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THE NATURE OF RIGHTS:
MORAL AND POLITICAL ASPECTS OF RIGHTS
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From Objective Right to Subjective Rights:
The Franciscans and the Interest and Will
Conceptions of Rights

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Thirty years ago, Richard Tuck began his inquiry in the history of natural rights theories with a distinction between theories of “active” and theories of “passive” rights. Soon after the publication of the book, Brian Tierney published a paper in which he criticized both Tuck’s rendering of the distinction and his analysis of the medieval history of natural rights theories in terms of it. These criticisms seem to me largely justified. Tuck never replied to his critic, and nobody has taken up the issue since. Yet, I would like to suggest that Tuck was on to something important, even if he failed to describe it adequately.

By saying that Tuck was onto something important, I do not mean that the actual theories as they were formulated by medieval and modern authors can be neatly divided into ‘active’ and ‘passive’ rights theories. Neither do I want to suggest that all writings discussing *ius naturale* in these centuries can be explained unproblematically as partial, if perhaps confused renderings of either theory. That would be to make history much less complex than it actually was. Nevertheless, it is possible to identify certain core ideas that did much of the real work in these writings and continued to do so for a very long time, even if the details diverged extensively, and even if we can trace dramatic shifts in the general outlooks of the theories. We can follow these core ideas to their logical consequences and construct “pure” theories from them. It is the conceptions at the basis of these pure theories that are the focus of this

paper. Historically, many authors have in fact tried to combine the virtues of both theories. Yet since they start from quite different assumptions, and have sharply divergent practical consequences, a philosophical analysis requires that we treat them separately.

The primary interest of focusing on pure versions of these theories is of course philosophical rather than historical. But since a good historical understanding requires philosophical analysis, it should also be of interest to the historian. There is, first, the obvious importance of understanding the subject under investigation. For example, we are often told that in the late Middle Ages we can see a transition from thinking in terms of duties to a language of rights, or from 'objective right' to 'subjective rights'. The problem with such statements is that we are not entirely sure ourselves what exactly makes something into a subjective right, as there are at least two competing theories about what rights are. Here philosophical analysis has to inform historical research. Secondly, as I will try to show in this paper, an analysis of such core ideas in natural rights theories may also help us understand some of the underlying dynamics in the history of natural rights theories. Innovation in the history of ideas is often driven by dissatisfaction with existing solutions to old problems. To the extent that we are able to see clearer what these problems were, we may also be able to see why they frequently remained unsolved for a long time. This is of course not to deny that the primary intention of the authors of these theories may often have been political rather than philosophical. It is only to underline that the logic underlying shared concepts imposes certain constraints on what any author could successfully argue. To construct pure theories from certain core ideas that played an important role in the history of natural rights, then, is nothing more than to attempt to get a grip on some of the constraints on natural rights theorizing imposed by conceptual resources present in the culture in which these theories grew.

Conversely, it is hardly ever recognized that philosophical analysis of rights can also greatly benefit from historical knowledge.¹ Contemporary analytic jurisprudence has witnessed a long debate over the nature of rights. According to proponents of the Will Theory, the distinctive feature of rights is that they bestow some 'freedom', 'control' or 'sovereignty' on the holder of the right. According to the adherents of the Interest Theory, rights protect interests, and this may include modes of protection that the holder of the right is unable to control. Tuck referred to Hart's classic exposition of the Will Theory of rights as a contemporary example of what he called a theory of 'active' rights. Supposedly, then, the theory that Hart sought to refute – the Interest Theory of rights – would be the contemporary equivalent of a theory of 'passive' rights. If Tuck was right, as I believe he was, these different conceptions of rights are as old as theories of rights themselves. But this raises the question what makes both theories into theories of 'rights'. Surely, there must be something more than mere linguistic coincidence to the fact that we use the word 'right' (in the subjective sense) for both these conceptions. Here, historical insight can come to the aid of the analysis of the concept of rights, as I will argue that the answer to the question what unites those two conceptions of rights requires an understanding of the history of natural rights theories.

As straightforward as it may appear at first sight, the idea of continuity between the early theories of natural rights and the contemporary debate over the nature of rights is already a minefield of possible misunderstandings and confusions. First we need to clearly keep in mind that we are concerned with natural rights *theories*. The difficulty here is that both theories incorporate a different notion of what it means to have a right – or, as I will call them, different conceptions of rights. Because of this, one may be tempted to speak of 'passive' rights and 'active' rights as if the relevant distinction is one between different *kinds* of rights.² This would in turn

¹ See Van Duffel 2004, 147–162.

² Tuck's concern was definitely with theories of rights, but some of his formulations made it appear as if different kinds of rights were at stake, and because of

seem to suggest that some of the rights that we know are 'active' while others are 'passive' rights. One reason why this is bound to be confusing is that many of the normative instances that are commonly identified as rights could be subsumed under either theory. In as far as we are concerned with natural rights, however, there is another reason why we should resist the temptation to speak of 'kinds' of rights. As I will explain further, the two natural rights theories are incompatible because they start from different conceptions of what it is to be a right holder which in turn generates incompatible claims on other human beings. Because of this one cannot affirm both theories and be logically consistent. Hence both 'kinds' of natural rights cannot exist simultaneously.

