story: if use is detached from ownership, then ownership will be seen as absolute and as legitimate apart from good usage, which previously underwrote both legitimate *dominium* and the *ius utendi*.

This development, along with other Franciscan tendencies to think of the person in terms of power over oneself, as already described, finally gives birth in Ockham to the modern notion of absolute ownership. Here one can do whatever one likes with one's own – whereas in the earlier Middle Ages there were many different degrees and modes of ownership, all linked to what the property was to be used for. As Villey pointed out (see the previous section), subjective *ius* of exercise over property was certainly known in antiquity, but it was always mixed up with objective elements of specific duties and responsibilities. And even though there were anarchic drifts towards contractualism in the Middle Ages, this mixture still in large part held – so, for example, the rights to enjoy a manorial property came along with the obligation to run the manorial court.

In this way, prior to nominalism, Franciscan thought does indeed foreshadow a fully modern sense of subjective right. But this is linked with their tendency to divide will from reason and so to inaugurate a doctrine of surd choice, independent of the lure of reason. This foreshadows fully-fledged voluntarism and is also complexly linked to a metaphysical bent towards elaborating real ontological divisions on the basis of intellectual ones rooted in our mental subjectivity -- a tendency that will in the end result in nominalism.

As Tierney points out, one can find, well before Ockham, the dialectical link between an inalienable but formal power of the will as such and alienability as to possessed content. Thus the Franciscan master Peter John Olivi already saw right as the confirmation of prior absolute possession, marked by the unrestricted power of alienability -- free of the trusts and entails which legitimated most medieval property (and still does much modern property beyond any liberal theoretical accounting).⁴⁵

The question of the limits of alienability already intruded in medieval discussions of a classically-inherited prisoner's dilemma: might even a guilty man condemned to death legitimately try to escape according to the natural law of self-preservation? Aquinas said no -- since real self-concern is tied up with one's position in society and the cosmos (although he allowed that a man *falsely* committed might rightly attempt to flee: ST II.II. Q.69 a.4) Henry of Ghent said yes, since already he had a subjective rights doctrine.⁴⁶ He was not a nominalist, yet his view is nurtured by the philosophical family to which nominalism belongs. Univocalism encourages the sense that one's existence is entirely one's own by right, while the separation of reason from will encourages the sense that there is a 'raw' freedom independent of ends, of which one can never be legitimately robbed.

⁴⁵ Tierney, 39-42.

⁴⁶ Tierney, 78-89

The fourth moment is the Ockhamist one, where *ius* is explicitly grounded in subjective power and capacity. Ockham put the capstone upon his Oxford Franciscan predecessor Duns Scotus's earlier conventionalist modification of the *bonum commune*, his derivation of the second table of the decalogue as both natural and revealed law from divine willed imposition, and, just as crucially, his pre-elaboration of the 'Social Contract' in his view that an *arbitrary* and merely consensually agreed-upon human division of property is permitted by the will of God after the Fall.⁴⁷ It is again typical of the extreme dialectic of the Franciscan 'beautiful soul' that it conceives of the situation in Eden in communistic rather than justly distributist terms as compared with Aquinas (or even, I would argue, Augustine) but then conceives of the legitimate post-fallen situation in far more liberal and proto-capitalist terms than did the Dominicans.⁴⁸

In Ockham's case, as in Scotus's, it is entirely untrue, as Tierney alleges, that his theological reflections on reason and will are not transferred to questions of law and politics. To the contrary, it is completely clear, as Villey argued, that Ockham derived human entitlement based on prior power and possession from a divine entitlement based on absolute power and possession. This tends to legitimate economic and political tyranny, even if, to be sure, the divine will in which humans *should* share is for Ockham a charitable will. Thus even though individual *dominium proprium* proceeds from natural *de facto* possession, in accordance with Ockham's metaphysical foregrounding of power (more fundamental for him than either 'nature'

