

WILLIAM OF OCKHAM ON THE RIGHT TO (AB-)USE GOODS*

William of Ockham's *Opus nonaginta dierum* (OND) has not always fared well in the hands of historians.¹ Quintessentially medieval—an almost word-for-word refutation of an already prolix defense of several *improbationes* of earlier papal decrees—its greatest claim to fame has usually been its length, not the content of Ockham's argument. Annabel Brett, for example, concluded in a remarkable study that William of Ockham had failed to adequately answer Pope John XXII's criticism of the Michaelist interpretation of Franciscan poverty. Specifically, she argued that he “failed to isolate a *potes-tas licita* which would be a power to perform acts which are licit in the sense of consonant with right reason, but are not

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¹ Ockham's writings are cited according to the following abbreviations: OPol — *Opera politica*, 4 vols. edited by H. S. Offler, et al., vols. 1-3 (Manchester: Manchester University Press, 1956-1974), vol. 4 (Oxford: Oxford University Press, 1997). OTh — *Opera theologica*, edited by Gedeon Gál et al., 10 vols. (St. Bonaventure, NY: The Franciscan Institute, 1967-88). Medieval texts are cited according to the divisions of the text, with the volume and page numbering of the edition given in parentheses; the abbreviations used follow those found in Paul Spade, ed., *The Cambridge Companion to Ockham* (Cambridge: Cambridge University Press, 1999), xv-xvii. For John XXII, I have used the critical edition established by Jacqueline Tarrant, ed., (*Extravagantes Iohannis XXII* [Rome: Biblioteca Apostolica Vaticana, 1983]) where possible; for *Quia vir reprobus* [= QVR], I cite the text Ockham quoted in his OND (OPol 1:292-2:858)—and thus cite it by the Ockham-determined “sections.” Wherever possible, though, I have checked his writings against the texts in Gedeon Gál and David Flood, eds., *Nicolaus Minorita: Chronica. Documentation on Pope John XXII, Michael of Cesena and the Poverty of Christ with Summaries in English. A Source Book* (St. Bonaventure, NY: The Franciscan Institute, 1996) [henceforth G/F]. Other canon law references are to the standard edition: Emil Friedberg, ed. *Corpus iuris canonici*, 2 vols. (Leipzig: Bernhardi Tauchnitz, 1879-81).

strictly just.”² One could imagine the pope making the very same claim, but this would be to misunderstand Ockham’s point. It is true that Ockham probably had little chance of convincing the pope of the coherence of his position. But this is not to say that his position was untenable.

A common criticism of Ockham’s theory of poverty is that he was, more or less, fighting on John XXII’s own terms, which generally also leads to the conclusion that Ockham’s theory is deficient in some respect.³ But if Ockham can be accused of fighting on the pope’s ground because he responded to *Quia vir reprobus* point-by-point, then the pope can equally be accused of fighting on Michaelist ground because he was doing essentially the same thing. Alternatively, this claim might be interpreted as meaning that Ockham accepted as axiomatic certain claims of John XXII and then proceeded to construct an alternate theory to that of the pope’s; consequently, this argument would continue, because Ockham could not get past certain foundational statements he was unable to properly address in the pope’s claims. It is a corollary of the argument presented here that this was not the case.

One of the paradoxes of the Franciscan *modus vivendi* was that, although their goal was to disengage from the civil order as far as all property relationships went,⁴ and despite the fact that Francis strongly commanded all brothers “through obedience” (*per obedientiam*) not to ask letters of the Roman curia,⁵ it quickly became necessary to have recourse to the

² Annabel Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997), 68.

³ In addition to Brett (n. 2 above), Gordon Leff, *Heresy in the Later Middle Ages: The Relation of Heterodoxy to Dissent, c. 1250-1450* (Manchester: Manchester University Press, 1999 [1967]), 250, has suggested that Ockham fought “on the pope’s ground,” and was ambivalent about Ockham’s success. Cf. Brian Tierney, *Origins of Papal Infallibility, 1150-1350: A Study on the Concept of Infallibility, Sovereignty and Tradition in the Middle Ages* (Leiden: E.J. Brill, 1972), 212.

⁴ As the *Regula bullata* 1.1 (Kajetan Esser, ed., *Opuscula sancti patris Francisci Assisiensis* [Grottaferrata: College of St. Bonaventure, 1978], 227) put it, the brothers were to live *sine proprio*, and that they *nihil sibi approprient nec domum nec locum nec aliquam rem* (6.1 [231]); cf. *Regula non bullata* 1.1 (242).

⁵ *Testamentum* 25 (Esser, 312-13). The problem of obedience deserves its own treatment, but cf. Francis’s comments in *Admonitiones* 3.5-11 (64-

papacy for all sorts of things.⁶ It is easy to see how this paradoxical relationship with the papacy could lead to trouble for the order, and indeed it was in the course of one of these appeals that the “Franciscan crisis under John XXII” might be said to have begun.⁷ The story, recounted by a Minorite who leaves no doubt as to his partisanship, is that when a Franciscan, Berengar Talon (coincidentally the current holder of Peter Olivi’s former chair in Narbonne), defended a Beguin’s view that Christ and his disciples possessed nothing, “either individually or in common, by right of ownership and lordship” against the Dominican inquisitor Jean de Beaune, the latter accused Berengar, too, of heresy. Not surprisingly, given the historical success of this method, Berengar appealed to the pope.⁸ As David Burr has said, “John reacted vigor-

65), *Epistola ad fideles (Recensio posterior)* 40-41 (121), and *Regula non bullata* 5.2-3 (250). For comment, see Andrea Tabarroni, “Povertà e potere nella tradizione francescana,” *Il pensiero politico dell’età antica e medioevale. Dalla polis alla formazione degli Stati europei* (Turin: UTET Libreria Srl., 2000), 176-77.

⁶ Cf. David Burr, *The Spiritual Franciscans. From Protest to Persecution in the Century After Saint Francis* (Philadelphia: University of Pennsylvania Press, 2001), 10; Ulrich Horst, *The Dominicans and the Pope: Papal Teaching Authority in the Medieval and Early Modern Thomist Tradition*, tran. James D. Mixon (Notre Dame: University of Notre Dame Press, 2006), 25. Gregory IX’s bull, *Quo elongati* (1230) was an early and significant outcome of this paradox. It declared that the *Testamentum* was not legally binding, and made the first important conceptual distinction between *dominium* and *usus* (the Franciscans only had the latter, and none of the former); see *Quo elongati* 12-38, 77-91, (Herbert Grundmann, “Die Bulle ‘Quo elongati’ Papst Gregors IX,” *Archivum franciscanum historicum* 54 [1961]: 20-23). Aside from Grundmann’s valuable introduction, see Rosalind Brooke, *Early Franciscan Government: Elias to Bonaventure* (Cambridge: Cambridge University Press, 1959), 128-31; David Flood, “Franciscan Poverty: An Introduction,” in G/F, 11-14; Leff, *Heresy*, 65-67; John Moorman, *A History of the Franciscan Order from Its Origins to 1517* (Oxford: Clarendon Press, 1998 [1968]), 90-91; and Malcolm Lambert, *Franciscan Poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210-1323*, 2nd ed. (St. Bonaventure, NY: The Franciscan Institute, 1998), 83-93.