A second possible source of confusion is that, while both the contemporary debate in analytical jurisprudence and the different theories of natural rights include accounts of the nature of rights, there is also a crucial difference between them. The natural rights theories not only define what rights are; they also tell us what rights we have. Accepting either of the two natural rights theories as 'true' carries enormous normative consequences. Will Theory and Interest Theory, on the other hand, are usually presented as analyses of the concept of rights. In fact, upon consideration it is not very clear what is at stake in this debate. The standard way of defending either position has been to show how it can accommodate (most of) the intuitions that people have about the subject, and to discredit the opposing theory by showing its inadequacies in this respect. This may incline one to think that they only aim at summarizing people's intuitions regarding the use of the word 'right'. However, it is clear that this could not possibly be the case, as adherents of both accounts consciously discard certain ways of speaking about rights as improper. Alternatively Will Theory and Interest Theory could be seen as attempts to posit an analytically rigorous concept of rights as a technical term. Either way these analyses, as such, have

this he made himself vulnerable to Tierney's criticism who interpreted the distinction as one of different kinds of rights.

no normative consequences. Whatever else they are: they are certainly not normative theories. Moreover, on the second interpretation it is difficult to see what could count as a criterion for the 'truth' of either.

This gives rise to a third complication. Will Theory and Interest Theory are typically presented as rival theories of the same concept. Accordingly they are (largely) seen as attempts to capture our commonsense understanding of the notion of rights. However, 'our' intuitive understanding of rights did not suddenly arise out of nowhere. It was shaped and molded by a long history of thinking about law and justice. If a case can be made for the presence of two very different natural rights theories throughout this history, it should come as no surprise that our intuitive understanding of rights has also been deeply influenced by the two conceptions of rights at the basis of these natural rights theories. My suggestion is that these conceptions indeed underlie the way we conceive of rights, and that Will Theory and Interest Theory are attempts to capture each of these conceptions. As I have argued elsewhere,³ they are more plausibly construed as explications⁴ of the conceptions of rights that are embedded in each natural rights theory. The fact that they were part of two incompatible natural rights theories would have generated an intuition that they are incompatible. But if they are indeed descriptions of two different conceptions that have become part of the way we understand rights – different 'kinds' of rights, if you will – they are obviously not conflicting accounts of the same concept.

It will become clear that these conceptions cannot be subsumed under a single a broader conception. So the crucial question is what makes both of them into conceptions of rights. I would like to suggest that this question can be solved historically, by looking at the development of natural rights theories. My answer to the question what makes both conceptions into conceptions of rights is embarrassingly simple: it is the fact that they were originally embedded

³ Van Duffel, "The Nature of Rights" (forthcoming ms).

⁴ Carnap 1988, 7–8.

in natural rights theories. I suspect that our ability to identify rights piggybacks on our ability to identify natural rights.⁵ Though the answer is simple, it is also a way of merely pushing back the question: instead of asking what makes both conceptions into conceptions of rights, we should now be asking how we are able to identify both theories as theories of natural rights. One may object that to be able to identify something as a theory of natural rights one needs to know whether it is a theory of rights, and hence one needs to know what rights are. But that is not necessarily the case. We could identify natural rights as what is due to human beings (as a matter of justice) simply because they are human beings. This characterization would also provide a solution to the problem of distinguishing subjective rights from objective right. It suggests that the origin of the distinction may be due to the birth of natural rights theories. Many things could be due to people as a matter of justice (objective right), but only some are due to us simply because of our humanity. The most compelling reason why something should be considered a natural right is, after all, that it is inherent in the nature of human beings. However, if there are indeed two very different theories of natural rights, which contain different conceptions of 'rights', it should be interesting to see whether they share the same (or a similar) conception of what it is to be a human being. If we find that they do, that would provide a strong case for the unity of the natural rights tradition, notwithstanding the fact that we have two very different theories of natural rights. Indeed, my suggestion is that the view of agency at the basis of natural rights theories provides precisely this unity.

To see why this should be the case, it is useful to take a closer look at one of the most important phases in the historical development of natural rights theories: the Franciscan poverty-debate. I

⁵ The discerning reader will notice that further on I identify the Franciscans as adherents of the Will Theory of legal rights. Though their sense of legal was not as 'positivist' as ours, they certainly did not take these rights to be inalienable. This issue is in fact far more complex than I can convey here. Let me just say that I am talking about *our* notion of subjective rights.

should mention at the outset that my concern is not with a supposed Franciscan "origin" of the distinction. I just want to make clear how the distinction was conceptualized. Since it was the Franciscans who assimilated "rights" with *dominium*, they probably were among the first to develop the "will" conception of rights. Ironically, the Franciscans were primarily concerned to argue that they were able to live *without* rights of any kind. But in the very last episode of the debate (or series of debates), William of Ockham felt compelled to argue that they had a different *kind* of rights and, almost in passing, formulated a natural rights theory diametrically opposed to the one formulated by his opponent, pope John XXII. Interestingly, though this theory was supposed to allow the Franciscans to live a life without *dominium*, the dynamics of the theory were such that came to presuppose the same conception of human agency as the theory that took *dominium* to be natural to human beings, or so I will argue.

FRANCISCAN POVERTY AND THE MEANING OF 'DOMINIUM'

The Franciscans were a mendicant order. They vowed to live in poverty. But they understood poverty much broader than simple abstention from worldly riches. Outward poverty was the expression of a more important inward poverty.⁶ One of the pivotal constituents of inward poverty was obedience. Francis asked his followers to "have nothing else to do, except to follow the will of the Lord and to be pleasing to Him." The ultimate form of internal poverty, of 'having nothing proper', was expressed in the vow, which Francis interpreted as the renunciation of one's will: "Indeed let the friars, who are subjects, remember, that for the sake of God they have renounced their own wills. Let them voluntarily serve

⁶ RegNB, 17. Francis's writings are referred to as: "RegNB" for his first rule, "RegB" for the rule that was approved by the pope, "Test" for his testament, followed by the paragraph number. See Francis of Assisi 2008. See also Esser 1975, 60; Brett 1997.