⁴⁷ Villey,

⁴⁸ In this respect one can now see that Hilaire Belloc and G.K. Chesterton were political thinkers of genius in seeing that 'distributism' was the Thomist opposite of both capitalism and most forms of socialism, since the latter pair have a common Franciscan root. Their work can no longer be in any sense

or ‘will’), an unqualified *ius utendi* as *potestas licita* with respect to ownership proceeds from its recognition by the State to whom an overriding divine power has been delegated.⁴⁹ The absoluteness of three sovereignties: divine, personal and political are here seamlessly conjoined.⁵⁰

It may be insisted that human self-sovereignty as *facultas* or subjective *ius* is still for Ockham to be exercised according to right reason in pursuit of natural justice. However, the latter is itself no longer conceived by him in a teleological fashion, and is instead confined to the recognition and upholding of prior conventional contract. This is undergirded either by purely positive human law, or else by purely positive ‘covenanted’ divine law, since for Ockham even the first table of the Decalogue, never mind the second, is derived from the authority of divine willing in the last instance. On this point the fine American medievalist Francis Oakley agrees with Lagarde and Villey against revisionist readings like that of Marilyn McCord Adams.⁵¹

Even the exhaustive citing of the canonists which Tierney mentions as evidence of Ockham’s dependence on them rather than on his own theology and philosophy itself shows, as Villey noted, a specifically *nominalist* obsession with positive precedent. More crucially, Ockham’s deployment (as opposed to mere definition) of terms like *ius*, *dominium* and *usus* do show a

regarded as eccentric.

49 See Gutmann, ‘Le Droit Subjectif’, 21, 24.

50 See Once more Elshtain, *Sovereignty*, 1-55.

51 Francis Oakley, *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005), 87-109.

nominalist and voluntarist excess beyond anything which the canonists usually envisaged.⁵²

Furthermore, Tierney loses sight of Villey's most decisive point at this juncture. In continuity with Bonaventure and the entire Franciscan political tradition, Ockham starts to *remove* ecclesiastically juridical matters from the sphere of Canonical competence and to transfer these to the competence of the moral theologian.⁵³ He does this by insisting that the only theologically relevant aspect of law concerns the divinely instituted *ius poli* which are the positive commands of revelation plus the indisputable dictates of natural reason, themselves in the end positively grounded in the divine will, as we have already seen. These dictates require us to obey the commands of God our master, to follow the instincts of *oikeoisis* in the natural state, and finally to observe the legitimacy of artificial contracts in the fallen human state. But natural reason *does not* for Ockham suggest that we can infer from natural *relations* between people, and between people and things, the *ends* of these relationships and the proper way of composing them according to a 'right distribution' that is not founded in mere mutual agreement. Yet just this exercise of natural reason was precisely that which, for Aquinas, issued in 'natural law' in the most crucial sense as regards the practice of justice.⁵⁴

This absence of the inherited sense of *ius naturale* is exactly what tends to remove the function of the canonists, which was a *hermeneutic* one: they had to interpret the bearing of doctrine, doctrinal writings and papal decrees upon the practical life of the Church. This was why their

⁵² Oakley, *loc.cit.*; Villey, 251-269; William of Ockham, *Opus Nonaginta Dierum*, ed Goldast (1614) pp. 993-999

function was more than that of simply preaching the word or theologically expounding it according to its correct literal sense. But within Ockham's perspective the theological-juridical task must end at this point of mere declaration of the divinely revealed will. Beyond the exposition of the *ius poli* lies the *ius fori* of human law. But this, within Ockham's social metaphysics, concerns merely the upholding of positive conventions. Hence human law is thoroughly secularised: even within the Church there is no *participation* in divine wisdom through legal enactment. This means that all the relatively worldly aspects of church life -- regarding property and the response to crime for example -- should fall under ordinary legal control. A spiritualised Church can have no rule for the ancient Canonic function.

Such a conclusion can be supported by a consideration which belongs to the 'second school of revision' with respect to historical theories of rupture in the understanding of *ius*. As Michel Bastit points out, canonical legal practice continued to work under older philosophical assumptions, uninflected by nominalism, until at least the 16th C.⁵⁵ When *ius* started to take on a more liberal subjective meaning beyond that point, one of the two decisive influences at work (the other being neo-Stoicism) was indeed theological, rather than canonical. And this theological influence unquestionably had its roots in Franciscan tradition, whose social metaphysics was brought to an extreme point of development in Ockham's writings.