⁷ A term used by Lambert, “The Franciscan Crisis under John XXII,” *Franciscan Studies* 32 (1972): 123-43. Of course, in all accuracy, this was not one crisis, but a whole “series of them” (Burr, *Spiritual Franciscans*, 179).

⁸ This story is often retold (e.g., Léon Baudry, *Guillaume d’Occam: Sa vie, ses œuvres, ses idées sociales et politiques. I. L’homme et les œuvres*

ously and, one suspects, enthusiastically.”⁹ This time around, however, the pope was not so certain that the Franciscan position was the correct one. This appeal served as a pretext for re-opening the poverty “question,” even if the ultimate motive(s) for this move remain enigmatic.¹⁰

1 JOHN XXII’S POSITION ON (AB-)USE

If we must continue to guess at what prompted John to broaden his attack, one point jumps out from the first version of *Ad conditorem canonum*: of the three traditional monastic

[Paris: J. Vrin, 1950], 105-07) as it opens the *Chronicle* of Nicholas the Minorite: G/F, 62-63. For a reassessment of the value of the *Chronica* (at least for the period before *Cum inter nonnullos*), see Patrick Nold, *Pope John XXII and his Franciscan Cardinal: Bertrand de la Tour and the Apostolic Poverty Controversy* (Oxford: Clarendon Press, 2003), esp. 1-24; but see the critical review of Flood in *Franciscan Studies* 62 (2004): 225-35. Decima Douie, *The Nature and the Effect of the Heresy of the Fraticelli* (Manchester: Manchester University Press, 1932), 153-201, still makes for good reading, but is now unreliable on many points.

⁹ Burr, *Spiritual Franciscans*, 263.

¹⁰ This he did in *Quia nonnunquam* [= QN] (217-21). There is still some doubt as to why John XXII moved from his repression of the Spiritual Franciscans to an attack against Franciscan poverty in general. Starting with Franz Ehrle (1888) and Josef Koch (1933), Thomas Turley, “John XXII and the Franciscans: A Reappraisal,” in *Popes, Teachers, and Canon Law in the Middle Ages*, ed. James Sweeney and Stanley Chodorow (Ithaca: Cornell University Press, 1989), 74-88, has reviewed the various hypotheses scholars have advanced. (Recapitulated by Takashi Shogimen, “William of Ockham and Guido Terreni,” *History of Political Thought* 19.4 (1998): 518 n. 5.) in his *Olivi’s Peaceable Kingdom. A Reading of the Apocalypse Commentary* (Philadelphia: University of Pennsylvania Press, 1993), 244-47, David Burr has argued for a return to a somewhat nuanced version of Koch’s hypothesis: once John became aware of the significance of the poverty controversy, the condemnation of Olivi could serve as a “weapon in that struggle.” Nold, *Pope John XXII*, 157-58, has recently argued that the pope simply could not accept “nominal rather than real” papal retention of ownership, and saw it as the “root cause of the Spiritual problem.” And, finally, Gabrielle Gonzales, “‘The King of the Locusts Who Destroyed the Poverty of Christ’: Pope John XXII, Marsilius of Padua, and the Franciscan Question,” in *The World of Marsilius of Padua*, ed. Gerson Moreno-Riaño (Turnhout: Brepols, 2006), 74, has suggested that the pope was not so interested in the poverty issue as in reevaluating the role the Minorites should play in the Church.

vows, poverty was the least important.¹¹ The pope, probably following Hervaeus Natalis,¹² was equally convinced that “the perfection of the Christian life consists principally and essentially in charity,”¹³ and that obedience to one’s superiors was of prime importance for any religious. As he had already said, without obedience, a *religio*, a regular way of life, is destroyed, for “great, indeed, is poverty, but chastity is greater, [and] of these the greatest is obedience—if it is preserved intact.”¹⁴ In short, aside from any of the theoretical considerations which would mark the controversy of the 1320s, it is safe to say that John did not share earlier popes’ views on the innate value of poverty.¹⁵ It is not surprising that he felt the

¹¹ The first version of *Ad conditorem canonum* [= ACC¹, in G/F, 83-88] was published December 8, 1322; the second version [= ACC², in Tarrant, 228-54] probably appeared shortly after January 14, 1323.

¹² Marino Damiata, *Guglielmo d'Ockham: Povertà e potere*, 2 vols. (Florence: Edizioni Studi Francescani, 1978-79), 1:324.

¹³ ACC¹ (G/F, 84): *perfectio vitae christianae principaliter et essentialiter in caritate consistat*. The early version of this bull has been ignored for the most part in modern studies, but is analyzed in Nold, *Pope John XXII*, 149-58. As he has said, ACC¹ remains a useful guide to John’s original motives in the early stages of the poverty debate (152). See also Andrea Tabarroni, *Paupertas Christi et apostolorum: L'ideale francescano in discussione 1322-1324* (Rome: Istituto storico italiano per il medio evo, 1990), 73-83.

¹⁴ *Quorundam exigit* [= QE] 190-92 (178-79): *Religio namque perimitur si a meritoria subditi obedientia subtrahatur. Magna quidem paupertas, sed maior integritas, horum est obedientia maximum, si custoditur illesa*. John no doubt was influenced by Hervaeus Natalis on this point (see J. G. Sikes, “Hervaeus Natalis: *De paupertate Christi et apostolorum*,” *Archives d'histoire doctrinale et littéraire du moyen âge* 11 (1937-38), 226, and 228), but he may well have Aquinas in mind here, for he had made a similar point. See his *Summa Theologiae* [= STh] 2a2ae.104.3, 2a2ae.186.8 (*Sancti Thomae Aquinatis doctoris angelici opera omnia* [New York: Commissio Leonis, 1882-], 10:499), and *De perfectione spiritualis vitae* 11 (41:b78-80). On the term “religio,” see Dominic Monti, “The Friars Minor: An Order in the Church?” *Franciscan Studies* 61 (2003): esp. 237-40. In passing, we should note that earlier renderings of *integritas* as referring to the “wholeness” of the order cannot have been the pope’s primary intent, for he follows the lines just quoted with, *Nam prima rebus, secunda carni, tertia uero menti donatur et animo, quos uelut effrenes et liberos ditioni alterius humilis iugo proprie uoluntatis astringit* (QE 192-94 [179]).