and obey one another, and let them be lesser and subject to all, who are in the same house.”⁷ One of the dangers that Francis never stopped warning the friars from since he saw it as especially at variance with internal poverty, was that they might exalt themselves internally for their way of living. He repeatedly induced the friars to be “meek, peaceable and modest and humble,” and to realize that anything good that they did was worked in them by God. Properly every man is a beggar before God, since all things belong to Him. Francis beseeched the friars to “strive to humble themselves in all things, not to glory nor rejoice in themselves nor to exalt themselves interiorly for the good words and deeds, indeed for no good thing, which God does or says or works in them at any time and through them” and to “[...] recognize that all good things are His.”⁸

Much of Francis’s zeal was directed against the symbols of what has been called ‘the new profit economy’ (for example his total ban on the handling of coins), and there is certainly a great deal of truth in the characterization of the movement as an attempt to retreat from the economic system.⁹ Appreciating the importance of this context, however, should not prevent us from acknowledging the deep religious concerns that converged in the notion of inward poverty. The increased handling of money brought with it changes in human relations and shifts in power, but also increased attachment – attachment that became a focal point in the preaching of Francis because it brought with it an increased this-worldliness and, especially, an increased danger of ‘excessive’ preoccupation with goods.¹⁰ In order to combat the natural inclination towards possessiveness, the psychological attitude of the friars towards the things they used was probably as important a point of attention as the pos-

⁷ RegNB 22; RegB, 10; RegNB, 5; RegNB, 7. For this aspect of Franciscan thought, see Esser 1975, 61, and Brett 1997, 13–18.

⁸ RegB, 3; RegNB, 17.

⁹ The term is Little 1978. Madigan 1997, 567–586, argues for a similar conclusion. For a summary statement Coleman 1988, 607–648.

¹⁰ For this point, see Esser 1975, 69. See e.g. RegNB, 22: “After we have abandoned the world [mundum]...”

sible human relations involved in the claims towards these goods. “Let all the friars beware of themselves, so that the churches, the little poor, little dwellings and everything, which are constructed for them, they do not inwardly receive, unless they be, as befits the holy poverty, which we have promised in the Rule, always dwelling there as strangers and pilgrims.”¹¹ The target of prohibitions of appropriation was in part its psychological effect, both directly and indirectly through its effect on social relations. Poverty was closely associated with having the proper amount of humility, and both are associated with the service of the Lord and with confidence in Him. “Let the friars appropriate nothing for themselves, neither house nor place, nor any thing, and as pilgrims and exiles in this age let them go about for alms confidently, as ones serving the Lord in poverty and humility.”¹²

Again the emphasis on humility and the denunciation of an appropriative stance are both present in Francis’ directive not to resist evil. At the end of his life, large groups of friars were preaching in different parts of Europe, and they were frequently resisted by the local clergy who perceived them as unwelcome competition. The ensuing disputes were often settled by the pope granting the friars permission to preach, sometimes even overruling decisions of local bishops. Francis witnessed this development with dismay, urging the friars not “to seek any letter in the Roman Curia, [...] nor under the appearance of preaching nor because of a persecution of their bodies.”¹³ Important for Francis was the absence of social standing and even self-respect.¹⁴ Though he was not very interested in legal matters, he nevertheless drew implications for the realm of rights: the friars were to abstain from seeking legally enforceable rights. If, after labouring to provide in their subsistence, their pay was not given to them, the friars should “have recourse to the table of the Lord, by asking for alms from door to door.” Francis even in-

¹¹ Test, 2; also RegNB, 17.

¹² RegB, 6; also RegNB, 7.

¹³ RegNB, 14; Test, 2.

¹⁴ E.g. RegB, 2.

structed the brothers not to resist “the evil man.” To the man “who has struck them upon one cheek” they were instructed to offer “even the other.”¹⁵ In a nutshell, and to use a word that Francis himself didn’t use, but that was to become the focal point in future debates about Franciscan way of life, poverty was a total absence of *dominium* in a very broad sense, meaning lack of social status, lack of control in social relations, lack of control over one’s own life, lack of property and lack of enforceable rights.¹⁶

Though we will be primarily interested in the normative sense of *dominium*, it is nevertheless important to keep this wider set of connotations in mind. Legally (and morally) *dominium* also had a range of meanings. In the strictest sense it meant ‘property’ or ‘ownership’. More broadly it could be used for rulership, for legislative authority, and even more broadly for any kind of normative control. In this broadest sense it could become a synonym for *ius*. It was in fact standard for Franciscans to equate *ius* and *dominium*. Having a (legal) right, for them, involved having some kind of normative power. In this sense, the Franciscans seem to have been adherents of the Will Theory of rights. I say ‘legal’ rights because the rights under consideration were those that can give rise to legal proceedings. Though lawyers were perfectly able to distinguish positive and natural law, these rights were not necessarily *merely* positive rights. Arguably, legal rights were often implicitly seen as arising from the exercise of natural rights, as was probably the case for Ockham. All kinds of groups (guilds, corporations of all kinds) were seen to set up small or larger jurisdictions.¹⁷ How could they do this unless they had some kind of natural *dominium*? Even if these practices were not always theoretically analyzed as arising from a normative ability which was inherent in all (or some) adult human beings, it is very plausible that this understanding was somehow implicit in the practice. The Franciscans, however, explicitly denied that human beings must continue to hold, acquire or

¹⁵ Test, 2; RegNB, 7; RegNB, 14, 92.

¹⁶ For this aspect, see especially Brett 1997, 12.