One can add to this list four further ways in which Ockham's political theory was, contra

53 Villey, *La Formation*, 229-223.

54 Villey, *La Formation*, 233.

Tierney, certainly informed by his metaphysical positions. First, in direct accordance with his nominalism he denies in the *Opus Nonaginta Dierum* that a group of persons forms any more than a merely fictional unity: it is a sheer aggregate of *multi homines congregati in unum*.⁵⁶ From this it follows, in keeping with Duns Scotus, that political society emerged only after the Fall though divinely permitted artificial establishment. In direct anticipation of Rousseau even more than Hobbes, Ockham considered that, under a lapsarian dispensation, all power was consensually transferred to an absolutely sovereign centre which then accorded a right of 'licit usage' to the prior factuality of private property. Given the sheer fictionality of the human legal sphere, it became possible, as we have seen, for the Franciscans to claim abstinence from participation in it and to exercise a simple *usus facti* of things, even those this claim in itself had to be recognised and authorised by the Pope as a kind of right, in a shadowy sort of simulacrum of the political process.

Under this nominalist dispensation, the mediation of material things has ceased to carry juridical weight. This accords with a typical position of Franciscan metaphysics, also assumed by Ockham and which provides a second additional point of metaphysical-political linkage in his thought. For many Franciscan thinkers, including Duns Scotus, unlike for Aristotle and Aquinas, matter possessed a 'quasi-form' independently of its shaping by spiritual form itself. This drastic qualification of hylomorphism allowed one to think of 'merely material' things whose form was

55 Michel Bastit, 'Michel Villey et les Ambiguités d'Occam'

56 Bastit 'Michel Villey'; William of Ockham, *Opus Nonaginta Dierum in Opera Politica* Vol I ed. H.S. Offler (Manchester: Manchester UP, 1956), p.366

fluid and in consequence detached from any intrinsic value or purpose.⁵⁷ These things were already objects and paradigmatically objects of possession. Hence the Franciscans might ‘use things’ without forming any bond of attachment to them that must inevitably constitute a form of ‘appropriation’ and so of ‘property’.

Here we come to the third, additional point of connection between Ockham’s metaphysics and his politics. For the usual Papal, Canonical and Dominican outlook, the use of something (whether ‘using something up’ like food or money or using something replenishable like land) was a continuous process in time involving an action defined by its teleological completion (eg nourishment of the body, purchase of goods or alternatively the farming of a piece of owned or rented property). In consequence *usus* involves a certain distinct connectedness of person with an inherently teleological thing which, if licit, one has to describe in terms of ownership, of whatever kind. But for Ockham, who regarded time nominalistically as but a sequence of isolated moments, one can consider the act of using a now non-teleologically inflected *res* in punctual fashion, free from any continuity or teleology. Hence its licitness is not derived from the end in view which must fall within a pattern of communal distribution, but rather from its instantiation of a pre-existing natural potential – for example to eat or to dominate and defend a segment of the earth.⁵⁸ This natural power of appropriation can then be authorised as *unqualified* ownership – the right to do what one one likes with one’s own, irrespective of communal ends. This is the overdetermination of factual ownership by rightful use. Alternatively, since legal

57 Bastit, ‘Michel Villey’, 71.

58 Bastit, ‘Michel Villey’; Ockham, *Opus Nonginta Dierum*, Vol II, pp 573, 586.

possession is merely an enacted fiction, one can allow the merely punctual Franciscan use without possession that is regarded as having no sequentiality, no teleology and no co-determination within a network of human relationships.

Failure to appreciate these subtle points of continuity between Ockham's metaphysics and his politics is less the result of supposed scholarly rigour than of a certain metaphysical 'tone-deafness' of the modern (but not the authentic) Anglo-Saxon mentality.⁵⁹

Fourthly, Ockham subscribed to the Franciscan notion of a charity exercised by a will sundered from reason. This is a more unilateral, less reciprocal, 'bonding' conception of charity which tends to become instrumentalized as 'discipline' and eventually encourages the rise of the biopolitical control of populations by an absolutely sovereign state.⁶⁰ A utilitarian 'do-gooding' is an eventual upshot of the Franciscan approach.