¹⁵ Significantly, Gregory IX, Alexander IV, and Nicholas III had all been Cardinal protectors to the Franciscans. Conversely, John’s views on poverty have often been compared to those of Aquinas (whom he read carefully), who is often thought to be a proponent of an “instrumental-

Friars Minor were “vainly boasting” (*inaniter gloriari*) about the “highest poverty” which, apparently, only they practiced.¹⁶ Whatever the deeper motivations for re-kindling the whole poverty debate, then, it seems reasonable enough to assume that if the pope thought that the traditional line about the order’s poverty was a cause of dissension both within the order and without the order—as he indeed did¹⁷—it is also not surprising that he would be willing to abrogate a fundamental aspect of Franciscan poverty which had in one fashion or another characterized the order for decades.¹⁸

If we had to boil John’s whole theory of ownership¹⁹ down to one essential point, it would be that it is impossible to justly use anything without some sort of right to do so. In the case of consumables this meant a property right, such as lordship or ownership; for everything else, at least a right of

ist” theory of poverty. Cf. e.g., Jürgen Miethke, *Ockhams Weg zur Sozialphilosophie* (Berlin: Walter de Gruyter & Co., 1969), 377; Giovanni Tarello, “Profili giuridici della questione della povertà nel francescanesimo prima di Ockham,” in *Scritti in memoria di Antonio Fachi* (Milan: Dott. A. Giuffrè, 1964), 418; see, e.g., *STh* 2a2ae.188.7 (10:530-32). My understanding of Aquinas’s writings on poverty are indebted to Jan G. J. van den Eijnden, *Poverty on the Way to God: Thomas Aquinas on Evangelical Poverty* (Leuven: Peeters, 1994), and particularly to the articles of Jones: “Poverty and Subsistence: St. Thomas Aquinas and the Definition of Poverty,” *Gregorianum* 75 (1994): 135-49; “The Concept of Poverty in St. Thomas Aquinas’s *Contra impugnantes Dei religionem et cultum*,” *The Thomist* 59.3 (1995): 109-39; and “St. Thomas Aquinas and the Defense of Mendicant Poverty,” *Proceedings of the American Catholic Philosophical Association* 70 (1996): 179-92.

¹⁶ ACC¹ (G/F, 85).

¹⁷ ACC¹ (G/F, 86).

¹⁸ John was very clear on this point, for he started both *QN* and *ACC* with a claim that the *conditor canonum* is to remedy problems which he believes have arisen from earlier decrees (*QN* 4-8 [217-18]; *ACC*¹ [G/F, 83]; *ACC*² 3-5 [218-19]).

¹⁹ It is instructive to bear in mind the attempt of Tony Honoré, “Ownership,” in *Making Law Bind* (Oxford: Oxford University Press, 1987), 165, to specify the essential features, or “incidents” of the modern “liberal concept of full individual ownership,” which he said “comprises the right to possess, the right to use, the right to manage, the right to the income of the thing, the right to the capital, the right to security, the rights or incidents of transmissability and absence of term, the duty to prevent harm, liability to execution, and the incident of residuary.” He discussed the implications of this definition in the following pages.

using.²⁰ The reason for this distinction is due to John's strict interpretation of the term "use." The earliest clear account of use comes from the redacted version of ACC, where he maintained that

use, which is [like usufruct] also a personal servitude, is nothing but a right of using another's goods with the substance of the thing preserved—that is, the right of securing in his own name the fruits and some advantage, in whole or in part, which can come from the thing in which usufruct or use is established.²¹

Although John did not deign to mention his source here, he was simply expanding a little on Azo's definition of "bare use," which stated that "use is a right of using another's goods with the substance preserved."²² (As this was a gloss on the jurist Gaius' point that bare use is typically established in the very same way by which usufruct is established,²³ the pope's point is well-taken.) Since this definition requires that the substance remain unimpaired, John argued that there can be no use, according to the proper sense of the term, of anything "consumable by use."²⁴

²⁰ John Kilcullen, "The Political Writings," in *Companion to Ockham*, 308; cf. Brett, *Liberty, Right and Nature*, 53, and Arthur McGrade, *The Political Thought of William of Ockham: Personal and Institutional Principles* (Cambridge: Cambridge University Press, 2002 [1974]), 176. For an overview of the controversy under John, see Lambert, *Franciscan Poverty*, 221-69.

²¹ ACC² 108-111 (238): *usus, qui etiam personalis est seruitus, nichil sit aliud quam ius tantum utendi rebus alienis substantia salua rei, id est, ius percipiendi fructus et utilitatem aliam in totum uel pro parte suo nomine qui possunt ex re in qua usufructus seu usus constituitur prouenire. QVR § 3 (311) repeated the definition; ACC¹ offered no clear definition of the term. See further Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: Peeters, 2001), 166-67.*

²² *Gl. ord. ad Dig. 7.8.1.1, s.v. etiam usus nudus: usus est ius utendi alienis rebus, salva rerum substantia*. All civil law glosses come from Iohannes Fehi, ed., *Corpus iuris ciuilis Iustiniani cum commentariis Accursii* (Lyons, 1627; reprinted, 1965).

²³ *Dig. 7.8.1.1: Constituitur etiam nudus usus, id est sine fructu: qui et ipse isdem modis constitui solet, quibus et usus fructus*. Civil law references are to Paul Krueger, et al., eds., *Corpus iuris civilis* 3 vols. (Dublin: Weidmanns, 1966); here 1:139).

²⁴ QVR § 6 (355): *Primo quidem, quia in rebus talibus, scilicet usu consumptibilibus, usus facti, sumendo 'usum' proprie, locum habere non*

John also creatively interpreted the traditional Franciscan claim that they only had simple use of fact.²⁵ Able lawyer that he was, John refused to understand “of fact” as anything other than an act or a deed, even though it was not uncommon to use the word to mark a distinction from *ius*. That is, in legal discourse, it was not uncommon for there to be a “fact”/“law” distinction;²⁶ we need only think of the phrases “de facto” and “de iure” to see how this distinction holds even today.²⁷ Hence the pope was trading on a very specific reading of “of fact” when he came to explain what earlier popes had meant when they granted the order “the use of utensils, books, and movable goods which are licit to have.”²⁸ According to John, since this use was granted to the order in general, this had to be a use of right, because “facts, which are a characteristic of individuals, demand and require a true person”—and an order, of course, is not a true person but should be considered

potest; ‘usus’ enim sumptus proprie requirit quod cum ipso usu substantia remaneat salva rei, ut ex praedictis patet: quod in rebus usu consumptibilibus nequit esse.