¹⁷ See Black 1984.

exercise *dominium* throughout their lives. They thought it was possible to live without having *dominium*, i.e. without property and without any enforceable or legal rights, so that in this sense, *dominium* was not natural in that it was not inalienable.

NATURAL DOMINIUM

As is well-known, at some point Pope John XXII launched a full-scale attack on the doctrine of Franciscan poverty.¹⁸ In the course of the dispute between him and the recalcitrant friars, John went as far as to claim that Adam, before Eve was born, already had exclusive lordship (*dominium*) of temporal things.¹⁹ This has been hailed by Tuck as one of the first ‘active’ natural rights theories. Around the same time other people also began to describe *dominium* as natural to human beings, or at least a natural by-product of human activity (labor). Two decades earlier, the French Dominican John of Paris argued in a very different context that human labour gave rise to true *dominium*, which is not dependent on human law, and two decades later the German theologian Konrad von Megenberg would do virtually the same.²⁰ It is as if the ideas that were to be canonized by Locke more than three hundred years later were already floating around, as it were, in the fourteenth century. But while the theories that embodied this conception of natural *dominium* have become somewhat more complex through the centuries, our grasp of what it means for someone to naturally have *dominium*, or to naturally be a *dominus* hasn’t progressed. Contemporary natural rights theories that start from this idea have not tried to analyse it at all. It has become common practice to simply take it for granted and to assume that the normative claims one fancies some-

¹⁸ The literature on the debate is vast. Two of the important recent additions are Burr 2001; Mäkinen 2001. Lambert 1998 remains a classic.

¹⁹ John XXII, *Quia vir reprobus*, transl. by John Kilcullen. See <http://www.humanities.mq.edu.au/Ockham/wqvr.html>

²⁰ See John of Paris 1971, 103. On John of Paris, see esp. Coleman 1983, 209–228 and *Ibid.* 1985, 73–100. On Konrad von Megenberg, see Drossbach 1997, 185–187 and Ubl 2000, 304–344.

how follow from it. Political theory has become detached from the philosophical anthropology that once grounded these theories, even if the theories continue to rely implicitly on some of the core inferences that were justified by this underlying philosophical basis. This is why contemporary natural rights theories often appear opaque and why studying the poverty debate is still worthwhile.

Ironically, while John believed that *dominium* was inalienable for human beings, it was the Franciscans (and the Dominicans) who provided the building blocks for understanding that statement. The first step was the idea that human beings have *dominium* over their own proper will. Contrary to animals, rational creatures have freewill. Closely linked with *synderesis* or conscience, it was first of all considered to be a capacity to distinguish good from evil. Secondly, this capacity enables us to ‘control’ (have *dominium* over) our actions. We are not merely pushed about by instincts or impulses, but we are able to reflect upon our desires, choose which of them are worth pursuing and decide for ourselves whether or not to act upon them. The third step involves what to most modern minds (except perhaps to libertarians) must seem a natural fallacy: somehow it was taken as axiomatic that this capacity enables us not only to have *dominium in the sense of control* over our actions, but also to acquire *dominium in the sense of property* over external goods. Clearly there is a shift from a ‘natural’ notion of control (the control over one’s decision making capacities) to a notion of normative control (being able to impose duties upon others by acquiring property). Fallacy or not, it is a thought that is also deeply entrenched in ‘our’ commonsense.

The Franciscans took this notion of control to be natural in the sense of being present in any normal adult, but certainly with respect to property their position was in two crucial respects different from that of a natural rights theory. First, like the overwhelming majority of theorists in those days (including Aquinas) they took property rights to be a product of positive law. Somehow the natural faculty of *dominium* didn’t inevitably result in a capacity to appropriate things in the state of nature, as it does for natural rights theorists. Just as it makes no sense to attempt to pay with a dollar

bill in a society that does not have the institution of money, so the image of a lone discoverer appropriating some newly found piece of land without any “backup” from a legal system at home would probably not have made any sense to them. Second, as already said, the Franciscans did maintain that it was possible for them to stop acquiring property, or even *dominium* in the wider sense of (legal) rights. So *dominium* was not natural in the sense of inalienable, or so they argued.

By the time the debate came to a close, two questions had become prominent: The first was whether the Franciscans could licitly use things belonging to someone else without having a right to use them. The second was whether they could use consumables without having property rights in them. The second question was, to my mind, satisfactorily answered merely by pointing to the fact that children eat the food owned by their parents, or guests at a dinner party eat the food owned by the host without the ownership ever changing hands. To answer the first question, they introduced the notion of a permission, a grace, or a license to use granted by the owner without the user ever having a claim-right defensible in court. The Franciscans claimed that this was precisely their status: anything they used was used “as belonging to another,” which meant that the owner could at any time withdraw the permission given. At no time could the friars ever claim a *right* to use the goods. For example, they could never sue the owner for damages in case he chose to withdraw the permission given to the friars. Again, in my view this reply makes perfect sense.

Nevertheless, Ockham is sometimes charged with having failed to respond adequately to Pope John XXII, particularly to a point made in his last intervention, the bull *Quia vir reprobus*.²¹ John had claimed that when the friars use something, they must use it either justly or unjustly. Since the friars clearly did not wish to claim that they were using these things unjustly, John continued, they must admit that they use it “by right” (*et iure*), since everything that is

²¹ See recently Brett 1997, 56–68. See also Kölmel 1953, 43–44.

done justly is also done by right.²² And hence they must also have a right to the use. This is one of the places where Tierney has traced the reinterpretation of the meaning of *ius* from an originally objective to a subjective sense.²³ But was it a legitimate reinterpretation? To modern minds, and apparently also to Ockham, it seems that the pope's premise is already problematic, as it is not immediately obvious that any act that is not unjust is therefore just *in the legal sense* – even if we can agree that any act is either licit or illicit. This was Ockham's reply. He distinguished three senses of "justice" and argued that the conclusion that any act which is licit is also just would be warranted only when "just" is taken to mean "morally good", which was clearly not the sense that the pope had in mind.²⁴ Jon Robinson pertinently remarked that Pope John XXII had effectively claimed that the spheres of morality and law are co-extensive.²⁵ Since I take it that this is both strongly counter-intuitive and something that the pope would not have been willing to maintain, Ockham's reply again seems effective enough.

