

# Northwestern Journal of International Human Rights

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Volume 2 | Issue 1

Article 2

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Spring 2004

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### Recommended Citation

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## THE IDEA OF NATURAL RIGHTS-ORIGINS AND PERSISTENCE<sup>1</sup>

Brian Tierney\*

¶ 1 As we stand at the opening of a new century, the present status of human rights is, as usual, somewhat precarious and their future in the world unpredictable.<sup>2</sup> There are not only very obvious problems of practical implementation in many parts of the world, but also serious doubts as to whether a Western ideal of human rights can have any universal significance for all peoples. Samuel Huntington, in his *Clash of Civilizations*, presents our modern culture of rights as a Western peculiarity with no resonance for the rest of humanity.<sup>3</sup> Another modern study has the unpromising title, *Human Rights: a Western Construct with Limited Applicability*.<sup>4</sup> At the other extreme a UNESCO report of 1947, referring to the idea of human rights, observed that "its beginnings in the West as well as in the East coincide with the beginnings of philosophy."<sup>5</sup> In the same spirit, Nikolas Gvosdev has discussed the policy of religious toleration pursued by some Chinese and Mongol emperors, including Genghis Khan, as an anticipation of the modern practice of human rights.<sup>6</sup> But it is a mistake to see a concern for rights whenever we encounter policies that we may find morally congenial but that were really based on quite other grounds. Genghis Khan was not really an early champion of human rights. Our modern concept has not always existed everywhere; rather it has its own distinctive history that we shall try to explore, and in its early stages it was indeed a Western history.

¶ 2 Before turning to this early history there is one more aspect of the contemporary situation that I need to mention. Even in the Western world, the original homeland of natural rights thinking, there is no consensus—and sometimes overt skepticism—about the existence and grounding of such rights. Libertarians and communitarians contend fiercely about the merits of their respective positions. Statesmen seem obliged to pay lip service at least to the idea of human rights, but philosophers often take a more skeptical stance. Alasdair MacIntyre, for instance, has declared that "there are no such rights and belief in them is one with belief in witches and in unicorns."<sup>7</sup> He prefers an earlier way of thinking that emphasized

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<sup>1</sup> This paper draws on my earlier writings on natural rights. See BRIAN TIERNEY, *THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625* (1997). In subsequent notes I have referred to this work when it presents original source material from the works of authors discussed in the present article.

<sup>2</sup> I have used the term "natural rights" and "human rights" indifferently. "Human rights" is preferred nowadays because this usage dissociates the idea of universal rights from the particular medieval context where the idea of natural rights first emerged. But the two terms have essentially the same meaning. Natural rights or human rights are rights that inhere in persons by reason of their very humanity.

<sup>3</sup> SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS* (1996).

<sup>4</sup> ADAMANTIA POLLS & PETER SCHWAB, *HUMAN RIGHTS: CULTURAL AND IDEOLOGICAL PERSPECTIVES* 1-18 (1979).

<sup>5</sup> *HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS* 260 (UNESCO ed., 1949).

<sup>6</sup> Nikolas K. Gvosdev, *Finding the Roots of Religions Liberty in the "Asian Tradition"*, 42 *J. CHURCH & ST.* 507-527 (2000).

<sup>7</sup> ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 69 (2d ed. 1984).

the pursuit of virtue rather than the assertion of rights. Another writer complains that the modern emphasis on rights has led to a lack of concern for the common good and to a society marked by "corrosive selfishness."<sup>8</sup>

¶ 3 But the most widespread modern objection to natural rights thinking is derived from cultural relativism or historicism. There are and have been hundreds of human societies. They all have different customs, different values; so, on this argument, there cannot be one set of human rights valid for all of them. Richard Rorty, for instance, has argued that "history goes all the way down," that peoples are irremediably molded in different ways by their different cultures. An historical approach cannot solve all these problems of modern philosophers and social scientists, but it might lead us to address them from a different and perhaps more helpful perspective.

¶ 4 In presenting the origins and early history—a sort of “Ur-history”—of the idea of natural rights, I shall necessarily be describing a Western construct. It is important, therefore, to emphasize at the outset that we shall not be dealing with an inevitable unfolding of ideas always present in the Western psyche or with a sort of predetermined organic growth from Western cultural genes.<sup>9</sup> Western history offered other alternatives. Plato discussed an ideal society without any appeal to natural rights. Moses gave commandments to the children of Israel, not a code of rights. The Christian church has suppressed rights in some contexts as well as affirming them in others. There was nothing inevitable about the emergence of a doctrine of natural rights. To explain how the idea first arose, we need to consider a series of contingent situations that occurred in the course of Western history and try to understand how the various responses to them shaped this new way of thinking.