²⁵ *Exiit qui seminat* (VI 5.12.3; in Friedberg, 2:1109-21) first employed this term; for discussion, see esp. Roberto Lambertini, *Apologia e crescita dell’identità francescana (1255-1279)*, (Rome: Istituto storico italiano per il medio evo, 1990), 176-81.

²⁶ Adolf Berger, “Encyclopedic Dictionary of Roman Law,” *Transactions of the American Philosophical Society* NS. 43.2 (1953), s.v. “factum” (466); for specific examples of the *factum/ius* distinction, see the entries on “error,” “error facti” (456), and “formula in ius conceptus” (475). Ockham, of course, did draw this distinction: *OND* 2.149–154 (302); cf. John’s talk of “de facto” use on pages 356-58.

²⁷ In fact, even Azo admitted that there was a use, *qui factum vel in facto consistit ut bibendo et comedendo*. Quoted and discussed in Maximiliane Kriechbaum, *Actio, ius und dominium in den Rechtslehren des 13. und 14. Jahrhunderts* (Ebelsbach: Aktiv Druck & Verlag, 1996), 33-35. Cf. *OND* 33.29-35 (510).

²⁸ *Quo elongati*, 84-85 (Grundmann, “Die Bulle,” 22): *Dicimus itaque, quod nec in communi nec in speciali debent proprietatem habere, sed utensilium et librorum et eorum mobiliū, que licet habere, ordo usum habeat et fratres, secundum quod generalis minister vel Provinciales disponendum duxerint, hiis utantur, salvo locorum et domorum dominio illis, ad quos noscitur pertinere*. Gregory IX was quoted on this point in *Ordinem vestrum* (Innocent IV; republished by Alexander IV): see Luke Wadding and Aniceto Chiappini, eds., *Annales minorum seu trium ordinum a S. Francisco institutorum* 38 vols. (Quaracchi: College of St. Bonaventure), 3:149(130) and 4:505(447).

a represented or imaginary person. Therefore, he concluded, while what are of right can be appropriate (*congruere*) to an order, what are of fact cannot truly suit.²⁹

For consumables, *res usu consumptibiles*, defining use as a right of using which must yet preserve the substance means that, technically, they cannot be used, only *ab-used*, or consumed.³⁰ Under Roman law, this right, a *ius abutendi* as John called it, was tantamount to a claim of ownership.³¹ Here again John betrayed his Romanist interpretation of ownership, which in its essence, equated *dominium* with the

²⁹ *Quia quorundam mentes [= QQM] 119-21 (267): Facta quidem que singulorum sunt personam ueram exigunt et requirunt; ordo autem uera persona non est sed representata et imaginaria potius est censenda. Quare que facti sunt sibi uere conuenire nequeunt, licet ei possint congruere que sunt iuris. Cf. QVR § 62 (563). See Baudry, "Le philosophe et le politique dans Guillaume d'Ockham," *Archives d'histoire doctrinale et littéraire du moyen âge* 14 (1939): 213. James Heft, *John XXII and Papal Teaching Authority* (Lewiston, NY: The Edwin Mellen Press, 1986), 72-73 has missed the point: (to John's mind) even Christ needed more than simple use of fact.*

³⁰ *QVR* § 49 (535): *Ex quibus* [Dig. 7.5.5.1-2 (1:138), and Dig. 12.2.11.2 (1:195)] *patet quod legislatores loquentes proprie de rebus, quae usu consumuntur, negant usum in illis habere locum, et abusum locum habere concedunt. Qui quidem abusus, id est rei consumptio, si fiat ab eo, cui ius abutendi, id est consumendi, competit, erit licitus; si vero ab eo, cui ius non competit, illicitus est censendus.* (The text in G/F, 578, is slightly expanded, but the argument remains the same.) Mäkinen, *Property Rights*, 164-70, has generally confused John's arguments about consumables, possibly due to the fact that she did not analyse *QVR* in her book, but perhaps also because she did not fully examine the civil law background to John's arguments.

³¹ *QVR* § 41 (522): *... consumptio tamen et actus consumendi locum habet, ut dicit constitutio praedicta; quae tamen non possunt dici simplicia nec a rei, quae consumitur, dominio separata: cum ipsa rei consumptione eius dominium pereat et prorsus desinat esse.... Ex quo patet quod usus talis nec simplex nec separatus a dominio potest dici, et hoc patet, cum per talem facti usum proprietas et dominium ipsius rei perire noscatur. Cf. ACC² 208-215 (246-47). As Kilcullen, "The Origin of Property: Ockham, Grotius, Pufendorf, and Some Others," in John Kilcullen and John Scott, *A Translation of William of Ockham's Work of Ninety Days* 2 vols. (Lewiston, NY: Edwin Mellen Press, 2001), 2:891 n. 43, has noted, Aquinas may be another source for this idea: in *STh* 2a2ae.78.1 co. (9:155), e.g., he claimed that when use of consumables is granted, the thing itself is granted—and thus in a loan (*mutuum*) the *dominium* itself is transferred.*

rights to use (*usus*), the rights to fruits (*fructus*), and the right of disposal (*abusus*).³²

In addition to his refusal to allow use to mean anything other than a right of using, John also denied the Michaelist claim that their use by license, a *licentia utendi*, did not also entail a right of using. That is, according to John, no act of using can be considered separate from its liceity or justness.³³ In fact, he argued from the licitness of an act to the justness of an act, and he thought *Exiit* made this point for him:³⁴

It does not seem probable that the author of the canon meant to reserve such a not-just use to the friars.³⁵ Rather, that he was thinking about a just [use] can be noticed more clearly from this: that he added, in that very same decree, that he would receive exactly the lordship of those things to himself and the Roman Church of which³⁶ the aforesaid brothers or or-

³² See D.L. Carey Miller, "Property," in *A Companion to Justinian's Institutes*, ed. Ernest Metzger (Ithaca: Cornell University Press, 1998), 45, but note that this tripartite division is at odds with John's tacit connection of a *ius utendi* to a *ius percipiendi fructus et utilitatem aliam* (in n. 21 above). In terms of Honoré's list of "incidents" quoted above (n. 32), *abusus* falls under the "right to the capital" category ("Ownership," 170).

³³ McGrade, *Political Thought*, 11 n. 35.