Another response, one that Ockham did not give but that seems to fit in the logic of the Franciscan case for a life without *dominium*, would have been to grant that the friars may have had a right to use the goods they were using, but to simply point out (to the opponents of the doctrine of apostolic poverty) that this was not the sense of 'right' the possession of which would endanger the Franciscan case that they could live without acquiring *dominium*. True, the Franciscans themselves equated *dominium* and *ius*, but they might just as well grant the pope his own definition of *ius*. Instead of arguing about the correct definition of the term, it would have been possible for them to merely indicate that even if the friars minor had a right to use in the sense that their actions were licit, it was

²² *Quia vir reprobus* § 65. "By right" is Kilcullen's translation. Brett uses "with right."

²³ See Tierney 1991, 457–466.

²⁴ William of Ockham 2000, 411–413.

²⁵ Robinson 2009, 359–360.

not a right that involved the holder having any *dominium*, and so it did not compromise the Franciscan way of life.

However, suppose for the sake of argument that John XXII would have bitten the bullet and maintained that any action that is not unjust does indeed involve the exercise of a 'right' to do what one does in the sense according to which having a 'right' is equivalent to having *dominium*. This would mean that any licit action of a human being involves the exercise of *dominium*. Brett has emphasized that John's focus was primarily not on *having* but on *doing*.²⁶ As we have seen, this was consistent with the Franciscan (and Dominican) conceptions of the origin of *dominium*, since a human being's primary *dominium* over his or her will in their view resulted in that being having *dominium* over its actions. Elsewhere I have argued that there is indeed a strain of thought in the Western tradition that sees human beings as sovereign beings and that tends to collapse the sphere of morality into the sphere of right.²⁷ To turn John into an early exponent of that tradition, we only need to imagine him as maintaining, in accordance with Aquinas and Franciscan theologians, that adult human beings under normal circumstances have *dominium* over their actions, and to take him as using the notion of *dominium* not merely in the naturalistic sense of control, but also in the sense in which it implies normative control. In fact this seems to have been the position of Hervaeus Natalis, from whom John may have derived his argument. Hervaeus had claimed that actions of those capable of reason were always either just or unjust.²⁸

The reason why this argument, if this is how it should be interpreted, could have been problematic for the Franciscans is that it touches upon an ambiguity in their account of how they managed to use things without ever acquiring *dominium*. In their defenses of their way of life, there are several suggestions as to how they avoided *dominium*, which amount basically to two fundamental

²⁶ Brett 1997, 54.

²⁷ Van Duffel 2004, 147–162.

²⁸ Hervaeus Natalis 2009, 45. See also Brett 1997, 54–56.

answers. The first is a very straightforward proposal: one merely chooses not to acquire *dominium*, either in the form of property or in the more general form of (legal) rights. How does one do this? Simply by disposing of one's property upon entry, by subsequently not accepting any gifts which would result in the attainment of any right or property, and by using only those things the use of which is granted by the owner (again, only in such a way that the friar does not have any right to the use). Franciscan poverty, according to this interpretation, could be seen as consisting of two distinct elements: a set of legal arrangements which made it possible for the friars to live without entitlements on the one hand, and on the other hand a way of life centered on advancing inward or spiritual poverty. The former would have had little to do with the latter apart from being instrumental in furthering humility etc. If this is the correct interpretation of Franciscan poverty, however, accepting John's claim that *dominium* is natural would have completely undermined the Franciscan doctrine. It would not have been possible to abdicate *dominium*, or to claim that one could have licit use without a right of using (and without *dominium* in the thing one used).

There is another, very radical, answer to the question how the Franciscans avoided acquiring *dominium*: it trades on the idea, already formulated by Francis, that the friars had renounced their own will. In his defense of Franciscan poverty, Pecham portrays the surrender of one's will as the ultimate sacrifice, consequential upon the vow of obedience:

He only perfectly abnegates himself who fully renounces his own proper will. For the will is in man's power to such an extent that it cannot be extorted by anyone else. A man can therefore offer God no sacrifice so pleasing as to cut off from himself that which is supremely his own, that is, *dominium* of his own proper will ... This obedience which, keeping nothing of the human to himself, so that the obedient man does not live himself, but Christ in him. (Pecham, *Tractatus pauperis*, quoted in Brett 1997, 13)

Aquinas, in his defense of the mendicant way of life, explicitly connected the *dominium* of one's will with the ability to appropri-

ate external goods. In a passage very similar to that of Pecham, he said that

"nothing is more desirable to man than the liberty of his proper will. For it is by this [the liberty of his own proper will] that he is a man and master [*dominus*] over other things [...] by this even that he is master of his own actions. So that just as the man who relinquishes riches, or persons conjoined to him, denies their being; so he who foregoes the authoritative judgment [*arbitrium*] of his proper will, by which he is master of himself, denies his own being."²⁹

