

Ethics of Property, Ethics of Poverty

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*It is surprisingly difficult to justify private property. Two questions are at stake: (a) a metaphysical and juridical one concerning the nature of property and (b) an ethical one concerning our attitude toward wealth. This issue reached an unprecedented importance during the 12th and 13th centuries as a new moral ideal emerged. This essay analyses the controversy (with emphasis on Bonaventure's Defense of the Mendicants) by first locating it in relation to the philosophical and theological authorities as well as Roman law. It argues that the dispute between the defenders of *paupertas altissima* and their opponents concerns the limit of the law. Gerard of Abbeville and John XXII saw a contradiction in a right to use that would exclude ownership. Yet, what the Franciscans were seeking was use without right. To relate to the world as something that is essentially inappropriable is to seek a form of life (a rule) prior to the law. Centuries after, such a possibility remains to be discovered.*

For most contemporaries, private property is so unquestionable a principle that the idea of probing its validity or inquiring into its foundation seems sacrilegious. As for the possibility of voluntarily renouncing it, it is barely imaginable. Yet, although it is difficult to imagine life without private property, it is surprisingly difficult to justify it. It is often assumed that property is natural and necessary for the well-being of individuals and the maintenance of social order. This alleged naturalness would turn it into an inalienable right while its alleged necessity would turn its effects into social goods. Without it, wouldn't we feel deprived? Wouldn't we lose any motivation to act or work? Wouldn't we lose our sense of responsibility? Wouldn't society cease to function? Yet, the urgency with which we run to the defense of property and proclaim it an undeniable requirement, a just institution, and a moral good betrays some uneasiness.

This issue reached an unprecedented importance during the 12th and 13th centuries as a new moral ideal appeared, an ethics of dispossession—*paupertas altissima*. It is often said that the late medieval period saw the birth of claims to individual private rights.¹ While this is probably true, we must also observe that it occurred in a context of profound questioning and contestation. What's more, this was not a purely speculative debate; at least for some, it became a form of life. Finally, the issue had a political impact: it entailed a critique of the clergy's lavish lifestyle and the tendency of the Church, arguably the first international corporation, to amass riches.²

¹ Christopher Pierson, *Just Property, A History in the Latin West*, Vol. 1: *Wealth, Virtue, and the Law*, (Oxford: Oxford University Press, 2013), 96. Pierson's work is essential to the study of this question, and the present essay is indebted to it.

² Marsilius of Padua offers a strong support to the "perfection of poverty" championed by the Franciscan order and a very explicit condemnation of clerical and papal abuses. According to Marsilius, the members of the episcopate "have a burning desire for pleasures, vanities, temporal possessions, and secular rulership, and they pursue and attain these objectives with all their energies not by rightful means, but by wrongdoing both secret and open." Marsilius of Padua, *The Defender of the Peace (Defensor Pacis)*, trans. A. Gewirth (New York: Harper, 1956), 185.

The debate engages two different questions, which, for being interwoven, are nevertheless distinct: (a) a metaphysical and juridical question concerning the nature and justification of property and (b) an ethical question concerning wealth and our attitude toward it. At stake are notions such as “dominion,” “possession,” “use,” “proper,” “common,” and “poverty” which, *prima facie*, are quite ordinary and readily understood, yet prove particularly difficult to delineate with precision. Some contemporary legal scholars have argued that the transition from the traditional sense of property as involving *materials* to the modern conception that sees property as a “*bundle of rights*” that includes intangibles (e.g., intellectual property, copyrights, and promissory notes) has led to the disintegration of the notion. Thomas Grey, who defends the so-called “eliminative position,” declares that, ultimately, property “ceases to be an important category in legal and political theory.”³ The notion would now be replaced by a multiplicity of specialized conceptions that do not overlap and even conflict in some cases. Depending on the circumstances, rights and obligations vary greatly: for instance, one who possesses intellectual property doesn’t have the same rights as one who owns a house.

However, even if it is so for attorneys and businessmen in the ordinary course of their practice, a fundamental philosophical issue remains. How should we relate to the things in the natural world? Who can have property? What rights do I have to claim anything as mine? What conception of humanity is assumed in *homo possessor*? To subject things to my dominion, I must in the first place be a subject; there is no “mine” if I am not an “I.” Thus, in order to claim ownership, I must stand over and against the other beings that populate the world. What is at stake is an ethical question in the most basic sense: it is a matter of ethos, that is to say, of life form.

To make sense of the medieval debate, it is important to first understand its theoretical background. Despite their divergence, medieval thinkers share a conceptual vocabulary that articulates a vast set of ideas, distinctions, and assumptions that forms a common framework. I will begin this essay by tracing the parameters within which the debate occurred, focusing on three authoritative sources: Scripture, Roman law, and the ancient philosophical tradition. In the second part, I will analyze the justification of property as it is articulated in particular by Augustine and Aquinas. Their thought ended up being the dominant and “official” doctrine—although it is not devoid of ambiguities and uneasiness. Finally, I will conclude with the challenge raised by the Franciscan controversy on the status of the mendicant orders and the debate on poverty in which Bonaventure played a key role. My hope is that by rediscovering the arguments in favor of *paupertas altissima* contemporary readers will, at the least, notice the strangeness of our ordinary relation to the world and the entities that constitute it.

I: Authorities and Foundational Narratives

Medieval philosophy operates within a circle of recognized authorities and authoritative texts the command of which was essential to the training of a university Master. Medieval legal

³ Thomas Grey, “The Disintegration of Property,” in J. Roland Pennock and J. Chapman eds., *Nomos XXII: Property* (New York: New York University Press, 1980), 81.

theory is no exception. On the issue of property, medieval thinkers appealed to three major sources: Scripture, Roman legal theory, and the ancient pagan philosophers (the knowledge of which varied greatly depending on what was available to scholars at different times). These authorities, however, do not offer an unambiguous teaching nor are they necessarily in agreement with each other. In this matter, too, philosophy is inseparable from hermeneutics and innovation doesn't occur without interpretation.

The primary task of the Church Fathers during the first five centuries of the Common Era was to define Christianity by determining what is *canonical* (what counts as Scripture) and what is *orthodox* (what Scripture means). What then, according to Scripture, should be the proper relation of a Christian to property? As Pierson puts it “among those texts which were seen as more or less unproblematically of divine inspiration (those works which became a part of the New Testament canon), the message on property seemed troublingly ambiguous.”⁴ In multiple occurrences, Jesus expresses contempt for riches while the poor are promised the kingdom of God (Luke, 6:20). Three Gospels (Mark, Matthew, and Luke) recount the story of a young and wealthy man anxious to know how he may receive eternal life. Obedience to the Old Law is not sufficient; rather, Jesus commands him to “sell whatsoever thou hast, and give to the poor, and thou shall have treasure in heaven.” Then, in response to the astonishment of his disciples, Jesus, famously, declares: “Jesus looked around at his disciples and said to them, ‘How hard it will be for rich people to enter the Kingdom of God! . . . It is much harder for a rich person to enter the Kingdom of God than for a camel to go through the eye of a needle.’” (Mark, 10: 23, 25).⁵ This claim goes much further than promoting an ethics of giving; this is an exhortation to *abandon* wealth and shed earthly goods as one would an unnecessary burden. The story can also be read along with Luke, 14: 26: “Those who come to me cannot be my disciples unless they love me more than they love father and mother, wife and children, brothers and sisters, and themselves as well.” On this account, property is associated with sinfulness and is irreconcilable with a godly life; salvation and wealth are simply incompatible. In a striking formula, James declares: “Your riches have rotted away, and your clothes have been eaten by moths. Your gold and silver are covered with rust, and this rust will be a witness against you and will eat up your flesh like fire. You have piled up riches in these last days.” (James, 5.2-3). Greed is not just morally reprehensible; according to Tertullian, it has its source in the sin of covetousness which is the “root of all evil.”⁶

Those who embrace an apocalyptic narrative are keen to stress these passages that agree with Jesus' claim according to which the end of the world will come within his generation (Luke, 21:32). If the end of times is imminent, it is pointless to cling to impermanent possessions. This abnegation of wealth expresses a general resentment against the world—a profane world of sin—which separates us from the promised kingdom of God. Thus, Augustine mentions that “Cain, whose name means ‘possession,’ is the founder of the earthy city. This indicates that this city has

⁴ Pierson, *Just Property*, 59.

⁵ All biblical translations New Revised Standard Version (Philadelphia: American Bible Society, 1997).

⁶ Tertullian, *De idolatria*, *Critical Text*, translation, and commentary J. H. Waszink and J. C. M. van Winden (Leiden: Brill, 1987), 41.

its beginning and end on this earth, where there is no hope of anything beyond what can be seen in this world.”⁷ Even Augustine, however, didn’t hold this interpretation throughout his career and at times expressed a more conciliatory position.⁸

Another essential Scriptural text on the question of property, the *Acts of the Apostles*, indicates that the early Church at Jerusalem held property in common:

A multitude of them that believed who were of one heart and of one soul; neither said any of them that aught of the things which he possessed was his own, but they had all things in common. Neither was there any among them that lacked: for as many as were possessors of lands or houses sold them and brought the prices of the things that were sold and laid them down at the apostles’ feet; and distribution was made unto every man according as he had need (Acts, 4:32, 34).

This practice of communal property contributed to the transformation of a “multitude” into a community of “one heart and of one soul.”