³⁴ In addition to the passages cited in n. 28, see *Exiit* (2:1114): *omnium utensilium et librorum, ac eorum mobiliū praesentium et futurorum, quae et quorum usumfructum [usum facti!] scilicet ordinibus [probably: ordini], vel fratribus ipsis licet habere, proprietatem et dominium, quod etiam felix recordationis Innocentius Papa IV. predecessor noster fecisse dignoscitur, in nos et Romanam ecclesiam plene et libere pertinere hac praesenti consitutione in perpetuum valitura sancimus*. The words in square brackets do not appear in Friedberg's edition, but are found in *Bullarium franciscanum*, ed. J. H. Sbaralea and C. Eubel, 7 vols. (Rome: Vatican, 1983), 3:409. We must assume that Friedberg's text is incorrect: for the first, even John used *usus facti* when referring to this section of *Exiit*, and for the second, the only order to which this really applies is that of the Franciscans.

³⁵ I follow G/F, 166, here and ignore the *non* ("non intellexit") added by Tarrant (276: preserved in n. 37 below). As her second *apparatus lectionum* makes clear, the so-called official version of the bull does not have the *non* either. Obviously, a third *non* would negate the point John was trying to make.

³⁶ The same holds here as in the note above, but, even more importantly, her text (276 [l. 230]: *quare*, emended from *quarum*) ignores the fact that this is an essentially verbatim quotation of ACC² 194-204 (245-46),

der would be permitted to have a use of fact; [and] he added that these brothers must not have the use of all things. But as far as it relates to a simple use of fact without any right of using, no distinction of the things can be supposed as far as the brothers are concerned. For they can, *de facto*, use prohibited things like they can use permitted things. From this it follows that the use of fact (about which the decree [*Exiit*] speaks) must be understood about such use that is just, and for which a right of using coincides.³⁷

There are a few things to note in this passage. First of all, although John could conceive of a “*de facto* use” which is without a right of using (for this is to use “forbidden” things), he refused to relate this notion to simple use of fact.³⁸ In reality, as far as the friars are concerned, there is no difference (*differentia*) when it comes to use. In other words, John was

which has the latter reading. G/F, 166, reads “*quarum*” as well. Heft, *Papal Teaching Authority*, 243, silently emended Tarrant’s text in the same way.

³⁷ QQM 227-236 (276-78): *Quod autem usum talem non iustum conditor canonis fratribus ipsis non intellexerit [omit: non] reseruare probabile non uidetur. Immo, quod de iusto intellexerit ex eo potest euidentius apparere quod in eadem ordinatione adiecit, quod illarum rerum dumtaxat in se et etiam Romam ecclesiam recipiebat dominium quare [read: quarum] usum facti liceret habere fratribus seu ordini antedictis, subiungens quod non rerum omnium usum habere debeant fratres ipsi. Quantum autem ad usum facti simplicem absque omni iure utendi attinet, nulla rerum potest censi differentia quo ad fratres. Sic enim uti de facto possunt prohibitis ut permissis. Ex quo sequitur quod usus facti, de quo ordinatio loquitur, de tali intelligi debeat qui iustus sit et pro quo competat ius utendi.*

³⁸ John believed that “use of fact” had to refer only to the completed (*perfectus*) act, not the act of using: see esp. QVR § 73 (599-600). Ockham, however, argued that *use* could be understood in four ways, the second being taken *pro actu utendi re aliqua exteriori*, which he then qualified: *usus facti est actus utendi re aliqua exteriori* (OND 2.80-99 [300]). Although Brett, *Liberty, Right and Nature*, 58, has argued that this constituted a redefinition on Ockham’s part, he was actually following Michael’s twofold definition in *Appellatio in forma maiore* [= *App. mai.*] (G/F, 255-57). We should also note that although this description of a “*de facto*” use sounds remarkably similar to Ockham’s second main definition of use—viz, [*usus*] *potest accipi pro potestate licita talem actum eliciendi ... cui non est necessario annexum ius, quo usum valeat in iudicio vindicare* (OND 61.183, 269-70 [359, 361])—John must mean (1) that this type of “*usus*” is not use “properly speaking,” and (2) that it is of the unjust variety which the friars are to avoid.

arguing for an equation of just use and licit use, for he began by agreeing that Nicholas III wished to reserve a just use to the friars, but also forbade them to use indiscriminately anything whatsoever. Licit use came from the point that only certain things were permitted for use. Since using things which are not permitted is wrong, such acts of using cannot be just. Licit use, therefore, is just use. Just use, however, presupposed a right of using: "Indeed, it is impossible that an extrinsic human act be just if the one exercising that act has no right of exercising it; rather, such a use is clearly proven to be not-just or unjust."³⁹ Since, he argued, just use presupposed a right of using,⁴⁰ then truly licit use itself must also involve a right of using.

The connection between licit use and just use holds even in cases where the owner has granted the would-be user a license of using. As John said, "if in fact someone grants a license of using his usable thing to another, to the extent that the license holds, it is agreed that he to whom the license was conceded has a right of using that thing."⁴¹ This connection is controlled by the fact that John posited an absolute dichotomy between just and unjust acts, which was fundamental to his whole position in the poverty controversy. Thus, in response to Michael of Cesena's claim that a license is different from a right,⁴² John countered by asking whether this licensed use was supposed to be just, unjust, or neither.

If he says "unjustly," it certainly agrees with the aforesaid constitution [ACC], which maintains that he who uses without a right uses unjustly. If he says that he uses justly, it follows consequently that he uses by

³⁹ *QQM* 271-273 (279-80): *Impossibile enim est actum humanum extrinsecum esse iustum, si exercens actum ipsum nullum ius habeat illud [read: illum] exercendi, immo non iustus seu iniustus necessario conuincitur talis usus.* (John clearly meant "if someone performing that act were to have no right of exercising the act," not "the right." G/F, 168, simply reads *ius habeat exercendi.*)

⁴⁰ Cf. *ACC*² 188-192 (245); *QQM* 224-226 (276).

⁴¹ *QVR* § 64 (571): *Si enim aliquis licentiam concedat alii utendi re sua usibili, ita quod licentia teneat, constat quod ille habet ius utendi re illa, cui licentia est concessa.*

⁴² *App. mai.* (G/F, 264); *Appellatio in forma minore* (G/F, 438).

right—for what is done justly is also done by right: X 5.40.12;⁴³ C. 14 q. 4 c. 11. If, however, he says that the one to whom the license is conceded uses neither justly nor unjustly, this is false. For it is impossible that an individual human act be indifferent, that is, neither good nor evil, neither just nor unjust. For since it is called a human act which proceeds from a deliberate will, and, consequently, which acts for some end which it recognizes as the object of the will, it is necessary that, if the end of the act is good, that the act itself be good. If, however, the end is evil, it is necessary that the act be evil.⁴⁴

Since there are no indifferent actions, it is possible to say that every act is just or unjust in so far as each is good or bad.⁴⁵ What is significant here is that John has effectively

⁴³ This decretal has been discussed by Tierney, “*Ius dictum est a iure possidendo*: Law and Rights in *Decretales*, 5.40.12,” in *The Church and Sovereignty*, c. 590-1918, ed. Diana Wood (Oxford: Basil Blackwell Publisher Ltd., 1991), 457-66 and *The Idea of Natural Rights*, (Atlanta: Scholars Press, 1997), 124-26; as he has noted, John interpreted this ambiguous passage contrary to the earlier canonistic tradition.