The radical answer to the question how the Franciscans managed to live without *dominium*, then, is to say that they made themselves unable to have *dominium* by giving up the primary *dominium* over their own wills. In doing so, they gave up their legal personality, so that it would not even be possible to confer *dominium* on them, even if one tried. The radicalism of this claim can be seen if we consider that a mere vow would not suffice to give up the *dominium* of one's own will. True, the friars promised to obey their superiors in every aspect of their lives. But continued obedience is not relinquishment of one's will. Indeed, it is a sustained sequence of acts of will: every time the friar is given an order, he must 'decide' to obey. If we take Pecham's quote above at face value, we may see that something else is at stake. The Franciscan practice of habitual obedience, continuous meekness, intensification of humility, and even the cultivation of a loathing of self, may have been directed at a psychological transformation which in effect eradicated the human personality. The obedience which, according to Pecham, "annihilates all of man" would indeed, over time, produce a being without individual will, such that the friar who has achieved the state aimed at "does not live himself, but Christ in him." By relinquishing the *dominium* over their will, they would in effect have eradicated their personhood. Hence the friars sometimes compared their mode of consumption and use of goods

²⁹ Aquinas, *De perfectione spiritualis vitae* ch. XI, quoted in Brett, 1997, 14. A full English translation of the treatise was published in 1902. However, the passage is clearer in Brett's rendering.

to that of a horse grazing in a meadow. The horse never acquires property in anything that it uses or consumes, simply because it is unable to do so.³⁰

Ironically, to the extent that this is an accurate description of the Franciscan answer to the question how to completely avoid *dominium* – I will argue further that it is not – it would entail that they did accept a strong natural rights theory. They would have accepted that *dominium* is natural to human beings (at least in the postlapsarian condition) to such an extent that the only way to avoid it would be to de-humanize oneself. Since the having of *dominium* starts not with external things but with the control of the will over itself and over one's actions, the only way to lose it is to give up this control – and hence to become a brute. If this is accepted, and if one accepts the Franciscan equivalence of *ius* and *dominium*, one has to admit that Pope John XXII was, after all, right when he claimed that any action of human beings is either just or unjust, and that one can only avoid acting unjustly if one has a (legal) right to do the things one does. His only mistake, then, would have been to think that this dichotomy could be applied to the Franciscans. But since the friars were – properly speaking – not in a human condition, none of their actions could aptly be described as either just or unjust.

The idea that human beings naturally have *dominium* is the basis of one of the two natural rights theories. It is beyond the scope of this paper to describe the implications of this suggestion in any detail, but I have suggested elsewhere that it generates something close to contemporary (right-) libertarianism.³¹ For the present purpose, it is sufficient that we have an idea of the underlying views of human agency, and to note that the conception provides a clear-cut criterion for a right to be subjective. To the extent that *ius* is equiv-

³⁰ One reason why we may be inclined to take this construal of Franciscan life seriously is that religious communities such as the Franciscans may have been designed to induce spiritual experiences which include controlled nervous breakdowns. For a colorful description, see Balagangadhara 2005, 994–997.

³¹ Van Duffel 2004, 353–375.

alent to *dominium*, any *ius* is always a *ius* that someone 'has'. *Dominium*, after all, is always the *dominium* of a particular agent. Hence, any complete description of the right essentially includes a reference the agent who has it.

SUBJECTIVE RIGHTS WITHOUT DOMINIUM?

A second natural rights theory (or, if you want, type of natural rights theory) that was gradually developed during the late Middle Ages embodies a different conception of subjective right. Here the idea is not that the agent who has the right is a *dominus*. Even though the connection is a bit less obvious than it is in the theory that equates having a right with having *dominium*, I will suggest that the notion – as it functioned in the natural rights theory from which it emerged – was also closely connected to that of agency. Since the early version of the theory posited entitlements that were in obvious tension with legal rights, it will be especially important to see whether there is anything other than mere linguistic coincidence to the fact that we recognize these entitlements as 'rights', rather than mere moral claims.

The theory I have in mind has a religious and a secular version. The religious version starts from the intuition that God created the earth for the sustenance of each human being, and that each and every one of us therefore has an inclusive right to what is minimally required for one's survival. The antecedents of the theory go back to early Christian thinking, but speculation about the nature of this entitlement in a legal context boomed from the twelfth century onwards. At that time theologians and canon lawyers began to ask whether it would be licit for someone in a state of extreme necessity to take something belonging to another without the latter's consent, if it were the only way to save his life. By the time the poverty debate took off in the middle of the 13th century, there already existed a *quasi* consensus among canon lawyers and theologians that it would indeed be licit for someone to take whatever one needs to survive, even if it belongs to someone else. This "right of necessity" was later adopted as a doctrine of civil law as well, and it re-

mained an almost unanimously accepted principle until the late eighteenth century.³²

Before going into some of the historic details, I wish to bring to attention two important aspects of the right. The first is that it gave rise to an exception to positive law. Individual property was almost universally seen as instituted by positive human law.³³ Natural law was neutral to this institution in the sense that it neither required nor prohibited human societies to have a private property regime. However, there was a consensus that things were ‘common’ according to natural law, not in the sense of common property but in the sense that everybody had by natural law access to the produce of the earth. Positive law could limit this access by instituting individual property rights, but it could not do so to such an extent as to allow people to die from starvation – or, more generally, lack of access to goods – in a situation where there was enough available to save them. One of the common ways of explaining the right of necessity was to say that positive law temporarily ceased to exist in a time of extreme necessity, which would result in a temporary slip back to the state of nature. In such a state, only natural law would be valid, and the dictum “according to natural law all things are common” was interpreted as giving a license to anyone to freely use whatever they needed to survive. This temporary lapse into the state of nature would only last until the necessity ceased, after which existing property rights would regain their normal force. So although the principle was a legal principle (natural law, after all, was law) and could be brought to bear on a case in court, it did not give anyone a right to anything under positive human law. It merely defined one of the limits of human legislation.