¶ 5 In pursuing this theme, I came to think that the jurists of the twelfth century, especially the church lawyers, played an important innovatory role. The problem, we shall see, is partly one of juristic semantics, to understand how the little phrase *ius naturale* shifted from an objective to a subjective meaning, how an ancient concept of natural law was reshaped into a modern idea of natural rights. I want to carry the story of origins from the twelfth century down to around 1500 because then an unforeseen event—a new contingency—redirected the course of human rights thinking for the future. I have in mind the European encounter with America and the great debate that it stirred up about the rights of American Indians among Spanish scholars, especially Vitoria and Las Casas and, on the other side, Sepulveda. At that time an ideal of human rights was passionately asserted and vigorously contested. And so it has been through the centuries. Our history can perhaps illustrate both the vitality and the vulnerability of the ideal.

¶ 6 At present, however, there is no agreement among historians about our problem of early origins. Some favor Hobbes as originator, some Grotius, some Gerson. But probably the most widely accepted viewpoint nowadays finds the first formulation of a concept of subjective natural rights in the nominalist philosophy of the late Middle Ages. This argument has been presented most fully in the many books and articles of the French scholar, Michel Villey. Villey contrasted the modern idea of subjective

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<sup>8</sup> The phrase is from ROBERT A. KRAYNAK, *CHRISTIAN FAITH AND MODERN DEMOCRACY* 167 (2001).

<sup>9</sup> On this theme, see the perceptive remarks of Heiner Bielefeldt, “*Western*” Versus “*Islamic*” Human Rights Conceptions?; *A Critique of Cultural Essentialism in the Discussion of Human Rights*, 28 *POL. THEORY* 90-121 (2000).

natural *rights* with an older tradition of objective natural *right*. He pointed out that the Latin phrase *ius naturale* traditionally meant "what is naturally just" or natural law. But a subjective natural right was something quite different. According to Villey, a subjective right was "à faculty, an ability, a liberty to act" or, specifically, "a *power* of the individual." But *ius* understood as law or objective right was a restraint on power. The two concepts were antithetical, radically incompatible with one another, and Villey much preferred the earlier one. Villey was disdainful of all the modern multiplying claims to rights. He wrote that, in a culture of rights, justice becomes "merely a label that we put on our own subjective preferences."<sup>10</sup>

¶ 7 For Villey, the great innovator, the revolutionary who first created a doctrine of subjective rights, was the fourteenth-century Franciscan philosopher, William of Ockham. On this view, Ockham's nominalist philosophy, holding that only individual entities had real existence, naturally led on to an individualistic political theory. So Villey wrote that Ockham was the father of subjective rights and, avoiding all sexist bias in the modern fashion, he also wrote that Ockham's philosophy was the mother of subjective rights. Specifically, Villey held, Ockham instituted a "semantic revolution" when he associated for the first time the two concepts, *ius* and *potestas*, right and power. Villey regarded this as an unfortunate aberration.

¶ 8 An argument rather similar to Villey's was presented in America by Leo Strauss and the group of scholars whom he influenced. In this version, Hobbes takes the place of Ockham as the revolutionary innovator, but Strauss too emphasized a radical opposition between an older doctrine of natural right or natural law that imposed obligation on us, and the modern concept of natural rights that focuses on the self-assertion of the individual.<sup>11</sup> Hobbes did indeed sharply distinguish the two concepts. In the *Leviathan* he wrote, "Law, and Right, differ as much, as Obligation, and Liberty; which in one and the same matter are inconsistent."<sup>12</sup> Yet many late medieval and modern thinkers have considered the concepts of natural law and natural rights as mutually supportive of one another. This leaves us with a problem to which I will return after considering some medieval sources.