⁴⁴ QVR § 65 (573): *Si dicat quod iniuste, concordat utique cum constitutione praedicta, quae vult quod qui sine iure utitur, utatur iniuste. Si dicat quod iuste utitur, sequitur per consequens quod et iure: quia quod iuste fit, et fit iure, Extra, de verborum significatione, c. Ius dictum; xiv, q. iv, c. Quid dicam. Si autem dicat quod ille, cui est licentia utendi concessa, nec iuste utatur nec iniuste, hoc falsum est. Impossibile est enim actum humanum individualem indifferentem esse, id est nec bonum nec malum, nec iustum nec iniustum. Cum enim actus humanus dicatur, qui ex deliberata voluntate procedit, et per consequens qui fit propter aliquem finem, qui quidem obiectum noscitur voluntatis, oportet quod si finis actus sit bonus, quod et ipse actus sit bonus; si vero finis sit malus, oportet quod actus sit malus.* See ACC² 188-192 (245) for a similar point about simple use without a right of using.

⁴⁵ Brett, *Liberty, Right and Nature*, 54-56, has suggested that John derived (but developed) this argument from Hervaeus Natalis (in Sikes, “Hervaeus Natalis,” 235), who had argued that just use requires *aliquod ius in tali re*. Cf. Tabarroni, *Paupertas Christi*, 79-80 n. 12, and Tierney, *Idea of Natural Rights*, 104-08. Mäkinen, *Property Rights*, 133, has identified a similar argument in Gregory of Fontaines’ works. On the point about human acts, Kilcullen and Scott (*A Translation*, 1:435) have traced the idea back to Aquinas’s argument in *STh* 2a2ae.18.9 co. (6:137): *Et oportet quod quilibet individualis actus habeat aliquam circumstantiam per quam trahatur ad bonum vel malum, ad minus ex parte intentionis finis. Cum enim*

claimed that the spheres of morality and law are co-extensive. What is unjust cannot be licit, and since just use requires a right of using, so too must licit use; and, therefore, so too must licensed use. The way John saw it, when a friar used something, be it a stick found in the wilderness or the Basilica of St. Francis, he either had the right to do so, or he used it unjustly and wrongly—like a thief.

2 OCKHAM ON THE SCOPE OF LAW

Much more could be said about John's position on the issue of Franciscan poverty, but this would take us beyond the issues of use, which was the locus of the pope's most devastating attack against the theory of poverty. When Ockham entered the fray, much ink had already been spilt. Not to be outdone, Ockham produced his own work, probably as useful for convincing opponents of the reasonableness of the Michaelist position as it was short. However, his long and complex refutation of John's position in the *Opus nonaginta dierum* (c. 1332),⁴⁶ at least as far as John's problems with just and licit use are concerned, is sound. To demonstrate this, there is no need for a complete account of Ockham's theory of property rights; but we must consider three things: the scope of natural and positive law (§ 2); the difference be-

rationis sit ordinare, actus a ratione deliberativa procedens, si non sit ad debitum finem ordinatus, ex hoc ipso repugnat rationi, et habet rationem mali. Si vero ordinetur ad debitum finem, convenit cum ordine rationis, unde habet rationem boni. Necesse est autem quod vel ordinetur, vel non ordinetur ad debitum finem. Unde necesse est omnem actum hominis a deliberativa ratione procedentem, in individuo consideratum, bonum esse vel malum.

⁴⁶ It was probably written in the first half of 1332: Miethke, *Ockhams Weg*, 83, and H.S. Offler (in *OPol* 1:288); Baudry, *Guillaume d'Occam*, 150-53, argued for a redacted version in 1333. McGrade, *Political Thought*, 14 n. 51, and Spade, in the introduction to *Companion to Ockham*, 10, avoided the question by listing the broadest possible range of dates (1332-1334).

tween rights and licenses (§ 3);⁴⁷ and the disjunction of law and morality (§ 4).

Unlike his famous discussion of natural law in the *Dialogus*, Ockham's account in the *OND* is fairly straightforward.⁴⁸ In the *OND* Ockham connected Augustine's "law of heaven"⁴⁹ to natural law:

A law of heaven is called natural equity, which is consonant with right reason (whether it be consonant with purely natural right reason, or right reason taken from those things which are divinely revealed to us), without any human decree or even a purely positive divine decree. For this reason, this law is sometimes called "natural law," because every natural law pertains to the "law of heaven."⁵⁰

According to Ockham, then, a "law of heaven" is natural equity, which is harmonious with right reason.⁵¹ The term

⁴⁷ Ockham, like many others, used *ius* to mean both "right" and "law," but he switched from one meaning to the other frequently and without comment; on this, see Tierney, *Idea of Natural Rights*, 118-20.

⁴⁸ 3.2 *Dial.* 3.6 (currently being edited online by John Kilcullen, et al.: <http://www.bitac.ac.uk/pubS/dialogus/ockdial.html>) contains the famous passage about the three "modes" of natural law; for discussion, see Kilcullen, "Natural Law and Will in Ockham," in Kilcullen and Scott, *A Translation*, 2:851-82, Wilhelm Kölmel, "Das Naturrecht bei Wilhelm Ockham," *Franziskanische Studien* 35 (1953): 39-85, H. S. Offler, "The Three Modes of Natural Law in Ockham: A Revision of the Text," *Franciscan Studies* 37 (1977): 207-18, Tierney, "Natural Law and Canon Law in Ockham's *Dialogus*," in *Aspects of Late Medieval Government and Society. Essays Presented to J.R. Lander*, ed. J. G. Rowe (Toronto: University of Toronto Press, 1986), 3-24, and Tierney, *Idea of Natural Rights*, 175-82. Natural law and divine law are not precisely synonymous (see, e.g., *OND* 66.42-46 [581]), but for present purposes, we need not concern ourselves.

⁴⁹ C. 17 q. 4 d.a.c. 43 (1:827), taken from Augustine, *Sermones* 355.4.5 (in *PL* 39:1572); cf. *Exiit* (2:1113).