Secondly, the right was not considered to imply any *dominium* over the things that people were allowed to use. The right of neces-

³² The best overview is still Couvreur 1961. See also Swanson 1997, 407–408; Mäkinen 2003, 165–180; Mäkinen 2006, 37–62. For a brief overview of the history and additional references, see Van Duffel “Natural Rights to Welfare” (forthcoming ms).

³³ For an excellent overview, see Kilcullen 2000.

sity was sometimes considered continuous with the notion of a natural right to use, which merely allowed everyone to use some unspecified part of the goods created by God for humankind. However, this ‘right’ did not enable one to exclude anyone else from the use. One could compare this to the situation of guests at a party. The host has put plenty of food and drinks on a table which all of the guests are free to use. None of the guests ever acquires either ownership or any right, defensible in court, even to the goods that they have taken on their plates – neither against the host nor against each other. If you and I were guests at the party and I would sneakily have taken a cupcake that was on your plate and that you clearly intended to eat, you would certainly be correct in accusing me of very rude behavior, but you wouldn’t be able to sue me in court for stealing your cupcake (since it wasn’t yours in the first place). Your ‘right’ to use merely indicates that you are doing nothing wrong when taking and consuming any of the drinks or food provided by the host. All this works well as long as there is enough for everyone and the guests are civilized. Or in the imagination of those days: it worked well until humanity got tainted by original sin. After the fall, when human beings became gluttonous and selfish, it became necessary to make distinctions between yours and mine – hence the institution of private property.

The question now is: What allows us to identify this right of use as a right at all? One reason for doubting that it is in fact a ‘real’ right is that it did not entail any duties. The right of use was simply a permission to take whatever one needs. To say that the guests at a dinner party have a right to take and eat the cupcakes provided by the host is simply another way of saying that it is not illicit for them to do so. They have no claim against the host to his serving any cupcakes, or even to his not taking them away, and no duties towards each other to leave any. Similarly, the descendant of the right of use – the right of necessity – was a right on the part of the poor to actually take what they needed to survive, much like the right of self-defense is a right to do what is necessary to protect

yourself from bodily harm.³⁴ It is not immediately clear that it entailed a duty on the part of wealthy people to provide anything. Surely, most Christians would have held that they have such a duty, but that duty was not correlative to the right.

Yet even if the original right of use (in the state of nature) did not entail any duties, the right of necessity (in the fallen state) would presumably entail at least a duty not to interfere with the pauper taking what he needs to survive. The existence of such a duty, however, does not suffice to infer the existence of a right, as we may have duties (like, say, duties regarding animals) which are not correlative to rights. So what, then, is it that makes us recognize this permission to use as a right? There seems no better place to look for an answer to this question than the poverty debate. Despite the fact that the Franciscans were intent on proving that it was possible for them to live without rights, Ockham nevertheless ended up claiming that they did have a natural right to use. In doing so, he made a clear distinction between (legal) rights which entailed *dominium* and the natural right of use which the Franciscans could not possibly renounce. Ockham seemed to have been reluctant to grant that the friars had a right to use the things they used. If we are able to see what made him concede that they had such a right after all, we may also be able to see why it is a right for us.

In the introduction I suggested that the two natural rights theories have a similar view of agency at their basis. But if the radical picture of the Franciscan strategy of avoiding *dominium* is correct, this cannot possibly be the case. According to this picture, the Franciscans would have relinquished their humanity (their freewill) in order to avoid acquiring *dominium*. If, after their renunciation of their humanity, they nevertheless retained a right of use and a right of necessity, these rights could not possibly depend on a conception of agency similar to that on which the other natural rights theory is grounded. In fact there are several independent reasons for doubt-

³⁴ This is why Tuck's terminology of passive rights is unfortunate. In the case of the right of self-defense, the attacker usually has a duty not to inflict harm, but not necessarily so.

ing that the above picture is indeed a true and complete description of the way the Franciscans construed their poverty (apart from the obvious question of how they thought that turning oneself into an irrational would be a way to live a perfect life!).³⁵ Most importantly, it would render the Franciscan preoccupation with restricted use of goods completely unintelligible. If the friars' psychological condition would render them incapable of acquiring any *dominium* and if the perfect life was defined in terms of living without *dominium*, it seems that they would remain perfect no matter how much they were using or consuming. Accepting the picture of renunciation of freewill also renders the centrality of the will in the moral philosophy of people like Duns Scotus incomprehensible, and would make it impossible to make sense of the doctrine which was the focus of heated dispute during one of the several episodes in the poverty debate: Peter John Olivi's doctrine of poor use or *usus pauper*.³⁶

The will, according to Olivi, is capable of self-dominion, and hence of self-restraint: it can stop habitual inclination and move itself towards virtue (or vice). Its superiority to the natural order manifests itself not only in its self-mastery, but also in its ability to free itself from worldly attachments. The state of poverty to which the friars committed themselves was a means for the will to return to the original state of perfect self-mastery which it had lost with the fall.³⁷ Hence, at least in the thought of Olivi, poor life does not seem to be connected to an abnegation of self. Rather, the practice

³⁵ One of the common objections of opponents of the Franciscan doctrine was that even if it were possible, it would be immoral for rational beings to make themselves like irrationals.

³⁶ On the controversy and Olivi's position in general, see especially Burr 1989. See also Burr 2001. On Olivi's doctrine of free will and its relation to Aquinas and Anselm, see Pasnau 1999. The literature on Duns Scotus's thought on free will is vast. For Olivi's influence on Scotus and the relevance of *usus pauper* on the development of his thought on the subject, see Ingham 2008.