¶ 9 It was in reading Villey that I began to think of twelfth-century jurisprudence as a significant source of later natural rights language. Villey held that Ockham made a radical innovation and produced a "hybrid monster" when he defined *ius* (right) as a subjective power (*potestas*). But in fact such language was common in juridical writings—especially among the medieval canonists—for more than a century before Ockham. One canonist, writing on the role of bishops-elect just before 1200, declared simply, "They have a power of administering, that is a right" (*potestas . . . id es ius*). Moreover, the twelfth century provides us with an unusual historical context within which the emergence of an idea of subjective natural rights becomes intelligible. The idea arose, I would argue from the conjunction of a new age of

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<sup>10</sup> See TIERNEY, *supra* note 1, at 21, 28-30 (quoting MICHEL VILLEY, COURS D'HISTOIRE DE LA PHILOSOPHIE DU DROIT (1963)). For a convenient summary of Villey, see Michel Villey, *La genèse du droit subjectif chez Guillaume d'Occam*, 9 ARCHIVES DE PHILOSOPHIE DU DROIT 97-127 (1964); VILLEY, LA FORMATION DE LA PENSEE JURIDIQUE MODERNE (4th ed. 1975).

<sup>11</sup> LEO STRAUSS, NATURAL RIGHT AND HISTORY (1971). In spite of the affinities between their views, the works of Strauss and Villey have seldom been considered together. For a critical discussion of both authors see L. FERRY & A. RENAULT, FROM THE RIGHTS OF MAN TO THE REPUBLICAN IDEA 31-47 (1992).

<sup>12</sup> THOMAS HOBBS, HOBBS' LEVIATHAN 99 (1909).

cultural vitality with a new hermeneutics, a new preoccupation with the old texts of the Western juridical tradition.

¶ 10 The twelfth century was an age of renaissance, of new vitality in many spheres of life and thought. This was the age of the first great gothic cathedrals and the first universities. New networks of commerce grew up and with them a revival of city life. In religious life there was a new emphasis on the individual human person—on individual intention in assessing guilt, individual consent in marriage, individual scrutiny of conscience. And in the everyday life of the time there was an intense concern for rights and liberties. Kings asserted their rights against over-ambitious popes, and bishops—most famously Thomas Becket—defended the rights of the church against powerful kings. Feudal society was a structure of interlocking rights—the rights of lords and vassals in relation to one another. And within feudal society many new communal associations were growing up that claimed specific rights and liberties for their members—city communes and innumerable guilds of merchants and craftsmen. This widespread concern for rights is famously exemplified in the Anglo-American tradition by our cherished Magna Carta. The first clause of Magna Carta declared that, "the English Church shall be free, and shall have all its rights entire."<sup>13</sup> Then the document went on to specify various rights of feudal lords and vassals and of merchants and sometimes of all free Englishmen. The concern for rights, however, was not a peculiarly English phenomenon. There were similar charters in other countries, and in the same year that Magna Carta was issued in England, an influential canonist in Bologna was writing, "No one is to be deprived of his right except for a very grave offense."<sup>14</sup>

¶ 11 For the purpose of our inquiry the most important feature of the twelfth-century renaissance was a great revival of legal studies, centered at first in Italy at Bologna. This was a new civilization, emerging after centuries of near-anarchy. Medieval people valued their rights but, in a still turbulent age, they also felt a need for more adequate systems of law. First, around 1100, came a recovery of the whole corpus of Roman law, then an immensely influential codification of church law in the work known as Gratian's *Decretum* (c. 1140). Canon law will not seem a very exciting study to most modern readers, but the twelfth-century canonists were not merely expounding a fixed body of ecclesiastical norms. They were engaged in a great enterprise, the creation of a new structure of universal jurisprudence for the church where none had existed before. Gratian's *Decretum* was not just a compendium of twelfth-century rules and regulations. It reached back to the church Fathers and the early councils of the church; it presented the juridical life of the church in the world for a thousand years, all included in one volume and equipped with a critical commentary. Medieval intellectuals found the work fascinating and they flocked to the great law schools of Bologna to study it. Soon dozens, then hundreds, of commentaries on the *Decretum* were written—nearly all of them still unpublished and accessible only in medieval manuscripts.

¶ 12 Of course, the rights I have mentioned so far—the kind of rights we find in Magna Carta—were rights of particular persons and classes. We still have to consider how medieval canonists of all

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<sup>13</sup> JAMES CLARK HOLT, *MAGNA CARTA* 449 (2 ed. 1992).