⁵⁰ *OND* 65.76-81 (574-75): *Ius autem poli vocatur aequitas naturalis, quae absque omni ordinatione humana et etiam divina pure positiva est consona rationi rectae, sive sit consona rationi rectae pure naturali, sive sit consona rationi rectae acceptae ex illis, quae sunt nobis divinitus revelata. Propter quod hoc ius aliquando vocatur ius naturale; quia omne ius naturale pertinet ad ius poli.* For a later account of "natural equity," see *Brev.* 2.24.1-28 (OPol 4:160-61).

⁵¹ It is unfortunate that Ockham never formally defined what he meant by "right reason" (cf. David Clark, "William of Ockham on Right Reason,"

“natural equity” is revealing, as is the fact that the law of heaven does not depend on specific decrees (*ordinationes*) for its inherent validity. It is for this reason that Ockham can uphold the traditional canonistic notion that necessity has no law.⁵² This point, we shall see, served as the basis for a legitimization of use that did not require a foundation in positive law.

In terms of positive, or civil, law, Ockham (like others before him) believed that it has legitimate force only where it does not contravene natural or divine law. That is, natural law encompasses positive law, but in certain instances it “permits” positive law to legislate, namely when some law is beneficial to society, but which has no essential connection to

Speculum 48.1 [1973]: 13). However, to be “consonant with right reason” generally seems to be an objective criterion, insofar as it somehow seems to recognize normative propositions (which is not to say that what we believe to be right is actually right); Lucan Freppert, *The Basis of Morality According to William Ockham* (Chicago: Franciscan Herald Press, 1988), 81-82, has suggested that God’s will is the norm which guides right reason. In *Connex.* 2.116-123 (OTh 8:355), e.g., Ockham described the first grade of virtue (i.e., the minimum requirements for a virtuous act) as follows: *quando aliquis vult facere opera iusta conformiter rationi rectae dictanti talia opera esse facienda secundum debitas circumstantias respicientes praecise ipsum opus propter honestatem ipsius operis sicut propter finem, puta intellectus dictat quod tale opus iustum est faciendum tali loco tali tempore propter honestatem ipsius operis vel propter pacem vel aliquid tale, et voluntas elicit actum volendi talia opera conformiter iuxta dictamen intellectus*. Cf. the claim in *Quodl.* 3.15.93-94 (OTh 9:261): *Rectitudo actus non est aliud quam ipse actus qui debuit elici secundum rectam rationem*. Useful accounts of Ockham’s ethical theory may be found in Marilyn McCord Adams, “The Structure of Ockham’s Moral Theory,” *Franciscan Studies* 46 (1986): 1-35, Peter King, “Ockham’s Ethical Theory,” in *Companion to Ockham*, 227-44, and Freppert, *Basis of Morality*, esp. 50-60 who devoted a whole chapter to the connection between the human will and right reason. For the *Connex.*, see especially the commentary in Rega Wood, *Ockham on the Virtues* (West Lafayette, IN: Purdue University Press, 1997).

⁵² Cf., e.g., *OND* 3.416 (322). See also C. 1 q. 1 d.p.c. 39 (1:374): *Quia enim necessitas non habet legem, sed ipsa sibi facit legem....* Cf. *De cons.* D. 1 c. 11 (1:1297); X 1.4.4 (2:37); X 5.41.4 (2:927); and *Gl. ord. ad Dig.* 10.1.un.1, s.v. “expedire”; on this theme, see the excellent article of Franck Roumy, “L’origine et la diffusion de l’adage canonique *Necessitas non habet legem* (VIII-XIII),” in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington*, ed. Wolfgang Müller and Mary Sommar (Washington, DC: Catholic University of America Press, 2006), 301-19, and the references at 302 n. 11.

right reason. For example, outside of appeals to etymology, there is no real reason why driving on the right-hand side of the street is “right”; that is to say, it is not contrary to right reason to drive on the left-hand side of the street.⁵³ Hence, then, the point that positive law is a *ius fori*, a law of the forum.

Unlike a law of heaven, a law of the forum, which has its origins in a pact (*pactio*) or a decree, has no essential connection to right reason.⁵⁴ The significance of the distinction can be explained thus: possession by the law of the forum alone is not a sufficient guarantee that one possesses well, but possession by the law of heaven is.⁵⁵ “Possessing well” as it is understood in relation to right reason, then, has no immediate or essential connection to positive law; even so, once a law or right (*ius*) has been humanly established through a pact, it must not be violated at will.⁵⁶ Thus we might say that individuals’ property rights are to be respected, but we need not say that an avaricious miser who ignores the plight of the neighbouring poor possesses “well” even though he does so by law.

⁵³ Edgar Scully, “The Political Limitations of Natural Law in Aquinas,” in *The Medieval Tradition of Natural Law*, ed. Harold Berman (Kalamazoo, MI: Medieval Institute Publications, 1987), 151–52, has noted that Aquinas also believed the majority of positive law was arbitrarily settled upon.

⁵⁴ OND 65.40–41, 274–276 (573–74, 579): *ius fori vocatur iustum, quod ex pactione seu ordinatione humana vel divina explicite constituitur ... ius fori est potestas ex pactione aliquando conformi rationi rectae, et aliquando discordanti*. As the word “ordinatio” makes clear, certain divine decrees—perhaps those which *non sunt de se mala, sed solum sunt mala quia prohibita* (3.1 *Dial.* 2.20.147–148)—belong to the *ius fori*; cf. Kölmel, “Das Naturrecht,” 83. Like much else in Ockham’s argument here, this passage of the *Dial.* also sounds like a reference or allusion to Aquinas, viz STh 2a2ae.57.2 ad 3 (9:5): *Unde etiam ius divinum per haec duo distingui potest, sicut et ius humanum. Sunt enim in lege divina quaedam praecepta quia bona, et prohibita quia mala: quaedam vero bona quia praecepta, et mala quia prohibita*.

⁵⁵ OND 65.276–279 (579). Cf. the Decretalists’ discussion on X 5.40.12 in Tierney, “*Ius dictum*.”

⁵⁶ OND 65.43–55 (574); Aquinas held a similar view: Ralph McInerny, “Ethics,” in *The Cambridge Companion to Aquinas*, ed. Norman Kretzmann and Eleonore Stump (Cambridge: Cambridge University Press, 1993), 209–10.

3 RIGHTS AND LICENSES

As we noted earlier, one of John XXII's fundamental positions was that use was nothing less than a right of using. Ockham disagreed. He drew a sharp distinction between use as a legal concept and use as an action. One way to talk about this distinction is to use the terms "use of right" and "use of fact."⁵⁷ Use of right may be grounded in natural or positive law, which means one can have a natural or positive use of right.