The positive relation one has to what she owns presupposes a foundational act of appropriation which, by definition, excludes others. When property becomes private, others must be deprived. Even common property, by granting right of use to the members of a specific community, wards members of other communities off it. To own is *ipso facto* to exclude and to exclude even those who have a greater need. Without this act of exclusion property could not occur. One possible way of reconciling the rejection of wealth advocated in the Gospels with the practices of ordinary life or the material owned by the Church is to argue that in order to flee from the approaching ruin of this world, a rich man should give up his wealth to the “celestial treasury” since God is the only true possessor of all wealth.⁹ While the ultimate goal is the City of God, we live in the earthly city and in this world to endow the Church is to give back to God.

If medieval thinking on property operates within the framework of Scriptural teachings, its juridical apparatus, however, is mostly derived from Roman law, particularly the *Corpus Juris Civilis*, a legal compendium composed in the 6th century under the rule of the Eastern Roman Emperor Justinian. The basic distinction between *iuris civilis* (which governs citizens), *iuris gentium* (the law of nations or people which governs foreigners and citizen alike), and *iuris*

⁷ Augustine, *City of God, Against the Pagans* (XV, 17), trans. Henry Bettenson (London: Penguin Random House, 2003), 191.

⁸ In *Letter 157* (dated 414) Augustine reinterprets Mark 10:25 to simply mean that with God all things are possible—thus, with God’s help, camels can, presumably, go through the eye of a needle. “Let the rich hearken to this: ‘what is impossible for man is easy for God,’ and whether they retain their riches and do good work by means of them, or enter the kingdom of heaven by selling them and distributing them to provide for the needs of the poor, let them attribute their good work to the grace of God, not to their own strength.” Augustine, *Letters Volume III* (131-164), trans. W. Parsons (Washington DC: Catholic University of America, 1953), 344.

⁹ See David Ganz, “The Ideology of Sharing: Apostolic Community and Ecclesiastical Property in the Early Middle Ages” in *Property and Power in the Early Middle Ages*, Wendy Davies and Paul Fouracre, eds. (Cambridge: Cambridge University Press, 1995), 17-30.

naturale (natural law, the source of the other two) is at the heart of the ancient Roman thinking about property.¹⁰ This distinction articulates the legal apparatus in terms of spontaneous and conventional, untaught and taught, universal and particular, but also, and importantly, in terms of original and derivative. The *Institutes of Justinian* declares that “natural law is clearly the older, having been instituted by nature at the first origin of mankind, whereas civil laws came into existence when states began to be founded, magistrates to be created, and laws to be written” (*Institutes*, II, 1, 11).¹¹ Accordingly, the task of the jurist is to bring the civil law in agreement with the natural law. At what point then does property arise for the first time? Can it be traced back to the root of all laws? Does it belong to the natural order of things? Does it occur through rational nature (*iuris gentium*)? Or is it merely the result of a particular civil agreement (*iuris civilis*)? In accord with the genealogical order that derives civil from natural, the *Digest* defends a version of the natural origin of property thesis:

The younger Nerva says that the ownership of things originated in *natural possession* and that a relic thereof survives in the attitude to those things which are taken on land, sea, or in the air; for such things forthwith become the property of those who first take possession of them. In like manner, things captured in war, islands arising in the sea, germs, stones, pearls found on the seashore become the property of him who first takes possession of them.¹²

Property is “natural” not because people have an innate right to own things, but in the sense that whatever nature produces has no *initial* owner. In the state of nature, all land is no man’s land, and it is this *absence* of original property that justifies the initial act of acquisition; it is because it belongs to no one that one can justly claim that a thing is one’s own. Nature provides; to take from it is to receive its gifts. Surprisingly perhaps, the *Digest* places in the same category things found on the ground and “things captured in war” even though in the second case whatever is captured is taken by force from someone who, presumably, was entitled to it. The two instances were nevertheless assimilated on the ground that war cancels civil laws and thus returns things to a state of nature.¹³

The basic form of appropriation is *occupatio*, the acquisition of ownership of a *res nullius* (nobody’s property) by taking physical control of it. This, as we saw, assumes that things are originally available to all and anyone. Some medieval thinkers, however, doubted that this initial

¹⁰ While Gaius and Ulpian were near contemporaries (2nd century CE), Gaius drew a twofold distinction between *civile* and *gentium*. It is Ulpian who made the above-mentioned tripartite distinction, defining *iuris naturale* as “that which nature has taught to all animals; for it is not a law specific to mankind but common to all animals.” It includes self-defense against aggression, sexual union, procreation, and rearing of the young (See Pierson, *Just Property*, 80-81). *Naturale* and *gentium*, however, were often used interchangeably.

¹¹ *The Institutes of Justinian*, trans. J. B. Moynes, 4th edition (Oxford: Clarendon Press, 1906), 37.

¹² *The Digest of Justinian*, Volume IV, (41. 2. 1), ed. and trans. Alan Watson (Philadelphia: University of Pennsylvania Press, 2009), 16.

¹³ During Roman history, there was some uncertainty as to whether the booty goes to the individual who captured it or to the state. See Alan Watson, *The Law of Property in the Later Roman Republic* (Oxford: Oxford University Press, 1968), 64.

occupatio is enough to justify dominion. Thus, in *Ordinatio* IV, Scotus declares that, although “in the natural state he who first finds a thing necessarily might use it as far as he needed it,” this doesn’t show that in the natural state there is distinct dominium. “Occupancy referred only to common use.”¹⁴ A secondary mode of acquiring property is by *traditio*, i.e., through the delivery of possession with the intention of passing ownership by giving, bequeathing, selling, and the like. The main difference between *occupatio* and *traditio* is that in the second case the thing already had the status of a property; it is the owner who changes. Thus, what is passed on is not simply a (movable or immovable) object but a *legal title*. To signify the transfer of this incorporeal title, a ceremony was often required (at least in cases of *res mancipi* or things held as particularly valuable) in order to mark symbolically that it is *ownership* itself, and not simply the object, that is transmitted.¹⁵

To own something entails having *dominium* over it; the converse, however, is not necessarily true. In general, the notion of *dominium* connotes the power that a dominant entity exercises over a subjugated being. But the meaning of *dominium* varies according to the kind of things it applies to and, despite its name, it was probably never taken to be truly “absolute.”¹⁶ The Justinian Code, for instance, not only never advocated the *ius utendi et abutendi* (the so-called “right to use and abuse”) but on the contrary declares that it is in the interest of the commonwealth that no one shall make ill use of their property.¹⁷ Thus, Ockham defined dominium in the narrow sense as signifying that the holder “may treat it [a good] in any way not forbidden by natural law.”¹⁸

According to J. Coleman, “in the twelfth and thirteenth century there was a blurring of a distinction that had been crucial to the Romans between holding office and owning property. This confusion of office and ownership paralleled a comparable development in secular political life and is reflected in their use of the single word *dominium* to denote both proprietary right and governmental authority.”¹⁹ While a Roman jurist would have used “*dominium*” to denote property rights alone, as Coleman observes, it is significant that modern English speakers understand “dominion” as denoting governmental authority.

¹⁴ Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: Peeters, 2001), 137.

¹⁵ Watson mentions that classical law required five witnesses, all Roman citizens of full age, who held a bronze scale. The transferee grasped with his hand the thing to be mancipated (unless land), struck the scale with a bronze ingot, and gave it to the transferor as a symbolic price (Watson, *Law of Property*, 16-17).

¹⁶ Peter Birks, “The Roman Law Concept of Dominium and the idea of Absolute Ownership,” *Acta Juridica* 1 (1985): 1-37. The idea of limiting something absolute is, literally, a contradiction: whatever is absolute doesn’t admit of degrees. “Absolute” should therefore be understood in a looser sense. It is possible to consider that while one’s right to own something is “absolute” in the sense that, so long as rightful ownership can be established, it is not to be challenged; however, the *use* one makes of what is rightfully one’s own remains bound by social norms. Max Radin talks of *dominium* as a “complex of privileges rather than claims.” Max Radin, “Fundamental Concepts of the Roman Law,” *California Law Review* 13.3 (1925): 211.

¹⁷ “*Expedit enim rei publicae nequis re sua male utatur.*” *Institutes* 1.8.2. Latin text: <http://www.thelatinlibrary.com/justinian/institutes1.shtml#i:viii>.

¹⁸ William of Ockham, *The Work of Ninety Days*, trans. J. Kilcullen and J. Scott (Lampeter: Edwin Mellen Press, 2001), vol. 1, p. 70.

¹⁹ Janet Coleman, “Medieval Discussions of Property,” *History of Political Thought* 4.2 (1983): 212.