<sup>14</sup> These words are from the Ordinary Gloss of Johannes Teutonicus to the *Decretum* of Gratian. See *DECRETUM GRATIANI . . . UNA CUM GLOSSIS*, gloss ad Dist. 56 c.8 (Venice, 1600).

people became interested in natural rights.<sup>15</sup> It came about like this. The very first chapters of the *Decretum* presented texts that included several different usages of the term *ius naturale*, and sometimes they seemed inconsistent with one another. For instance, Gratian himself wrote that by natural law all property was common. Then he wrote that any human law contrary to natural law was vain and void. So how could the existence of property in the real world, held according to human law, be explained and justified? The early commentators quickly realized that the term *ius naturale* was being used with different meanings in different contexts. The greatest of them, Huguccio (c. 1190), explained to his students: "Not all the examples of *ius naturale* given below refer to the same meaning of *ius naturale* . . . But, lest the mind of some idiot be confused, I will diligently explain them all." And he proceeded to do so—at length.

¶ 13 The important point for us is that, in explaining the various possible senses of *ius naturale*, the jurists found a new meaning that was not really present in their ancient texts. Reading the old texts with minds formed in their new, more personalist, more rights-based culture, they added a new definition. Sometimes they defined natural right in a subjective sense as a power, force, ability or faculty inhering in human persons. These usages did not at first define a doctrine of specific rights. When the canonists wrote of *ius naturale* as a faculty or power they meant primarily an ability rooted in human reason and free will to discern what was right and to act rightly. But once the old concept of natural right was defined in this subjective way the argument could easily lead to the rightful rules of conduct prescribed by natural law or to the licit claims and powers inhering in individuals that we call natural rights. Soon the canonists did begin to argue in this way and to specify some such rights. The first one, a very radical one, was a right of the destitute poor to the necessities of life, even if this meant appropriating for themselves the surplus property of the rich.<sup>16</sup>

¶ 14 In presenting subjective definitions of *ius naturale*, the canonists did not abandon the old meaning of the term as natural justice; rather they were coming to see that an adequate concept of natural justice had to include a concept of individual rights. Nor were the canonists asserting a doctrine of mere selfish individualism. After all, the first words of the *Decretum*, their great law book, were a restatement of the Golden Rule, "Do unto others as you would have them do unto you." Also, the canonists did not contrast individual values with community values. They could have agreed with a modern philosopher, Jacques Maritain, when he wrote that "there is nothing more illusory than to pose the problem of the person and the common good in terms of opposition."<sup>17</sup> Maritain, who saw a relationship of "mutual implication" between individual and community, based his argument on a complex metaphysical theory.<sup>18</sup> The canonists were not metaphysicians but jurists; and so, without any overt philosophizing, they thought long and hard about the many forms of corporate life that were growing up in their society and created a

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<sup>15</sup> For the canonistic texts mentioned in the following discussion see TIERNEY, *supra* note 1, at 58-69.

<sup>16</sup> On the persistence of this doctrine see S.G. Swanson, *The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity*, 18 HIST. POL. THOUGHT 399-459 (1997).

<sup>17</sup> JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 67 (1966).

<sup>18</sup> Using the Aristotelian language of matter and form, Maritain distinguished between "material individuality" and "spiritual personality." *Id.*

subtle and intricate juridical theory of corporation structure that allowed for a play of individual rights within corporate bodies.<sup>19</sup>

¶ 15 Two more important developments of juristic thought occurred in the course of the thirteenth century. Toward the end of the century jurists began to argue that the right to appear and defend oneself before a court of law—what we should call a right to due process—was not just a part of the civil law of particular nations but rather was grounded in the universal natural law. They argued that, just as there was a natural right of self-defense against physical assault, so too there should be a right to defend oneself against legal charges.<sup>20</sup>

¶ 16 The second thirteenth-century development concerned a perennial problem in discussions of natural rights that we have already mentioned. Are claims to natural rights peculiar to Western culture or do such rights belong or should belong to all peoples? In the middle of the thirteenth century, Pope Innocent IV, a great canonist in his own right, faced a similar issue. He asked whether the basic rights to own property and to create licit governments belonged only to Christian peoples or whether even infidels—he had in mind particularly Muslims—could also enjoy these rights. The most extreme papalists of the time held that, since the pope was the representative of God on earth, he was lord of the whole world and, hence, rightful ownership and legitimate jurisdiction could inhere only in those who recognized his authority. Innocent himself was a strong defender of papal power but he would not go so far. Instead, he wrote "God makes his sun to rise on the good and the wicked and he feeds the birds of the air."<sup>21</sup> Accordingly, the pope declared, "ownership, possession and jurisdiction can belong to infidels licitly . . . for these things were made not only for the faithful but for every rational creature."<sup>22</sup> Innocent's text had a significant afterlife. It was often repeated in canonistic commentaries and was eventually adopted by sixteenth-century theologians who defended the rights of American Indians against their Spanish conquerors.