³⁷ Ingham 2008, 343. It was a common theme in defenses of the mendicant way of life to portray it as a return to the state of innocence and nobody could deny that *some* kind of *dominium* existed even in that state. For Aquinas, see *Summa theologiae* 2a2ae q. 64. a. 1. For Bonaventura see Mäkinen 2001, 85. For Ockham, see Ockham 2000, 234-240.

of poverty is a way of enhancing the *dominium* of the will over itself and over one's inclinations so as to make it possible to return to the state of the will before innocence was lost. Though Olivi's works were condemned within the order, his influence was nevertheless immense. So Franciscan poverty was certainly not always characterized as implying a renunciation of the *dominium* over one's will. To the extent that it was not, it was possible to construe the ability to have rights that did not imply external *dominium* (in the normative sense) as implied in the ability to control (have *dominium* over) one's will. Though Ockham did not develop this line of reasoning explicitly, it is implicit in the idea of a natural right of using and in the motivation behind the right of extreme necessity, as I shall try to make clear.

Ockham argued that human beings have a natural right to use things, which nobody could licitly renounce. The natural right of using exists for everyone and applies to anything that one is not prohibited from using by any other law (positive human or natural or divine). It existed already before the fall, and continued to exist after the loss of innocence. In the post-lapsarian condition, however, its application could be limited by the institution of private property rights. The permission of a property owner could 'untie' the natural right of using with respect to some thing. If the permission given was revocable, it would give no legal right to use the thing. This was how the friars used temporal goods. The owner (either the donor or the pope) had given them a permission to use these goods, and doing so had 'untied' the natural right of using them. Since the permission was revocable, it gave the friars no legal right to claim the use of these things in court. Only in cases where the friars did not have access to the means of necessity through a donor were they allowed – like anyone else – to use things by the right of necessity. In such cases they could licitly use things belonging to others regardless of whether they had the owner's permission to do so.

At one point in the long argument of the *Work of Ninety Days*, however, Ockham strays from this line of reasoning and claims that the friars do not have any right of using, *not even a natural right*,

except for the time of extreme necessity. Here he explicitly states that outside the time of extreme necessity the brothers only have a permission to use things, not a right.³⁸ My guess is that the context of the texts to which he was responding led Ockham to drift from his usual line of argument. Whatever the reason, it shows us something important about his use of the notion of a right. In general, he seems to have had no qualms to refer to the general permission of using things (given to people by natural law) as a natural right. But at a time when he wanted to insist that the friars did not use by any right (not even a natural right) while using things by the permission of the owner, he still allowed that they had such a right for the time of extreme necessity. This shows that for Ockham – as, I think, for us – it is not a category mistake to call something a right when one refers merely to the permissibility of one's having or doing something, but the intuition that something is a right is stronger when it is protected by duties on the part of others not to interfere with one's having or doing the thing. This raises two questions: First, how do we know whether the permission is in fact a *subjective* right? And second, what explains this difference in the strength of our intuition?

To answer these questions, we need to look at the religious pre-suppositions of the right of necessity. I have argued elsewhere³⁹ that the remarkably stable consensus regarding the right of necessity was based not merely on the idea of a general duty to preserve life, but more specifically on a sense of the purpose of each individual life in God's plan. Each human being has a special role to fulfil in this plan, and God has given us the earth and its produce to enable us to carry out our duty towards Him. Whenever greed drives some to take more than their share and others are left with less than enough to survive, the original right of use overrides existing property rights, because the primary purpose of earthly goods is to allow each of us to fulfil our role in God's plan. The important

³⁸ Ockham 2000, 418–419. In a footnote, John Kilcullen suggests a possibility of resolving the inconsistency, but it seems to me that it cannot be resolved.

³⁹ Van Duffel, "Natural Rights to Welfare" (forthcoming).

thing to notice about this right is that whereas it is ultimately justified by God's intentions, the right facilitates the realization of God's plan by supporting or protecting the ability of human beings to act. And since human beings have the ability to freely choose what to do, God's intentions are only realized through human intentional action. This, I submit, is the origin of the gradual secularization of this natural rights theory, and also of the transition to a theory of subjective rights. The secular version of the theory grounds our having these rights not in God's plan, but in the ability of human beings to develop a plan for their own life.⁴⁰ The process of secularisation from one to the other, however, did not come about only when philosophers started to ground human rights without referring to God. It is a gradual process which has its origin in the very fact that human agency is also at the focus of the religious theory.

I think this background also explains both our intuition that something can be a subjective right even if it is a mere permission, and the contradictory (but false) intuition that rights must entail duties. Rights of this kind enable or protect human action. Hence the intuition that a permission can be a right, since it does enable one to do something that one otherwise could not (licitly) do. In the case of the original right to use (in the state of innocence), a right could also be inclusive without entailing duties, since it was assumed that other human beings would not interfere with one's use of things. Outside the state of innocence, however, most rights that are mere permissions are either protected by a protective perimeter of other, more general, duties not to harm, or else they are quite barren.

CONCLUSION

We can now see what unites both the theories of natural rights: both of them have human action as their focus. If we were to sum-

⁴⁰ The most developed examples of this theory are Gewirth 1978 and Griffin 2008.

marize them in a nutshell, we could say that the theory which descends from the right of necessity claims that human beings must be able to act, whereas the theory that conceptualizes natural rights as *dominium* claims that human action constitutes an area where the will of the being whose action it is must be sovereign. My suggestion is that rights language, as it evolved historically in the West, is supported by these theories in the sense that they underlie our ability to single out certain normative instances as 'rights'.

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