According to Roman law, *possessio* occurs when two conditions are met: a person must have (a) *corpus* i.e., sufficient control over a thing and (b) *animus* i.e., the requisite intention or manifest will to treat something as one's own. Thus, in principle, infants and the insane (*furiosi*) are excluded.²⁰ The second requirement (*animus* or intention to own) will be of great importance in the mendicant dispute. Thus, in the 14th century Marcilius of Padua insists that to have dominion requires the *will* to exercise and defend dominion. Likewise, appealing to the Roman law, Bonaventure declares: "it is stipulated in the law that liberty cannot be acquired for he who does not wish it and that a benefit is not given to an unwilling person."²¹ But how from this state of affairs does a right emerge? At what point and through what process does a fact (*detentio*) become a right (*possessio*)? To answer this difficult question the Roman jurists appealed to the notion of *usucaptio* which is best defined as the acquisition of a thing through possessing it without interruption for a certain period of time. Thus, so long as it had a "valid beginning" (*bonum initium*)—i.e., the good wasn't stolen, had been obtained in good faith and with "just cause"—the passage of time is all it takes to turn having into owning. This doctrine responded to a practical concern: land-grabbers taking possession of a land as soon as the previous owner had been evicted had an interest in establishing lawful title as quickly as possible.²² Thus, to require *usucaptio* (two years for land and one for chattels) was a way of preventing uncertainty over titles and to answer a practical problem. But *usucaptio* is not just an *ad hoc* solution; it also articulates the belief that prolonged possession of a good generates a right, that a *de jure* claim can, in some sense, be derived from a *de facto* state of affairs.

Finally, two main sources from pagan thought had a great impact on medieval jurists and philosophers: Aristotle and the Stoics. Classical Greek thought regards property as a matter of *oikonomia*, i.e., as belonging to the sphere of activities concerned with the handling and management of assets and material goods. To situate the issue at this level is already to indicate that it is an ancillary skill and that it cannot count as an end in itself. The value of economy resides entirely in the fact that it provides the necessary conditions that make possible something else, something infinity more important, namely: an active and virtuous life.

Initially, Aristotle focuses on the distinction between public and private.²³ Theoretically, various permutations are possible; for instance, we could eliminate common property altogether and place everything in the hands of private interests. This, however, would be absurd and dangerous; it would be the end of the political community. To treat everything as a commodity, to place every aspect of life in the hands of private entities would tear apart the social fabric. Politics

²⁰ It has been observed that, at least during the last century of the Republic, even an infant could acquire possession without the authority of his tutor (Watson, *Law of Property*, 83). At that point, the intention of the acquirer would have had little weight. Even so, *animus* must have been at least assumed in order to uphold the distinction between detention and possession since, as we saw, the proper legal sense of *possessio* doesn't designate a thing (a property) nor even the factual act of detaining something, but a right.

²¹ Marsilius, *Defender of the Peace* (Discourse XI, 9), trans. Alan Gewirth (New York: Harper, 1956), 311.

²² Pierson, *Just Property*, 57. As Pierson mentions, this is not unlike the process of primitive accumulation analyzed by Marx in the *Capital* whereby a violent expropriation is followed by a claim to the "sanctity of property."

²³ Aristotle, *Politics* Book II, chapter 5.

is about co-existence and there is no co-existence where there is no *common-wealth*. But then, where should we draw the line? What should be private? What should be held in common? Should we, as Plato suggested, give it a maximal extension so that what is held in common includes almost everything (even women and children)?

This is both impractical and undesirable. Consequently, Aristotle's discussion of property is primarily about land. Appealing to a distinction between ownership and use, Aristotle eventually declares that private ownership with common use is preferable on the ground that private property has the added advantage of preventing disputes about the distribution of goods whereas to share without clear rules of allocations is to open the door to endless disputes.

When each attends to his own property, men will not complain against one another, and they will produce more since each will be paying special attention himself to what he regards as being his own; while on the other hand, because of virtue, the *use* of property will agree with the proverb according to which "common are the possessions of friends."²⁴

Assuming optimal conditions, private property has the advantage of quelling feuds as people agree on recognizing each other's spheres of rights. Furthermore, private property provides the satisfaction associated with what is one's own and the result of one's own achievement; as Aristotle puts it: "to regard property as one's own gives a man immense pleasure; for it is indeed natural and not in vain for each man to love himself."²⁵ It also improves the care devoted to what is one's own.²⁶ Finally, some virtues, for instance generosity, couldn't be exercised without private ownership and personal resources. Thus, for all the above mentioned reasons and for the sake of political stability the State should guarantee some minimum level of property.²⁷ During the Scholastic era, Albert and Aquinas will follow these arguments very closely.

Faithfully or not, Aristotle's defense of private property has been rehashed for centuries. Yet, before praising or disparaging it, we should observe Aristotle's ambivalence. Private property is at the service of *common use* which is conducive to virtue and friendship. "In these [well administered states] each has his own property; yet, he makes available a part of it to his friends and another part for common use."²⁸ By itself, the art of acquisition is certainly not where the good life can be found; quite to the contrary, the relentless yearning for accumulation (*pleonexia*) is a recipe for a life of constant frustration. For all his idiosyncrasy, Epicurus expressed a view shared

²⁴ *Pol.* II, 5, 1263a27-32 (this and other translations of Aristotle are mine).

²⁵ *Pol.* II, 5, 1263a42-1263b1.

²⁶ "Each man pays more attention to what is his own, and less attention to what is common . . . for each man . . . pays less to it on the ground that someone else will take care of the matter" (Aristotle, *Politics*, II, 5, 1261b35-39).

²⁷ "Measures should be adopted then to make possible a lasting prosperity. And since this is beneficial to the prosperous also, the proceeds of the special revenues should be accumulated and distributed to the needed in sums, as far as possible, to enable them to save enough to buy a piece of land, or else to start a trade or become a farmer" (*Pol.* VI,5, 1320a-35b4).

²⁸ Aristotle, *Pol.* II, 5, 1263a34-35. Accordingly, Aristotle praises the Cretan practice of communal meals. The Cretans used to reserve a part of the harvest from publicly owned and rented land to replenish the provisions of common meals.

by many ancient philosophers when he declares that “nothing is enough to someone for whom what is enough is little.”²⁹ Augustine likewise acknowledges the danger of *pleonexia*, albeit for theological reasons: “Fear is all the more increased and covetousness is all the more unloosened according as there is an increase of those things which are called riches. . . . Riches, more than anything else, engender pride.”³⁰

Ancient philosophers, however, didn’t limit themselves to discussing the relative merits of private versus common property. In fact, this debate does not say anything about the ontological status and the justification of property. For this, we need first to turn our attention to the human psyche. The first thing I can truly call ‘mine’ is myself; the self appears simultaneously as owner and owned. To be is not just to be alive but to live one’s *own* life. The human psyche presents a remarkable feature: it can master itself (albeit with various degrees of success and occasional failures). Without this, temperance (the virtue that deals with the appetites) would not be possible since to be temperate is to control oneself.³¹ This means that I (acting) and ‘me’ (object acted upon) must, somehow, be different; otherwise, as Plato observed, the soul couldn’t be in conflict with itself.³² Yet, obviously there is only one “me;” therefore, this difference must be internal. Plato portrays the human psyche as an inner political arena; it is not only a seat of plurality but of conflicts and struggles, authority and obedience. Psyche relates to itself as observer and observed, ruler and ruled; it is a self-relation which allows human beings to be responsible for themselves, caring for themselves, and controlling themselves, all traits that make what we call “personhood” possible. Thus, we can describe the accomplished act of being human as an act whereby one owns oneself. It is precisely for this reason that, according to Aquinas, dominium is inscribed in human nature: “Man in a certain sense contains all things; and so just as he has dominion over what is within himself, in the same way he can have dominion over other things. . . . [I]n man reason has the position of a master and not of a subject.”³³ However, Aquinas adds that this dominion is not a matter of commanding but of *using*. In order to claim property rights over a natural thing outside me, I must treat that aspect of myself which resembles most a natural thing as something I own.

To appeal to the soul is, in some sense, to naturalize property. Even defenders of the mendicants will acknowledge the point. Thus, Marsilius of Padua declares:

This term ‘ownership’ is used to refer to the human will or freedom in itself with its organic executive or motive power unimpeded. For it is through this that we are capable of certain acts and their opposite. It is for this reason too that man alone

²⁹ Epicurus, *Vatican Sayings* 68, in *The Epicurus Reader*, trans. Lloyd P. Gerson and Brad Inwood, (Indianapolis: Hackett, 1994), 39.

³⁰ Augustine, *Commentary on the Lord’s Sermon on the Mount*, trans. D. Kavanaugh, (New York: Fathers of the Church, 1951), vol. 11, p. 261.

³¹ Self-mastery is itself a prerequisite for other virtues such as courage, for instance.

³² Plato, *Republic*, IV 431a.

³³ Aquinas *Summa Theologiae* (hereafter *ST*) I, 96, 2. Retrieved from: <http://www.newadvent.org/summa/1096.htm#article2>.

among the animals is said to have ownership or control of his acts: this control belongs to him by nature, it is not acquired through an act of will or choice.³⁴

But of course, as Marsilius will argue, if the ability to have ownership or control of oneself is part of our nature by virtue of the faculty of willing (*velle*), then not willing (*nolle*) to own an external object is also exercising our natural capacities.

Any defense of property rights that embraces this view should recognize, at least implicitly, the peril it harbors. The very properties that can objectify my virtue can also be my downfall. If the *rightful* possession of something is grounded in the condition that I own myself, that I exercise self-control, then those who become ensnarled by the very things they possess lose control of themselves. The moral danger is that as one accumulates goods, one can end up not simply *obsessed* by the relentless desire to acquire more but literally *possessed* by it. A life lived for the sake of having or for the sake of self-gratification would be a corruption of the very thing that justifies property in the first place. Thus, if I must be free *in order to* own, I must also be free *from* what I own. This moral ambiguity didn't escape the attention of medieval thinkers.