The historical case linking nominalism-voluntarism and modern subjective rights can still therefore stand. Ockham was the first to make fully explicit what had previously been but partially sketched out in earlier Franciscan theory.

⁵⁹ I strongly agree with the intuition of thinkers like Coleridge, Newman, Ruskin and Chesterton that the true English spirit has for many reasons been suppressed. It is far more shown in literature than in philosophy, which is often much more *philosophically* sophisticated.

⁶⁰ See Pierre Rousselot, *The Problem of Love in the Middle Ages*, trans. Alan Vincelette (Milwaukee: Marquette UP 2006), 155-211; Michel Foucault, *The Birth of Biopolitics* trans. Graham Burchell (London: Palgrave Macmillan, 2008).

The above reflections also indicate that we should also take seriously Michel Villey's hesitancy in the face of contemporary talk of 'human rights'. Their buried foundation lies in a questionable theological voluntarism and a questionably atomising metaphysic. In either case the same logic ironically upholds both the absolute negative liberty of the individual and the unrestricted formally-grounded power of the sovereign political power. And only the latter can render the former *operable*, only the latter can effectuate positively the supposedly 'natural' character of rights, whether this naturalness is taken to be 'fallen' (Ockham) or innocent (Rousseau).

4. The Meaning of 'Right' Today

Modern 'rights talk' may, however, often indicate, in false terminology, a true objective *ius* or linked elements of objectively appropriate claims and rights to active (and indeed creative) exercise of a certain role. Often when we speak of rights we are really indicating a more fundamental correlative duty – the duty of the State to provide free health care, for example, alone makes any sense of the right of all to this benefit. Similarly, we are often really indicating respective shares of *ius* within a relational context. The 'rights' of women, for example, if they are more than human rights in general, can only mean the respective shares of objective *ius* which they should be able to receive, claim or exercise in relation to men and children. Where this is forgotten, as it too often is, then the notion of woman's right as self-possession can dialectically rebound into further oppression of women. So if, for example, only women have 'rights' over foetuses, men as men will naturally exercise their implied equivalent rights to have

nothing to do with childbearing or the nurture of children at all.

But all too often rights are, even in practice, accorded a merely subjective foundation. This is probably why we have recently seen that such things as the right not to be tortured can be so readily suspended by absolute sovereignty in the name of liberalism itself. In the emergency of formal regulation, even the most notionally inalienable will be alienated, although this same formality theoretically legitimates our non-consent to such alienation. I suppose that this is 'the terrorist's dilemma' of our continuing Franciscan Middle Ages.

And the point here, is not, as Rowan Williams thinks, in a lecture given last year to the LSE, to try to find an 'absolute' grounding for inalienable human rights.⁶¹ Indeed the very notion that diverse rights are 'absolute' because non-relational is part of the problem, not the solution.

Williams puts forward 'the speaking body' as an adequate ground, since this can include also foetuses and the mentally deficient. But if the point of the speaking body is merely its freedom, and minimally its freedom to be, then there is no real shift as compared to speaking after Rousseau and Kant of the freedom of the adult rational mind. One still faces the problem of the infinite diversity and quantity of demand.

On the whole, Williams speaks in terms of 'the right of the body to speak' according to an

⁶¹ Rowan Williams, 'Religious Faith and Human Rights', on the web at <http://www.archbishopofcanterbury.org/1798>.

unlimited plural diversity. At the end of his talk though, he parenthetically calls himself short and remembers that the body of Christ concerns not the contracting of wills or a Habermasian negative freedom to take part in the public conversation, but rather the peaceful coordination of different human roles for the achievement of a collectively agreed-upon common good. But in that case, what is spoken has to be judged for acceptability by all others and we are back with the classical objective partition of *ius*, not a modern doctrine of subjective right, which is utterly alien to St Paul's Helleno-Judaic approach to the political.⁶²