¶ 17 Before leaving the medieval canonists we need to consider one more very important aspect of their thought. In discussing the views of Villey and Strauss, I mentioned a problem inherent in their arguments about natural law and natural rights. If *jus naturale* in its classical sense was a restraint on power, as Villey argued, it could not (without a semantic revolution) also define the subjective right or power inhering in individuals that we encounter in Ockham. In his more pungent language, Hobbes made the same point: "Law is a fetter; Right is freedom, and they differ like contraries."<sup>23</sup> Obviously one cannot derive a freedom from a fetter.<sup>24</sup> The two concepts seem to be, as Hobbes wrote, "irreconcilable." And

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<sup>19</sup> See BRIAN TIERNEY, FOUNDATIONS OF THE CONCILIAR THEORY 100-108 (1998).

<sup>20</sup> On this development see KENNETH PENNINGTON, THE PRINCE AND THE LAW 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION (1993).

<sup>21</sup> Referring to *Matthew* 5:45 and *Matthew* 6: 26 (King James).

<sup>22</sup> INNOCENT IV, COMMENTARIA INNOCENTII . . . SUPER LIBROS QUINQUE DECRETALIUM, Com. ad 3.34.8 (Frankfurt, 1570).

<sup>23</sup> THOMAS HOBBS, DE CIVE 170 (1983).

<sup>24</sup> Nor indeed a fetter from a freedom as some scholars imply when they argue that Hobbes derived natural law from natural right.

yet many medieval and modern thinkers have treated the doctrine of rights as a legitimate development of principles always inherent in the natural law tradition.

¶ 18 The explanation lies in another aspect of the canonists' teaching on *ius naturale*. Adapting a Roman law doctrine that law could be permissive as well as preceptive, they sometimes argued that natural law too did not consist only of restraints on power, commands and prohibitions; it could also define an area of permissiveness where agents were free to act as they chose. According to one of their definitions, *ius naturale* could mean "What is permitted and approved though not commanded or prohibited by any law." Huguccio used this concept of permissive natural law to justify the existence of private property. Common ownership was indeed included in *ius naturale*, as several text of the *Decretum* asserted but, Huguccio argued, only as permission, not as a command of natural law. In this area, humans were free to make other arrangements including the establishment of rights to private property. The canonists were, so to speak, hollowing out a sphere of individual freedom where rights could be exercised within the framework of the old *ius naturale*.<sup>25</sup>

¶ 19 There is a whole history still to be written about the idea of permissive natural law as a ground of natural rights. The idea persisted for several centuries from the twelfth century onward in the writings of such figures as Vitoria, Suarez, and Grotius. Locke, in his turn, referred to "the permissions of the law of nature." Eighteenth-century jurists continued the discussion. Christian Wolff wrote, "the law of nature is called preceptive when it commands us to act; it is called prohibitive when it forbids us to act; it is called permissive when it gives us a right to act."<sup>26</sup> Huguccio could have understood that very well. Even Immanuel Kant appealed to permissive natural law in explaining the origin of individual property.

¶ 20 To return finally to the canonists. It would be incorrect to maintain that their scattered glosses presented any coherent theory of natural rights; the achievement of the *Decretists* was something different; they were creating a language within which a doctrine of rights could be expressed by generations of later thinkers. Their definitions of *ius* as "faculty" or "power" were repeated frequently by jurists and political theorists down to the time of Grotius. And already by 1300 some natural rights were coming to be recognized—the right of the destitute poor that I mentioned, a right of self-defense against physical assault or in a court of law, rights in marriage, even rights of infidels. But this was only a beginning. There was no certainty that the doctrine would persist and become explicit in Western political theory. As it happened, though, new situations arose within which the rights language of the lawyers was preserved and developed.