The Stoics pursued the exploration of this metaphysical hypothesis, and their observations had a significant impact on medieval thought, too. While Stoic ethics places wealth among the indifferents, property can nevertheless be traced back to a phenomenon observable in animals no less than in humans: "*oikeiōsis*" (variably translated as "disposition," "appropriation," "familiarity," "affinity," or "endearment"). The term designates the appropriation to oneself, the perception of oneself as well as of something else as one's own;³⁵ it is related to *oikeiotes*, which denotes the sense of belonging, of being at home. Thus, *oikeiōsis* designates a care for oneself that also extends beyond the self. On this view, all human beings (indeed, all sentient beings) are the rightful owners of themselves.

Insofar as some things (but not all) possess the intangible property of being owned, a theory of property needs a metaphysical account. But insofar as a theory of property seeks a beginning in some original act of appropriation, it also needs a foundational myth, an "*in illo tempore*" story of a primordial age of innocence that ignored lack and want and is now lost. This loss is supposed to explain the sinfulness and scarcity of our times. In Letter 90, Seneca declares that "the first men and those who sprang from them, still unspoiled, followed nature."³⁶ Primeval life was ruled by a fellowship which "remained unspoiled for a long time, until avarice tore the community asunder

³⁴ Marsilius, *Defender* (Discourse II, 12, 18), 193.

³⁵ "Chrysippus affirms in the first book of his work *On Ends* that the dearest thing to every animal is its own constitution and its consciousness thereof; for it was not likely that nature should estrange the living thing from itself or that she should leave the creature she has made without either estrangement from or affection for its own constitution. We are forced then to conclude that nature in constituting the animal made it near and dear to itself" Diogenes Laertius, *Lives of Eminent Philosophers*, Volume II, Book 7. 85, LOEB Classical Library, trans. R. D. Hicks (Harvard: Harvard University Press, 1925), 193.

³⁶ Seneca, *Moral Epistles*, Vol. II, LOEB Classical Library, trans. R. M. Gummere (Cambridge: Harvard University Press, 1920), 397.

and became the cause of poverty, even in the case of those whom she herself had most enriched.” Avarice introduces evil and with it the rise of a second age of humanity.³⁷

Christian thinkers will likewise conclude from the similar myth of *Genesis* that private property can only be a sign of our fallen condition. Thus, in the prelapsarian state of mankind common property had preeminence over private property: the goods of creation are destined for the whole human race, and although the fall alters the human condition, it doesn’t erase this original divine dispensation for all.³⁸ In a postlapsarian condition, however, appropriation is a legitimate means to satisfy human needs and maintain well-being. Thus, the universal destination of goods remains primordial. As Augustine notes, private property depends on civil law, for the earth was given by God to all mankind. As Bonaventure puts it: “we should understand that private property resulted from the iniquity of the first parents, because if they [Adam and Eve] had not sinned, there would have been no appropriation of this kind.”³⁹ For the medieval thinkers, however, it is fundamental to distinguish between what *results from sin* and what constitutes an *actual sin*. Private property may result from sin without being intrinsically sinful. In the original condition, God entrusts the earth and its fruits to the *common* stewardship of mankind.

If it is so it becomes difficult to avoid the conclusion that at bottom private property results from an act which, although it couldn’t have been a theft since things didn’t have a prior owner, was nevertheless a violent appropriation that deprived others. A possible consequence one could draw from the foundational myth is that in a sense property cannot be fully justified. At best, we have only guardianship. As Seneca puts it, if one complains that he is being driven from the farm which his father and grandfather owned, it can always be answered:

Well? Who owned the land before your grandfather? Can you explain what people (I will not say what person) held it originally? You did not enter upon it as a master, but merely as a tenant. And whose tenant are you? If your claim is successful, you are tenant of the heir. The lawyers say that public property cannot be acquired privately by possession; what you hold and call your own is public property—indeed, it belongs to mankind at large.⁴⁰

Yet, in fact many thinkers (including Seneca himself) shrunk away from this position which seems to condemn all social civil order as unjust and unjustifiable.⁴¹ As a consequence, it will be an

³⁷ “But avarice broke in upon a condition so happily ordained, and, by its eagerness to lay something away and to turn it to its own private use, made all things the property of others, and reduced itself from boundless wealth to straitened need. It was avarice that introduced poverty and, by craving much, lost all.” (Seneca, *Moral Epistles* 90, 425)

³⁸ This at least was the dominant narrative. John XXII’s *Quia Vir Reprobis* constitutes an important deviation from this view since it argues that property was *originally* private. See below, part III.

³⁹ Bonaventure, *Defense of the Mendicants* (Works of Bonaventure, Vol. 15), trans. José de Vinck and Robert J. Karris (St. Bonaventure, NY: Franciscan Institute Publications, 2010), 252.

⁴⁰ Seneca, *Letter* 88, Vol. II, LOEB, 355-7.

⁴¹ A remarkable exception is the Pseudo-Pelagius’ *De divitiis*. The anonymous author argues that wealth cannot be just and that the few who are rich are the reason for the many who are poor. See Anon. ‘*De divitiis* (On Riches)’ in A. Bradstock and C. Rowland, eds. *Radical Christian Writings* (Oxford: Blackwell, 2002), 15-33; J. Morris, “Pelagian Literature,” *Journal of Theological Studies* 26.1 (1965): 26-60; and Pierson, *Just Property*, 69-71.

important task for medieval thinkers to ward off this idea and determine the condition of a just property in accord with religious dogma and rational analysis. Their effort will result in the establishment of what could be called an “official doctrine,” but even it will not be without contestation.

II: Just Ownership: Augustine and Aquinas

Most medieval thinkers who discussed the status of property ownership asked three questions: (a) What is the source of property? (b) Under what condition is acquiring property rightful? and (c) What constitutes its right use? Even those who justified private property admitted that the institution is fundamentally a human device rather than a divine institution. From that standpoint, property can be seen as a subset of the more general question concerning the purpose and justification of social organization. To this, the general answer is that, in the present condition of fallenness, it is necessary to impose restraints on human sinfulness; in a similar manner, ownership rights are necessary in order to restrain violent accumulation and theft. But in order to be just, human institutions must also agree with divine dispensation. Thus, virtually all defenses of the right to property see it as a necessary institution but also as one that must be restricted.

In the Christian West, Augustine and Aquinas more than anyone else contributed to shaping the core principles that guide reasoning in this matter. Concerning the origin of property Augustine makes the following observation:

Look, there are villas! By what right do you protect those villas? By divine or human right? Let them reply: ‘Divine right we have in the Scriptures; human rights in the laws of kings.’ On what basis does anyone possess what he possesses? Is it not by human right? By divine right ‘the earth and its fullness belong to the Lord’ (Ps. 24. 1). God made the poor and the rich from one clay and the one earth supports both the poor and the rich. Nevertheless, by human right one says ‘this villa is mine; this house is mine; this slave is mine.’ Thus, by human right, by right of emperors. Why? Because God has distributed these same human rights to the human race through the emperors and kings of the world.⁴²

In its basic form, human property is relative. Despite social agreements and customs, we do not truly own what we possess. All that is not by divine institution expresses an impermanent order. The *human* laws in the name of which I claim that this thing is mine cannot supersede the ultimate divine ownership of all things. In fact, it is not unusual to see the laws of emperors and kings protecting the interests of those who acquired unjustly their wealth. Nevertheless, from the fact that private property was not contained in the original Edenic state, it does not follow that it must be condemned altogether. This imperfect arrangement whereby mine and thine are

⁴² Augustine, *Tractates on John VI*, 25 in *Augustine: Political Writings*, ed. E. Fortin and D. Kries, trans. M. Tkacz and D. Kries (Indianapolis: Hackett, 1994), 248-249.

distinguished may contribute to a more peaceful social order, and while a human invention, it is not thereby *averse* to divine disposition.

It would however be incorrect to conclude from the remark in the *Tractates on John* that Augustine abandons the jurisdiction of private property to the relativism of the law of the land. Laws have a remedial purpose (the restraint of violence), and ultimately, earthly authority remains accountable to divine authority. Finally, although the temporal law, *by itself*, cannot be the source of right possession, it may be so insofar as “God has distributed these same human rights to the human race *through the emperors and kings of the world*.”⁴³ What is ordained by the will of human rulers is distributed by divine law; God’s providence works through the tribulations of history.

What interests Augustine most is not the juridical claims or the legal apparatus that property rights require but the nature of our relation to things that the very existence of property presupposes. Property is a determinate mode of our attachment to things. To own is to absolutize this attachment by warding off the possibility of losing what we covet. The fear of destitution is never far away from the desire to own. The broadest term for this attachment, perhaps, is “love.” Love attaches an object to a subject, but since the term ‘love’ is so broad a term, it is of great importance to clarify its form and the nature of its object. At an initial level, Augustine poses a basic distinction between *cupiditas* (love directed at earthly things), and *caritas* (love of the *summum bonum*). Thus, the earthly city is ruled by *cupiditas* while the heavenly one is governed by *caritas*. Although they both are forms of love, the movements that animate each one go in opposite directions. *Caritas* loves the object for the object’s sake, not for the lover’s sake. *Caritas*’s movement aims at an other; it longs for what it cannot possess and keeps it at a distance; it is love that adores and worships. For this reason, *caritas*’ ultimate object is unlike anything in the world and cannot be owned. *Caritas*’s desire never appropriates its object. By contrast, *cupiditas* attaches itself to “one of those things that can be lost;” it seeks fulfilment in the possession of transitory things of all sorts. Insofar as *cupiditas* attempts to order the beings it covets to its *own* private good, it ultimately has only one object: itself. *Cupiditas*’ love is *amor sui*; it makes its object subservient to the self. What it seeks in the object is not the object itself but one’s own *jouissance*. Human love, qua *cupiditas*, is fundamentally acquisitive and the value of the object it seeks is a function of the gratification it promises. From that standpoint, property is an expression of *cupiditas* since to claim ownership is to appropriate, to turn an object into something self-centered (*privatus*).