Similarly, if the body simply *is* our expressed self, as Williams rightly says, and not something we own, then the key characteristic of action is not 'owned' freedom but instead always-already transferred *gift* -- which again must be socially judged for acceptability, as to whether it truly is gift and not rather social poison. There is a strangely lost and yet wilful wistfulness about Williams saying, in effect, to the London School of Economics audience, let us imagine that the modern rights doctrine was built on the idea that we *are* our speaking bodies. For in reality, as he well knows, it was built precisely on the *refusal* of that doctrine, and rather on the idea that a detached willing mind 'owns' first its body and then other bits of the material world – whereas, after Merleau-Ponty, we should inversely see the entire material world as the extension of our own embodiment.⁶³

62 John Milbank, 'Paul Against Biopolitics', in *Theory, Culture and Society* 2008.

63 Maurice Merleau-Ponty, 'The Intertwining – The Chiasm' in *The Visible and the Invisible* trans. Alphonso Lingis (Evanston: Northwestern UP 1968), 130-155.

So precisely the notion of the body which Williams favours as a ground for human rights in fact renders a modern human rights doctrine incoherent and impossible.

Finally, while of course it is important to recognise the *ius* of the irrational, the idea that *all* expressing bodies should be accorded equal rights affords us no hierarchies that might distinguish between the rights of a human baby, a lamb and even a stone. In fact, for Aquinas the *ius* of a pre-ensouled foetus *was* less than that of a foetus at a later stage of ensoulment but still worthy of a strong degree of respect and protection. By contrast, Williams' incoherent hybrid doctrine of modern Catholic respect for 'life' with a modern secular rights doctrine could encourage, against his own desires, conservative as well as liberal hysteria over debates round questions of human and animal biology. As we well know, rival claims over rights of the foetus and adult human beings allow of no dialectical mediation and no real debate. But this is precisely because of the mistaken framing of the debate in terms of subjective rights which are, by definition, unmediated and unmediable.

As against such attempts to salvage rights doctrines, one might suggest that one cannot make more absolute the refusal of torture by appealing merely to 'natural' norms granted civil, legal enforcement. In an emergency the idea that one should not torture because this violates someone's right to control their own bodies or right to avoid pain will seem pretty weak.

Instead one needs some sort of sense of *violation* as is indicated by Pascal Mercier's novel *Night Train to Lisbon* where a doctor saves the life of one of Salazar's torturers, even though he knows

he will continue to torture, and later rescues a woman involved in the resistance from murder by her colleagues, even though he knows that she alone has memorised all their secrets which she will likely be forced to reveal.⁶⁴ Although the doctor is an atheist, what leads him to do these things seems to be a lingering sense that we need, beyond ethics, the fiction of the sacred in order to sustain the sense of a taboo against violation. And of course one can add that ordinary people are not imaginatively moved to action by the merely fictional.

What might constitute, beyond the horizon of subjective rights, an objective sense of violation? One can suggest, in an alternative rendering of Williams' intuition, the idea that our physical weakness is linked to a crucial ultra-sensitivity of touch that is part of what renders us human.⁶⁵ And the idea that to see a face contorted in pain distorts nothing less than a theophany.

One needs then the idea that human beings mediate the material and the spiritual and that they are therefore made 'in the image of God'. In this case the sacredly objective *ius* of the human as such is concerned with the *relative* position of humanity within the created hierarchical ordering of reality. Secular rights notions simply are not strong enough here – because we do not in the end wince at violence against mere nature or mere transgression of a conventional ethical absolute.

Let us hope then that soon we can revive doctrines of objective *ius* that will better protect and

⁶⁴ Pascal Mercier, *Night Train to Lisbon* trans Barbara Hershav (London: Atlantic, 2008).

also help to interrelate and mediate those various good causes which we now try to protect through incoherent notions of 'human rights'.

Then, perhaps, the Dominican Middle Ages of just partition related to hierarchy of virtuous usage can resume its quest for an alternative modernity.

65 See John Milbank and Catherine Pickstock, *Truth in Aquinas* (London: Routledge, 2001), 60-87.