¶ 21 The next such context, the next contingency, was a great dispute that arose early in the fourteenth century between the pope and the leaders of the Franciscan Order about Franciscan poverty and property. The dispute arose out of the Franciscans' claim that they had abandoned all property "singly and in common" and all right to use property, retaining for themselves only a "bare factual use" of things. The Franciscans further claimed that by living in this fashion they were faithfully imitating the perfect evangelical way of life instituted by Christ and the first apostles. For reasons that are still not clear, Pope

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<sup>25</sup> On the canonistic doctrine of permissive natural law and its subsequent history see Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 J. HIST. IDEAS 381 (2001).

<sup>26</sup> Christian Wolff, *Institutiones Juris Naturae Et Gentium* 24, in CHRISTAIN WOLFF, 26 GESAMMELTE WERKE, abt. 2 (Hildesheim 1969) (1750).



John XXII decided to condemn this doctrine. Perhaps the pope saw that, if the Franciscan claim were true, then the church never had exemplified an evangelical way of life, for it had always owned property. Whatever his motives, in 1323 the pope decreed that henceforth it would be considered heretical to maintain that Christ and the apostles had nothing or that they had no rights in the things that they actually used. In another decree directed against the Franciscans, the pope made the point that there could be no just use of anything without a right of using it. The pope's language ensured that the idea of a right would be at the center of the ensuing debate.

¶ 22 It was this dispute that inspired all the political writings of William of Ockham. In 1328, he joined a group of dissident Franciscans who refused to accept the pope's decrees, and subsequently poured out a flood of works defending the Franciscan position and attacking the pope. These works did make important contributions to the developing idea of natural rights as Villey insisted; but in them Ockham was not embarking on a semantic revolution. He was carrying on an established tradition of juristic discourse, sometimes in new and interesting ways. In his polemical writings Ockham did not refer to his nominalist philosophy but he relied on frequent citations of earlier canonistic texts. Responding to the pope's argument that there could be no just use without a right of using, Ockham took up the canonists' argument about a natural right to the necessities of life. The right that the Franciscans had renounced, he argued, was every kind of worldly right, every right to sue in court, or to own property. But there was also a natural right to use external things that was common to all men and that was derived from nature, not from any human statute; and no one could renounce this right since it was necessary to maintain life. By virtue of this right, Ockham argued, the friars could use justly without having any right derived from human law. "The friars do have a right," he wrote, "namely a natural right."<sup>27</sup>

¶ 23 Ockham first took up the idea of natural rights, I think, just as a debating ploy to respond to a rather forceful argument of John XXII. But, once he had used the idea in this way in his first polemical work, he apparently saw that it had much further potential. In his later works Ockham supplemented his defense of Franciscan poverty with wide-ranging attacks on the whole doctrine of papal absolutism asserted by the pope's supporters, and in doing so he succeeded in turning the old idea of Christian freedom, found in scripture, into an argument for natural rights. According to scripture Christian law was "a law of perfect liberty"; but if the pope possessed a truly absolute power, Ockham argued, the Christian people would be reduced to a state of miserable servitude. To define the limits of papal power he reminded the pope that all just governments existed for the common good, but he also referred repeatedly to the individual natural rights of the subjects, "the rights and liberties conceded by God and nature."<sup>28</sup> It was perhaps the first time that the idea of natural rights had been used to challenge the claims of absolutist government.

¶ 24 I will mention just one more medieval figure, the great French theologian, Jean Gerson who wrote at the time of the conciliar movement for church reform around 1400. Gerson gave a very influential definition of a right as "a faculty or power belonging to anyone according to right reason," and from this he derived a natural right of self-defense against a tyrannical pope and a natural right of liberty through which

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<sup>27</sup> For a more detailed discussion of Ockham's argument with relevant texts see TIERNEY, *supra* note 1, at 118-130.

<sup>28</sup> *Id.* at 182-193.

a Christian could seek his own salvation even in a corrupt church. But Gerson also maintained an ideal of the church as an ordered organic community, a mystical body in theological language. It did not occur to him to oppose individual rights to community values. He cherished both.