The opposition of *caritas* and *cupiditas* is the foundation of the two cities. “Two societies have issued from two kinds of love. . . . [W]orldly society has flowered from a selfish love which dares to despise even God, whereas the communion of saints is rooted in the love of God that is ready to trample on self.”⁴⁴ Should we stop at this stark dichotomy, it would seem that no earthly goods could be the object of *caritas* and that the only path to the heavenly city requires transcending or suppressing the self. Yet, the demand to sacrifice one’s own happiness seems not

⁴³ “*Quia ipsa iura humana per imperatores et reges saeculi Deus distribuit generi humano.*”

⁴⁴ Augustine, *City of God*, Book XIV, Ch. 28, trans. Henry Bettenson (London: Penguin Books, 1984), 593.

only psychologically, but also logically, impossible. We cannot simply oppose term to term *caritas* and *cupiditas* in such a way that the affirmation of one term entails the negation of the other. While *cupiditas* excludes *caritas*, the converse is not necessarily true. The very turn toward the heavenly city and God could not occur if the lover didn't assume that it is there that her *own* true good and felicity resides. If acquisitiveness is in the nature of human love, then self-love not only cannot be eliminated but it is a component of loving God. She who is willing to "trample on self," as Augustine says, is still doing so because she is seeking a good and, as we learned from Plato, that which is intrinsically good is also necessarily beneficent. There is no such thing as a good that wouldn't be good for me.

Thus, a new structure must be proposed: a hierarchy of measured or proportioned loves must mediate the initial dichotomy of *caritas* and *cupiditas*. The possibility of some justice within the city of man (and consequently of some just property) demands that the two orders be more than mutually exclusive. Privately owned goods which are the objects of *cupiditas* can nevertheless be rightly governed when they are directed to the common good. Instead of demeaning self-love, one must consider how self-love can be oriented to the final end. Legitimate property may be a human device that follows from the postlapsarian condition; it may depend on rights granted by secular proclamations, but through the decrees of emperors and kings God has distributed these rights to humanity.⁴⁵ Thus, God neither commands nor prohibits but rather permits all to proclaim this right in the earthly city.

The divide between the eternal city of God and the temporal city of man leads to a dual approach to property and wealth. Insofar as they depend on the relative and temporal decrees, adjudications of claims are better left to human jurists. As a consequence, the question concerning the most equitable distribution of wealth among citizens is of little concern for Augustine. Alms are necessary for salvation, not for social justice. But insofar as we must prepare for the city of God, our present *disposition* toward wealth and our *use* of it are of crucial importance. One who clings to those things that can be taken from us against our will "becomes subject to those things which ought to be subject to him and creates for himself goods whose right and proper use require that he himself be good. But the man who uses these rightly proves that they are indeed goods, though not for him (for they do not make him good or better) but become better because of him."⁴⁶ While neither the owned property nor ownership itself can be said to be righteous, the righteousness of the agent grants some goodness to her property and her use thereof. Thereby, morality and property can be reconciled.

In medieval Europe Augustine's views on matters of property will rarely be challenged. They will, however, be adapted to changing circumstances. Many scholars have observed that a shift of attitude occurred around 1200 when the claim that wealth is inherently sinful began to

⁴⁵ Pace Richard J. Dougherty "Catholicism and the Economy: Augustine and Aquinas on Property Ownership," *Journal of Markets and Morality* 6.2 (2003): 482.

⁴⁶ Augustine, *On Free Choice of the Will*, trans. Anna Benjamin and L. Hackstaff (New York: Macmillan, 1985), 32.

erode.⁴⁷ In that regard, Aquinas plays an exemplary role insofar as he managed to maintain a tradition of moral suspicion toward private property and acquisition in general while simultaneously accommodating important new social development. To do so without contradiction depends on distinguishing carefully the case of the laity and that of religious communities. Contemplative life requires the stricter standard of religious perfection, a demand that cannot be imposed upon the laity. Depending on the audience, Aquinas upholds the anti-wealth stand of the Church Fathers or a more tolerant attitude toward accumulation.⁴⁸ It is contrary to contemplative life to possess anything in private because, by definition, such a self-oriented practice induces a sinful self-love. In accord with Augustine, Aquinas declares that “the care that one takes of one’s own wealth pertains to love of self, whereby a man loves himself in temporal matters, whereas the care that is given to things held in common pertains to the love of *caritas* which ‘seeketh not her own,’ but looks to the common good.”⁴⁹ But even the approval of common property among members of a religious order remains cautious: “the care that is given to common goods *may* pertain to *caritas*, although it *may prove an obstacle* to some higher act of *caritas* such as divine contemplation or the instructing of one’s neighbor.” These last two are, of course, the very activities that constitute contemplative life. At best, the care for common goods in monasteries and convents can be an expression of *caritas* if it remains subservient to the activities that properly constitute contemplative life. The laity, however, cannot be held to the same demands; there, private property, the search for profit, commerce, and even some (limited) form of usury all have a justified place.⁵⁰

Turning to the question of the naturalness of property, Aquinas posits a conceptual distinction between the *nature* of an external thing and its *use*. In general, property means dominion and “dominion” denotes power. But clearly, we have no power over the *nature* of external things; they are what they are independently of our will, and “we can work no change in their nature”⁵¹; consequently their nature doesn’t fall under our dominion. As regard their use, however, “man has a natural dominion over natural things, because by his reason and will he is able to use them for his own profit, as they are made on his account.” In linking this “natural dominion” to the use of things Aquinas appeals to the authority of Aristotle and *Genesis* 1:26 (“let him have dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth...”). Human dominion has therefore a divine origin, but it is limited to *use* and shouldn’t be confused with sovereignty.

⁴⁷ See (among others) John F. McGovern, “The Rise of New Economic Attitudes in Canon and Civil Law, AD 1200-1550,” *The Jurist* 32 (1972): 39-50 and Barry Gordon, *Economic Analysis before Adam Smith* (New York: Macmillan, 1975).

⁴⁸ This interpretation is defended by Skip Worden in *Godliness and Greed: Shifting Christian Thought on Profit and Wealth* (Lanham MD: Lexington Books, 2010), 71-93.

⁴⁹ Aquinas, *ST* II-II, 188, 7. Retrieved from: <http://www.newadvent.org/summa/3188.htm#article7>.

⁵⁰ In general, to take usury for money lent is unjust in itself, because “this is to sell what does not exist, and this evidently leads to inequality which is contrary to justice.” Nevertheless, Aquinas claims that “a lender may without sin enter in agreement with the borrower for compensation for the loss he incurs of something he ought to have for this is not to sell the use of money but to avoid a loss” (Aquinas, *ST* II-II Q 78, A 2, ad. 1). <http://www.newadvent.org/summa/3078.htm#article2>.

⁵¹ Aquinas, *ST* II-II, Q. 66, 1. obj. 3. Retrieved from: <http://www.newadvent.org/summa/3066.htm#article1>.

As such, the argument leaves many things unclarified. It is not clear, in particular, whether the distinction between the “nature” of a thing and its “use” leaves any room for human property in the full sense of the term. Thus, in his response to the objection according to which “no man should ascribe to himself that which is God’s” Aquinas appeals to a “natural dominion over things as regard the power to *make use* of them.”⁵² Yet, man’s “natural dominion” and his “power to make use” of them cannot be identical, (for from the fact that I use something, it doesn’t follow that I own it.) Even if *sovereign* dominion can only belong to God (since his power extends to the nature of things), there still remains a distinction in human matters between use and property. In this respect, article 2 of Q. 66 provides an important development: First, Aquinas argues that “use” calls for *common* possession. Second, because the acts of procuring and dispensing external things are, as Aquinas puts it, “competent to man” (i.e., they agree with human nature) this makes property lawful. In addition, property is necessary for the reasons already articulated by Aristotle. Thus, there can be personal use of common property (as one person at a time may read a book which nevertheless belongs to the library). In such a case, use and property remain distinct. Furthermore, while community of goods is ascribed to natural law, it doesn’t follow that “all things should be possessed in common and that nothing should be possessed as one’s own: but because the division of possession is not according to natural law but rather arose from human agreement which belongs to positive law . . . the ownership of possession is not contrary to the natural law, but an addition thereto devised by human reason.”⁵³ It is a matter not only of what the natural law commands, but of what it tacitly permits. Since private property is neither a part of natural law nor opposed to it, humans seem free to practice the private ownership of goods. Yet, Aquinas alters this apparent neutrality of the natural law by an appeal to the authority of Aristotle and the Old Law in terms of the effects of private property: “a more peaceful state is ensured to man if each one is contented with his own.”⁵⁴ Thus, while the division of possessions is neither a divine command nor according to natural law, it is nevertheless *rationally* and *practically* preferable.

The difficulty in ascertaining the legal place of property is linked to the fact that Aquinas inherits the Roman notion of *ius gentium* as a juridical sphere distinct from natural and civil law.⁵⁵ Thus, Gaius understood natural law as the source of all laws and *ius gentium* as its application. Insofar as it is established by natural reason, *ius gentium* applies to *all* people while civil law bears upon Roman citizens alone. Jurists would also appeal to this distinction in order to adjudicate in matters that involved people from different nations when their respective civil laws didn’t agree. In that sense *ius gentium* may be better understood as a specification of natural law rather than as a legal sphere distinct from it. Aquinas defines *lex naturalis* as it applies specifically to men as “an inclination to good according to the nature of man’s reason, which nature is proper to him. . . . [W]hatever pertains to this inclination belongs to the natural law; for instance to shun ignorance,

⁵² Aquinas, *ST* II-II, 66, 1, ad 1.

⁵³ Aquinas, *ST* II-II, 66, 2, ad 1. Retrieved from: <http://www.newadvent.org/summa/3066.htm#article2>.

⁵⁴ Aquinas, *ST* II-II, 66, 2.

⁵⁵ As Anton H. Chroust and Robert J. Affeldt write: “The Roman concept of *ius gentium* has succeeded in becoming one of the most nebulous terms in Thomistic jurisprudence, a constant source of confusion to scholastic philosophy.” Anton H. Chroust and Robert J. Affeldt, “The Problem of Private Property According to St. Thomas Aquinas,” *Marquette Law Review* 34.3 (1950-51): 177.

to avoid offending those among whom one has to live, and other such things regarding the above inclination.”⁵⁶ Although *ius gentium* is not strictly identical with the first and second forms of natural law (i.e., self-preservation and the “inclinations that belong to human beings according to that nature which is common to all animals”) insofar as is the product of rational deliberation that draws consequences from true premises about human nature, it is distinct from local conventions. Chroust and Affeldt conclude from this that: “*ius gentium* understood in this sense is not really the consequence of the fall of man. . . . Hence, private property is not so much an institution which has become necessary through the fall of man, than an institution of intelligent social co-existence based on ratiocination.”⁵⁷ Aquinas’ appeal to Aristotle at this precise junction provides a justification to turn private property into a decree of *ius gentium* and makes it, if not a precept of natural law, at least an acceptable consequence thereof. This doesn’t remove the temporal and imperfect character of this institution, but it makes it “*conditionally* justifiable on the basis of the *ius gentium*, while at the same time . . . the community of all property and possessions is *absolutely* justified through the *lex naturalis*.”⁵⁸

The lawfulness and goodness of private property is not an absolute and immutable characteristic; it depends on its ability to contribute to the common good. An indication of this conditional status can be seen in the fact that, in general, material goods are to meet human needs and purposes (i.e., the perpetuation of life and the development of virtues). Should private property fail to serve this purpose (or should a more urgent need occur), the institution could be canceled. Thus in the seventh article of Q. 66, Aquinas famously declares that “it is lawful for a man to succor his own need by means of another’s property, by taking it either openly or secretly, nor is it properly speaking theft or robbery.” Further, “in the case of a like need, a man may also take secretly another’s property in order to succor his neighbor in need.”⁵⁹ It should be noted that the argument depends on a specific condition: the need in question must be “so manifest and urgent that it is evident that [it] must be remedied by whatever means be at hand (for instance when a person is in some imminent danger and there is no other possible remedy).” Any other appropriation of another’s possessions would be a theft and therefore a sin. Further, this permissibility derived from natural right doesn’t signify a return to a prior state of common property; it is simply a limited and temporary suspension of the law. The same is true with respect to superabundance. Natural law prescribes that what one owns in superabundance is owed to the poor for their sustenance; but Aquinas adds that the “stewardship of his own goods is left to the judgment of each so that from these he may meet the need of those suffering it.”⁶⁰ Thus, short of dire necessity, superabundant goods become disposable for the welfare of others according to the judgment of the original owner, but not by virtue of a common property right.⁶¹ In these matters

⁵⁶ Aquinas, *ST I-II*, 94, 2. Retrieved from: <http://www.newadvent.org/summa/2094.htm#article2>.

⁵⁷ Chroust and Affeldt, “The Problem of Private Property,” 178.

⁵⁸ Chroust and Affeldt, “The Problem of Private Property,” 181.

⁵⁹ Aquinas, *ST II-II*, 66, 7, ad 3. Retrieved from: <http://www.newadvent.org/summa/3066.htm#article7>.

⁶⁰ Aquinas, *ST II-II*, 66, 7.

⁶¹ As Paul Weithman puts it: “Aquinas does *not* say that property held in superabundance is common in the sense that it is owed by society corporately, or that it is owed by the poor corporately, or that it is owed by some specifiable poor person or persons singly. The weak sense of ‘common property’ to which Aquinas commits himself is not, therefore,

the act remains discretionary not supererogatory and the determination of what is necessary and what is superfluous is left to individual judgment.

III: *Paupertas Altissima*

The anonymous Italian author of the burlesque *Canzone del fi' Aldobrandino* (late twelfth or early thirteenth century) talks of his allegorical marriage to the cadaverous Lady Poverty whose relatives are Sorrow, Beggary, Longing, and Distress.⁶² Poverty brings suffering, disgrace, and shame. Dante, in contrast, portrays poverty as an unrecognized *gift*. For all the repugnance it elicits, poverty may be a means of spiritual renewal, and those who can overcome their initial revulsion may receive from her a great reward. The distance that separates the repulsive Lady Poverty of the *Canzone* from her allegorical Dantean counterpart (in *Canto XI* she is Christ's wife and Francis's lover) is huge and it is not, as it has been suggested, a matter of a "variety of coexisting attitudes and doctrines" or of historical "transformation of values"⁶³; rather, it is first of all a matter of *will*. The poverty that is proclaimed (if not deified) as an ideal is *voluntary*. This alone separates it from the involuntary poverty which remains an ignoble calamity.

With the emergence of mendicant orders in the 13th century, the concept of property undergoes an unprecedented scrutiny. Between the 1279 bull *Exiit qui seminat* in which Nicholas III acknowledges that the Franciscans have abdicated every *right* of ownership while maintaining the simple *de facto* use over things and the 1322 bull *Ad conditorem canonum* in which John XXII abrogates Nicholas' decision, a theological, legal, and philosophical debate raged over the nature of property and, by extension, the meaning of "rights." Although the debate deploys the conceptual arsenal of scholasticism and although the Franciscan claim is defended on legal grounds, it is evangelical perfection as a preparation for a new and final era that is sought. As the revised Franciscan rule of 1221 declares: "The rule and life of the friars is to live in obedience, in chastity, and without property . . . remembering that of the whole world we must own nothing."⁶⁴ Poverty is pursued because contemplative perfection requires the greatest simplicity. The mendicants thought of their order as instrumental in "hastening the dawn of a new contemplative era in the life of the Church."⁶⁵ No doubt, claims of evangelical perfection and demands of humility and subjection of the self are open to ambiguity and paradoxes. How can one *publicly* advocate humility without perjury? Thus, objection 14 in Bonaventure's *Disputed Questions on Evangelical Perfection* raises this dilemma:

the sort of common property which is a prerequisite for governmental redistribution." Paul Weithman, "Natural Law, Property, and Redistribution," *The Journal of Religious Ethics* 21.1 (1993): 171.

⁶² See Nick Havely, *Dante and the Franciscans* (Cambridge: Cambridge University Press, 2004), 9-10.

⁶³ Havely, *Dante and the Franciscans*, 8-9.

⁶⁴ Quoted by Pierson in *Just Property*, 99.

⁶⁵ According to Kevin Hughes: "he [Bonaventure] is quite sure that he is living in the last days; he is quite sure that Francis and Dominic and his followers have a singular and decisive role to play in this final act in the evangelical stance against avarice." Kevin Hughes, "Bonaventure's Defense of Mendicancy" in *A Companion to Bonaventure*, ed. Jay Hammond, J. A. Wayne-Hellmann, and Jarred Goff (Leiden: Brill, 2014), 521.

You who present humility in appearance, either you consider yourself humble or you do not. If you do, you thus attribute yourself a noble virtue, and so you are proud. If you do not, then when external habit shows you to be humble, you bear one habit in your soul and another in your appearance and so you are a hypocrite.⁶⁶

Bonaventure responds by arguing that the mendicants' humiliation is not a sign of *acquired* humility but a *desire to strive to acquire humility*. This may resolve the double-bind dilemma, but of course it leaves unanswered the further question of whether humility can ever be acquired without contradiction and, if not, whether it makes sense even to strive to acquire it.

The rule of poverty which is essential to the Franciscan identity states: "Let the friars appropriate nothing for themselves, neither a house, nor a place, nor anything else." In terms of its concrete application, it meant that the friars renounced private and common property but were allowed to use movable and immovable goods which belonged to the Church. In the *Defense of the Mendicants (Apologia Pauperum)* of 1269 (that is to say, in the wake of the polemics between secular and mendicant masters at the University of Paris), Bonaventure provided a sustained justification of this claim. The starting point is the distinction of four possible relations one can have to temporal things: ownership, possession, usufruct, and simple use. Since the last one is absolutely necessary to human life, it is not based on secular laws and, as such, it is unrenounceable. "The life of mortals is possible without the first three but necessity requires the fourth, no profession may ever be made that renounces entirely the use of all kinds of temporal goods."⁶⁷ More importantly, since use is simply a matter of fact, it doesn't require establishing a *right*.