¶ 25 So a tradition of natural rights was quite ancient and quite widely diffused in the years around 1500. But by then the tradition was becoming moribund. The debates about natural rights that were going on in the schools of Paris at that time were full of metaphysical subtleties, but they had little to do with any real-life problems. They seem like arguments for the sake of argument, clever intellectuals playing clever intellectual games. For instance, in earlier natural rights theories and then again in those of the seventeenth century it was often asked whether a right to property—dominion—came from natural law or civil law. When John Mair, a leading master of Paris, addressed this question around 1500 he took a deep breath, so to speak, and told his students that, to begin with, there were *eight* kinds of dominion to consider. They were: Dominion of the blessed, dominion of the damned, original dominion, natural dominion, gratuitous dominion, evangelical dominion, civil dominion, and canonical dominion.<sup>29</sup> The students must have been very impressed if not completely baffled. And John Mair was relatively simple for his time. His contemporary, Conrad Summenhart, found no less than twenty-three different kinds of dominion, each with associated rights. The argument goes on and on and as it moves through the endless distinctions and subdistinctions it seems to become ever more remote from any problems of the real world.

¶ 26 This was just the kind of tired late medieval scholasticism that the Renaissance humanists were trying to laugh out of existence. And they might have succeeded. Late scholastic thinkers like John Mair were living in the world of Machiavelli and the "new monarchies," a time when there was more concern for orderly government than for individual rights. Contemporary humanists looked for guidance to the ancient world of Greece and Rome, and there they found arguments for monarchy, and for mixed government and for classical republicanism, but nothing about natural rights. It is perfectly possible to make coherent political theories without this concept and Renaissance writers often did so. There is no more talk of natural rights in More's *Utopia* than in Plato's *Republic*. Perhaps the whole doctrine of natural rights—reduced to a sort of late scholastic word-play, far removed from real life—might have been swept away in the new world of Renaissance humanism.

¶ 27 But a new, unforeseen contingency changed all this—the European discovery of America. Quite suddenly the abstract scholastic discourse became relevant to a great new world historical problem, the possible justifications of colonialism, the rights of indigenous peoples. A great debate arose in Spain, often centered again on the concept of natural rights. Could such rights be truly universal human rights? Or were some people natural slaves as Aristotle had taught? Could rights inhere not only in civilized people like Spaniards but also in idol-worshippers, cannibals, naked savages even?

¶ 28 I can consider only one participant in the debate here so I will choose the most passionate and prolific of them, Bartolomé de las Casas, the great defender of the Indians.<sup>30</sup> Las Casas wrote, in a famous phrase, "All the races of humankind are one." And so, arguing from this conviction, he claimed

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<sup>29</sup> John Mair, Joannis Maioris . . . IN QUARTUM SENTENTIARUM QUAESTIONES, Dist.15 q.10 (Paris, 1519).

<sup>30</sup> For the texts of Las Casas cited in the following discussion see TIERNEY, *supra* note 1, at 272-287.

human rights for the Indians, a right to liberty, a right to own property, a right of self-defense, a right to form their own governments. Las Casas eventually wrote a whole shelf of books in defense of the Indians, but his underlying thought is expressed in just one line from one of them: "They are our brothers, and Christ died for them." But, although Las Casas wrote out of this deep religious commitment, he also saw the need to defend Indian rights in terms of reason and law that could have the widest appeal. Indeed, his work is especially interesting in the present context because he appealed overtly and frequently to the juridical tradition that undergirded the earlier development of natural rights theories. To give just one example, he took up an old maxim of the medieval jurists—*Quod omnes tangit* ("What touches all is to be approved by all")—and used it to prove that Spanish rule in America could be legitimate only if the Indians consented to it, for the matter certainly "touched" them. The quirk in Las Casas' argument was that he applied it to each individual Indian. Where the natural right to liberty was concerned, the consent of a majority could not prejudice the rights of minority individuals withholding consent. The claim of the minority dissenters should prevail. It was an extreme doctrine of individual natural rights. In another context, weaving together a text of Gratian's *Decretum* with one from Thomas Aquinas, Las Casas wrote, "Liberty is a right instilled in man from the beginning."