The source of the difference between the first three cases and the last one (use) can be traced back to the will. Following the principles of Roman law, Bonaventure insists that there cannot be ownership where there is no will to own. This entails that property and ownership primarily depend on psychological and procedural conditions. The rule of poverty is thus not a matter of forsaking *things*; it is a matter of freeing oneself from *the will to possess* things. What is at stake in this debate, in Agamben's words, is the "*abdicatio omnis juris*" (abdication of every right) that is the possibility of a human existence beyond the law. . . . Franciscanism can be defined—and in this consists its novelty, even today unthought, and in the present conditions of society totally unthinkable—as *the attempt to realize a human life and practice absolutely outside the determinations of the law*.⁶⁸ This is possible only if the basic concepts of *ius*, *dominium*, *proprietas*, *possessio*, and *usus* become objects of sustained critical analysis that puts their limits to the test. What remains beyond (or below) them, untouched by the legalistic apparatus, is nothing more than mere life.

⁶⁶ Quoted by Hughes in "Bonaventure's Defense of Mendicancy," 516.

⁶⁷ Bonaventure, *Defense of the Mendicants* XI, 5. *Works of Bonaventure*, Vol. XV, 307.

⁶⁸ Giorgio Agamben, *Highest Poverty, Monastic Rules and Forms-of-Life* (Stanford: Stanford University Press, 2013), 110.

Thus, the mendicant orders were seeking a *forma vivendi (habitus)*. Such a life doesn't violate the law for the simple reason that it places itself outside its jurisdiction. The legal terminology in which it is embedded tends to mask the nature of the debate. As we saw earlier, the Latin term "*dominium*" doesn't simply refer to ownership ("*proprietas*") but also connotes power and authority. Bonaventure distinguishes *dominium* proper from *proprietas* which is the right (*ius*) of dominion by which someone is said to own something. The third case, usufruct, seems *prima facie* less evident since usufruct is defined as a "right of enjoyment" that allows the holder to derive some profit or benefit from a property that is owned by another or is held in common ownership. Thus, by definition, those who enjoy the benefits of usufruct do not claim to have a property right on the good (e.g., a parcel of land offered for lease) from which the usufruct is derived. However, although the beneficiaries do not own the property, they still have a *right* over the profit derived from it; the harvest from a field or the fruits from an orchard are rightly "theirs." For this reason, usufruct too must be abandoned. Finally, the friars also renounce money, since it is not possible to engage in commercial transactions, to handle coins and valuables, without having *dominium* over them.⁶⁹

Even a modern labor theory of property—that is, the claim according to which property is a natural right that comes about as the result of the application of labor over natural resources—is circumvented. The assumption that in the labor process some of it, somehow, enters "into" the object and is irremediably mixed with the material on which labor is exerted would still not be sufficient to make it "mine." Something else must be assumed. The fact that Bonaventure places usufruct alongside *dominium* and *proprietas* indicates that the mendicant project seeks not to renounce things, but to renounce a certain ethos toward things. In Richard of Conington's terms: "no one has dominion without desire and will." It is this *animus acquirendi* or will to acquire that is regarded as the source of property rights, and consequently it is such a will that the friars must renounce.⁷⁰ Bonaventure insists on this point:

Since a sum total of things, for example an inheritance, is acquired through the sole acquiescing of the will, so also nothing more is required for its rejection than a contrary intention. And just as, by means of a mere act of the will, a stranger becomes an heir, so too by means of the opposite disposition he is immediately cut off from the inheritance.⁷¹

Life requires no more than a relation of "simple use" (*simplex usus*) toward things. But what does it mean to simply "have" something? Appealing to the authority of I. *Tim.* 6: 17-19 ("As for those who in the present age are rich, command them not to be haughty, or to set their hopes on the uncertainty of riches, but rather on God who richly provides us with everything for our

⁶⁹ In the event of practical necessity, the friars could make use of money (or other valuables) on reserve, but it was kept and spent on their behalf by a money-agent (*nuntius*) who operated outside the order and could receive donations (see Mäkinen, *Property Rights*, 63-4).

⁷⁰ See Brian Tierney, *The Idea of Natural Rights; Studies on Natural Rights, Natural law, and Church Law* (Emory University Studies in law and Religion, 1997), 147.

⁷¹ Bonaventure, *Defense*, XI, 9, 311.

enjoyment. They are to do good, to be rich in good works, generous, and ready to share, thus storing up for themselves the treasure of a good foundation for the future, so that they may take hold of the life that really is life.”) Bonaventure claims that “he [Paul] uses the word ‘having’ not in the sense of the power of *dominium*, but of the ability to use [*ad facultatem utendi*], as we say that we have anything we use, even though it doesn’t belong to us but was provided without cost by someone else.”⁷² Thus, the Franciscan rule of poverty doesn’t deny the legitimacy of property; it doesn’t have the revolutionary purpose of abolishing property, since it actually depends on it; instead, it simply attempts to live without it and to demonstrate this possibility through its performance. *Dominium* is placed in the hands of the Church without which the Franciscan experience would be impossible. The mendicant project doesn’t advocate renouncing private property in order to return to a presumed original form of *common* property; it proposes—and this is its true originality—to do away with property altogether. If we imagine common property as the zero degree in relation to which private property is super-added, then the Franciscans can be understood as seeking an *infra*-property form of life.

As we saw, the argument depends on the premise that the will to own is the source of property. Bonaventure, however, doesn’t propose to do away with the will but appeals to *another kind* of volition that can be stronger than the desire to acquire. “A person would be unwise to prefer the compulsion of necessity to the spontaneity of the will in the works of supererogation. This is as absurd as if a person were to prefer the hanging of robbers to the suffering of martyrs, since martyrs suffer voluntarily whereas robbers suffer necessarily.”⁷³ The renunciation of property is an affirmation of the will; it is a willful renunciation of the will to acquire. The suffering it causes is self-inflicted, and in that sense, the order attempts to carry the abnegation of the martyrs in everyday life. “Supererogation” refers to the “counsels of perfection” (i.e., those counsels that concern acts performed beyond what God requires) and therefore indicate that the vows of poverty aren’t meant to be a universal precept. For this reason, the Franciscan contention isn’t and shouldn’t be confused with a critique of property. Not all forms of private property are sinful. As Bonaventure carefully observes: “it is certain that Clement’s dictum, ‘because of inequity one person says that this object is his, and another says it is his’ should not be taken as a universal statement but merely as one that applies in many cases.”⁷⁴

Yet, the argument is ambiguous. If it admits that renouncing property is not for everyone, it also intimates that those who can live without property are spiritually above those who depend on it. It is impossible to use the language of perfection and imperfection without conveying this connotation. “Although riches, both private and common, can be possessed without sin, relinquishing them is a matter of perfection, because just as imperfection by itself is not sinful . . . so too perfection is not only the rectitude of justice but also a liberation. Since they are alluring

⁷² Bonaventure, *Defense*, XII, 20, 343. De Vinck translates *ad facultatem utendi* as “of the opportunity to use.” Opportunities, however, depend on external conditions, situations, or contexts in which the agent happens to find herself. The Latin term “*facultas*” designates, on the contrary, an ability that belongs to the agent, not to her context. What matters is that this ability can be exercised without a will to own.

⁷³ Bonaventure, *Defense*, XII, 29, 353.

⁷⁴ Bonaventure, *Defense*, IX, 3 251-2.

and dangerous, riches prevent this liberation.”⁷⁵ Thus, not only is this self-inflicted suffering liberation, but the renunciation it implies, while placing its practitioners outside the law, also perfects the law (what Bonaventure calls “rectitude of justice”).

In 1279, Pope Nicholas III in the bull *exiit qui seminat* adopted for the most part Bonaventure’s argument but proposed to distinguish five kinds of relations to things, making a further distinction between the right of use (*ius utendi*) and simple factual use (*simplex usus facti*), the last one constituting the only relation to temporal things that is necessary for sustenance of life.⁷⁶ To enjoy *ius utendi* is to use a temporal good as one’s own but such a use is still the exercise of a right established by some human covenant. By contrast, simple *de facto* use is mere employment. “By [the fact] that they [the Franciscans] seem to have abdicated the ownership, use, and dominium of any thing, it is not proved that they have renounced simple use of everything. That is, a use which, I say, having the name not of the *use of right*, but only *of fact*, being only factual, offers users in using only what is fact, nothing of right.”⁷⁷ Nicholas’ appeal to the *de facto/de jure* distinction to differentiate between two forms of use stresses that simple use occurs outside the realm of jurisdiction.

Yet, is this distinction tenable? Among the secular masters who first opposed the Franciscan argument, Gerard of Abbeville (died 1272) occupies a preeminent position. First, it is greed, argues Gerard, not possession, that perverts our relation to temporal things. Greed is unlimited and unsatisfied want. Appealing to Aristotle, Gerard (as well as his fellow master at the Sorbonne William of Saint-Amour) argues that the Franciscans do not opt for the virtuous choice (which would be the proper mean between greed and poverty) but simply select one extreme.⁷⁸

Further, in his *Contra adversarium* Gerard adds a central argument that focuses on the *use/dominium* distinction: in the case of consumable things, ownership cannot be separable from use. “To say that you have only the use of them, and that the dominium pertains to those who have given them, until they are consumed by age, or until the food is taken into the stomach, will appear ridiculous to all, especially since among men *usus* is not distinguished from *dominium* in things that are utterly consumed by use” (*Contra adversarium*).⁷⁹ The assumption that guides the objection is that we can properly “use” something only if the substance of the thing in question retains its integrity. Whatever I use I can return or restitute. If I reside in your house or borrow your horse, use and property can clearly be told apart. However, in consumption the thing ceases to exist (to use it is to *use it up*). Thus, in this instance at least, no matter how “simple” use is, it cannot happen without the exercise of dominium. Even an adamant defender of the Franciscan position such as Marsilius of Padua acknowledges that his claim goes against linguistic

⁷⁵ Bonaventure, *Defense*, IX, 4, 252.

⁷⁶ Mäkinen, *Property Rights*, 96.

⁷⁷ Mäkinen, *Property Rights*, 97.

⁷⁸ Cited by Hughes in “Bonaventure’s Defense of Mendicancy,” 530-1.

⁷⁹ Cited in Mäkinen, *Property Rights* 47. The same argument appears in John XXII’s *Quia Vir Reprobis* (Pierson, 111-112).

conventions since the term “possession” commonly conveys both the incorporeal ownership and the corporeal “handling of the thing or of its use or usufruct in the present or in the future.”⁸⁰

In answer, Bonaventure argues that the situation is similar to “the case of a son-in-power’s proprietary personal fund where the son-in-power has the use without having dominion over this fund for a single instant.” What the son-in-power [*filius familias*] enjoys is the use of a possession that he can neither retain nor proclaim; “rather, it is sought through the son-in-power for his father. So also in the case of these poor it should be understood that the dominium over the things they receive for their sustenance is delegated to the Father of the Poor, while their use is conceded to them.”⁸¹

John XXII’s intervention in the poverty controversy adds an important doctrinal revision to the debate. In *Quia Vir Reprobis* (a vitriolic refutation of Michael of Cesena, the Minister General of the Franciscan Order) John argues that property was *originally* private (in the sense of exclusive ownership).⁸² Appealing to *Genesis* 1:28 (“Be fruitful and multiply, and fill the earth and subdue it; and have dominion over the fish of the sea and over the birds of the air and over every living thing that moves upon the earth”), John concludes that property was God’s gift to Adam rather than the result of human fallen nature. Ockham and Marsilius of Padua (among others) will strongly oppose this view. Ockham, in particular, leads the charge by returning to the conceptual analysis of “*dominium*.” In the *Work of Ninety Days* written in 1332, Ockham claims that in a broad sense *dominium* refers to “a principle human power of laying claim to and defending some temporal things in a human court.”⁸³ In a narrower sense, *dominium* adds the following specification: “the [property] holder may treat it in any way not forbidden by natural law.”⁸⁴ In either case, Ockham understands *dominium* as a right that arises from agreement and is a matter of civil law. A right allows one to litigate in court for the use of things, should this use be obstructed by someone else. This, however, is precisely what the mendicants have renounced. As for the dominion mentioned in *Genesis*, it is best understood as a power of use over temporal things. “Thus it must be conceded that in the state of innocence our parents had lordship, in some sense, over temporal things, nevertheless it should not be conceded that they had ownership of temporal things.”⁸⁵ Focusing on the impossibility to separate use and dominion in consumable goods, Marsilius of Padua, for his part, maintains that “one who is perfect could catch a fish and eat it, but nevertheless with the express vow of never contentiously claiming the said fish (or any

⁸⁰ Marsilius, *Defender of the Peace* (Discourse II, 12, 18), 193.

⁸¹ Bonaventure, *Defense*, 310. This point is borrowed from Roman law. A *peculium* is a sum of money given by the *paterfamilias* to a son (or a slave) for their own use, usually in the context of a commercial transaction. Any obligation (right, duty or debt) arising from the use of the *peculium* is directly acquired by the *paterfamilias*. See Robin Evan-Jones and Geoffrey MacCormack, “Obligations” in *A Companion to Justinian’s Institutes* ed. Ernest Metzger (Ithaca: Cornell University Press, 1998), 171.

⁸² Retrieved from: http://www.mq.edu.au/about_us/faculties_and_departments/faculty_of_arts/mhpir/staff/staff-politics_and_international_relations/john_kilcullen/john_xxii_quia_vir_reprobis/.

⁸³ Ockham, *The Work of Ninety Days*, Volume I, trans. J. Kilcullen and J. Scott (Lampeter: Edwin Mellen Press, 2001), 67.

⁸⁴ Ockham, *Work of Ninety Days*, 70.

⁸⁵ Ockham, *Work of Ninety Days*, 309.

temporal thing) in the presence of a coercive judge,”⁸⁶ thus stressing that where there is no legal claim there cannot be ownership. Finally Wyclif argues that the crucial act in God’s dominion is one of *lending*, so that men can only have a temporary share of whatever is on loan. In other words, human dominium over the world is, as it were, borrowed.⁸⁷

IV: Conclusion

These examples suffice to demonstrate that the dispute between the defenders of *paupertas altissima* and their opponents concerns the limit of the law. Gerard and John XXII find a contradiction in the idea of a *right to use* that would exclude ownership and this may well be the case; yet, what the Franciscans were seeking was something else, it was *use without right*. Thus, Gerard’s arguments appeal to civil law where property is attached to usufruct while Bonaventure, on the contrary, places poverty as a practice beyond the law. “If perchance someone tries to oppose our reasoning by claiming that there is a warning in civil law that use cannot be separated perpetually from dominion, we will answer that this principle of civil law has no application here, since the law pronounces such a decree lest dominion becomes useless, and hence be nothing but an empty word.”⁸⁸ One of John’s most trenchant objections consists in arguing that use without a right to use cannot belong to a state of perfection since it is to act unjustly. This objection goes to the heart of the issue, for if John is right, it follows that nothing can occur outside the juridical sphere. Every act whatsoever is either just or unjust—it may be so in varying degrees, but it is extra-judicial. In response, the mendicants argue that simple use is *licit* although it is not *legal*. This is why Ockham appeals to a “licit power” that is acquired by a mere revocable permission or grace and as such is not a right.⁸⁹ If a rich man invites poor people and places food and drinks before them, the poor have the *licit power* to eat and drink, but they have not for that reason acquired a *right* since the host could, if he pleases, take the food away and the guest could not appeal to any right. “When the permission obtained cannot be revoked at will, a right is acquired; but when it can be revoked at will and the one having permission cannot by virtue of the permission litigate in court, no right is acquired.”⁹⁰ Only a permission that cannot be revoked constitutes a right; short of this, there is no right.

The question, as Agamben puts it, is: “how can use—that is, a relation to the world *insofar as it is inappropriable*—be translated into an ethos and a form of life?”⁹¹ Even nature depends on grace in order to exist and persist, and although the mendicant renunciation doesn’t entail disdain for temporal goods and the natural world, it is a precarious existence that requires a blind trust in providence. By renouncing dominion and the right to earthly goods, the mendicants find themselves entirely sustained by what is not their own. What the opponents of the Franciscan

⁸⁶ Marsilius, *Defender of the Peace*, 303.

⁸⁷ See S. E. Lahey, *Philosophy and Politics in the Thought of John Wyclif* (Cambridge: Cambridge University Press, 2003), 97-99.

⁸⁸ Bonaventure, *Defense*, 11.7.

⁸⁹ See Siegfried Van Duffel and Jonathan Robinson, *Ockham’s Theory of Natural Rights*, 14-15. Retrieved from: http://individual.utoronto.ca/jwrobinson/articles/vanduffel-robinson_ockhams-theory-of-natural-rights.pdf.

⁹⁰ Ockham, *Work of Ninety Days*, Vol. 2, 433.

⁹¹ Agamben, *Highest Poverty*, 144 (emphasis added).

experience were most worried about is thus the possibility of a form of life that is nothing more than this: life pure and simple, life beyond the law. Peter John Olivi, among others, stresses how the *rule* (by contrast with the *law*) requires to be lived: “it makes more sense to say ‘living in obedience’ than to say ‘observing obedience’ or ‘obeying’; one says, in fact, that someone lives in a certain state or in a certain work only if his whole life has been applied to it, in which case he is rightly said to be and live and dwell in it.”⁹² Such a rule does not dictate the acts of a subject; rather, it constitutes the agent herself. It does not establish common property but creates a cenoby (a “*koinos bios*,” a life that is both unique and common). The rule does not apply *to* life the way a universal precept applies to a particular case; instead, it produces a form of life and produces itself in it.⁹³ Rules of this kind (by contrast with deontic or governing ones), function as “constitutive norms”; they institute what they command. Use designates then a space outside the law, a void that the law can neither institute nor govern. Insofar as use entails a temporal process, insofar as it is a *habitus*, it cannot be appropriated.

To relate to the world as something that is essentially inappropriable is to seek a form of life that is prior to the order of the law and that the law (despite all its coercive power) cannot erase. In this condition, the self is not constituted by an act of appropriation but by its activity of dwelling. Centuries after the medieval debate, the possibility of such a relation to the world remains to be discovered.

⁹² Olivi’s *Rule Commentary*, ed. and trans. David Flood (Wiesbaden: Steiner, 1972), 119.

⁹³ It has been noted that Francis and his followers frequently use the phrase “*regula et vita*” in the sense of one single phenomenon or that they use “*vita*” in sentences where one would expect “*regula*”: e.g., “If anyone desiring to accept this life . . .” (Agamben, *Highest Poverty*, 100).