¶ 29 Las Casas also presented a detailed argument against Aristotle's doctrine of natural slavery, a doctrine that was revived and defended by Sepulveda, a leading adversary of Las Casas in the Indies debates. The Indians were clearly barbarians, Sepulveda argued, and he pointed out, Aristotle had taught that all barbarians were natural slaves. Las Casas responded by distinguishing various senses of the word barbarian. The word could refer to all cruel and merciless people, but in that sense the Spanish were more barbarous than the Indians. People who could not understand each others' language could be called barbarians to one another, but here the Spanish and the Indians were equally barbarians. Sometimes all non-Christian people were classified as barbarians, but again the word did not imply natural slavery for it referred to peoples of high culture like the ancient Greeks and Romans. Finally, Las Casas mentioned one rare kind of human being who might correspond to Aristotle's natural slaves—wild, savage men who lived alone in the forests and mountains like brute animals without any ordered society. Las Casas' argument ended here with a striking conclusion. Even these people, even the most degraded class of humans, were not entirely without rights, he maintained. Specifically they had a right to brotherly kindness and Christian love. It was truly a doctrine of *human* rights that Las Casas presented.

¶ 30 The writings of the Spanish Neoscholastics gave new life to the idea of natural rights. In the following centuries the idea continued to grow in mens' minds and to flourish. New contingencies arose, new contexts within which the idea was applied in new ways—the Wars of Religion in Europe, the English Civil War, and then the American Revolution and the French Revolution. But after that apogee the enthusiasm for natural rights again dwindled away. For Jeremy Bentham all talk of natural rights was nonsense and "nonsense upon stilts." Under the onslaught of legal positivism, cultural relativism, and the formidable challenge of Marxism, the idea of natural rights was abandoned by most jurists and philosophers. But then, finally, in our own time, came the aftermath of World War II and a great revival of the ideal of universal human rights. For a time at least simple-minded cultural relativism seemed inadequate in face of the unthought-of evils of the Nazi regime.

¶ 31 But then, as always in this history, new objections arose. Skeptical philosophers have reminded us that there really is no universal human nature, no "essence" of humanity as Richard Rorty put it, for human rights to inhere in. So we find ourselves in the confused situation that I mentioned at the outset. Perhaps, though, our urhistory can help us a little here. A reading of the early sources will suggest that the idea of natural rights never was necessarily dependant on some now outmoded metaphysical theory of essences. For Huguccio or Ockham or Gerson—as for John Locke in a later age—it was enough that humans have some common characteristics.<sup>31</sup> Surely in all societies people have preferred life to death, freedom to servitude, nutrition to starvation, dignity to humiliation. And human rights claims are one way of addressing these common needs and aspirations of human beings.

¶ 32 We might also learn from our history to appreciate better the wide variety of contexts within which a doctrine of rights could take root and flourish. Medieval society was Christian and Western but in most ways it was more like the society of an underdeveloped country nowadays than like a modern industrial state. We could learn too from medieval authors that individual values and community values do not have to be in conflict with one another. They can exist in a state of synthesis, even of synergy. Medieval people seem to have known intuitively that individuals flourish best in healthy societies. The first right theories were not necessarily in conflict with the communitarian values of traditional societies.

¶ 33 A more widespread recognition and effective implementation of human rights in the future is neither inevitable nor impossible. History throws contingencies at us; the outcome depends on how we respond to them. It is true that the idea of human rights is of Western origin; but that does not mean that it is necessarily irrelevant for everyone else. Huntington's picture of five self-contained civilizations seems over-simplified in an age of globalization. Some modern cultural phenomena are universal. Modern technology is a Western creation, the product of several centuries of distinctively Western development, but it has been eagerly accepted in all parts of the world. A Malay fisherman prefers to put an outboard engine on his boat rather than straining at an oar; he does not care that it comes to him from an alien civilization. It is harder to spread ideas and ideals than to export artifacts; but in modern times, even on the level of political thought and practice, the most ancient oriental civilizations have been molded in part by external influences. China imported Marxism from the West; India and Japan derived their constitutional structures from Britain and America. Moreover, all the great world religions have taught respect for the value and dignity of human life, and this is the only necessary grounding for a doctrine of universal rights. So it is possible that the ethical norms of various other cultures might be transposed into our Western idiom of human rights and even that this might be of value to the human race. Perhaps we in the West tend to exaggerate the range of rights that should be considered truly universal; certainly we cannot "put a label" on all our Western preferences and call them universal rights. But if we continue to cherish a few core rights that really do respond to the common needs of humanity we might still hope to ameliorate, to some extent, the condition of humankind in the coming centuries.

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<sup>31</sup> Alison Renteln has pointed out that the evidence of anthropological relativism does not exclude the possibility that they may be cross-cultural universals. ALISON RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 98 (1990).