Natural rights, of course, are irrenounceable:

The abdication of the natural right to the use of a thing is ungodly since no one is permitted to renounce that right. For he who renounces such a right would be unable to preserve his own life from another's goods in a critical moment of extreme necessity without the other's license—which is not true.⁵⁸

Because this natural right comes from nature and not from a "supervening" constitution, this natural right of using is common to the entire human race. "But," he added,

although every person may have such a right of using *at* every occasion, he does not have it *for* every occasion. For those who have nothing individually or in common, although they may have a right of using another's goods, nevertheless they do not have that right except for the time of extreme necessity: in which time they may licitly use every present thing (without which their life could not be preserved) on the strength of the law of nature. However, at another time they could not use another's goods on the authority of that law.⁵⁹

⁵⁷ See n. 26 above.

⁵⁸ *OND* 62.71-74 (564-65): *abdicatio iuris naturalis in usu rei non est sancta, cum illi iuri nemini liceat renuntiare; qui enim tali iuri renuntiaret, non posset in articulo necessitatis extremæ de re aliena sine licentia alterius conservare vitam suam: quod falsum est.* Cf. 60.93-94 (556), 61.119-122 (561), 61.140-145 (562), 65.197-200 (577-78), and 65.243 (579).

⁵⁹ *OND* 61.35-44 (559): *Ius utendi naturale commune est omnibus hominibus, quia ex natura, non aliqua constitutione superveniente, habetur.*

The point here is that just because we can claim a natural right of using does not mean we can go about willy-nilly, ignoring existing positive law-based property rights. Indeed, one of the most conspicuous features of Ockham's political writings is the canon law gloss that "no one ought to be deprived of his right without fault and without cause."⁶⁰ Since, say, eating the fruits of someone else's field clearly does deprive someone of their right to the fruits of their field, what Ockham was saying was that you had to be really, really hungry before you invoked your claim to a superseding right of using those fruits.

In the course of day-to-day life, however, we tend to deal more with a positive law-based right of using. According to Ockham, a right of using was "licit power of using an external thing which one must not be deprived of unwillingly without any fault on his part and without rational cause," and then

Verumtamen, licet omnis homo habeat omni tempore tale ius utendi, non tamen habet tale ius utendi rebus pro omni tempore. Illi enim, qui nullas res habent proprias neque communes, licet habeant ius utendi rebus alienis, non tamen habent ius utendi rebus alienis nisi pro tempore necessitatis extremae: in quo tempore virtute iuris naturae omni re praesente, sine qua vita eorum salvari non posset, licite uti non possunt; alio autem tempore auctoritate illius iuris rebus alienis uti non possunt. It need hardly be said that this type of *ius naturale* cannot be renounced (OND 60.93-94 [556]).

⁶⁰ OND 61.55-59 (559-60): *Nullus autem sine culpa et absque causa rationabili debet suo iure privari*, citing *Gl. ord. ad X* 1.2.2, s.v. "culpa caret," *Gl. ord. ad X* 4.13.11, s.v. "sine sua," and *Gl. ord. ad D.* 22 c. 6, s.v. "priusquam." This notion reappears in one formulation or another again and again in Ockham's other writings: *AP* 5.20-22, 57-58 (OPol 1:243-44); *Brev.* 2.3.51-54 (OPol 4:115), 2.5.104-107 (OPol 4:119-20), 2.16.13-17 (OPol 4:143), 4.4.11-14 (OPol 4:201); 1 *Dial.* 7.67 (ad fin.); 3.1 *Dial.* 1.16.29-35; 3.2 *Dial.* 1.23 (c. prin.); *IPP* 6.11-18 (OPol 4:291), 9.29-31 (OPol 4:300); *OQ* 1.7.52-63 (OPol 1:35), 1.11.16-18 (OPol 1:45), 2.2.17-22 (OPol 1:70), 7.4.31-35 (OPol 1:171). It is also found in what might be Ockham's first attempt at "political" writing, which has been edited in George Knysh, "Ockham's First Political Treatise? The *Impugnatio constitutionum Papae Iohannis* (April/May 1328)," *Franciscan Studies* 58 [2000]: 237-59, at §§ 12, 18, 21 [248, 250-51]. Roberto Lambertini, "Natural Law, Religious Poverty and Ecclesiology According to Francis of Marchia," in *Intellect et imagination dans la philosophie médiévale*, ed. M. C. Pacheco and J. F. Meirinhos, 3 vols. [Turnhout: Brepols, 2006], 3:1626 n. 3, however, remains unconvinced of Ockham's authorship. George Knysh, *Political Ockhamism* (Winnipeg: WCU Council of Learned Societies, 1996), 106, first described this as a key feature of Ockham's "juridism."

specified that “if he were deprived, he could prosecute the depriver in court.”⁶¹ In other words, a right of using is the combination of two elements, a “licit power of using” and the ability to defend this power in court.⁶² This was one place where no rapprochement was possible between Ockham and the pope, for the latter maintained that there was a real difference between a *ius utendi* and a *ius agendi*.⁶³ This was essentially a difference of canon and civil law: John, thinking of civil law, had reason to argue thus;⁶⁴ and Ockham, for his part, defended his point by reference to canon law.⁶⁵ However, Ockham further divides the power of using from issues of licity. All people, indeed all animals,⁶⁶ have a God-given power of using. By itself, this power of using is enough to licitly use an unowned thing; in Ockham’s example, derelict clothing which belongs to nobody.⁶⁷ Where the thing in question is

⁶¹ *OND* 2.155-158 (302): *ius utendi est potestas licita utendi re extrinseca, qua quis sine culpa sua et absque causa rationabili privari non debet invitus; et si privatus fuerit, privantem poterit in iudicio convenire.*

⁶² As Kriechbaum, “Actio, ius und dominium,” 26-27, has noted, this was a common claim of the Michaelist position.

⁶³ *QVR* § 61 (558): *ius utendi* [as related to *usus*] ... *est aliud a iure agendi; potest enim alicui competere ius utendi, cui non competit ius agendi.*

⁶⁴ Ernest Metzger, “Actions,” in *Companion to Justinian’s Institutes*, 208-12.

⁶⁵ Cf. Tierney, *Idea of Natural Rights*, 121-22 and n. 61. Mäkinen, *Property Rights*, 166, misrepresented John’s opinion on this point. Brett, *Liberty, Right and Nature*, 63, on the other hand, only allowed a *ius utendi* to be a “subjective power of action ... not a relation of control over things, as was *ius* for the earlier Franciscans.” But this misses the other half of *ius utendi* for Ockham, for what else can the ability to take legal action (*ius agendi*) be but the result of some relation of control?

⁶⁶ *OND* 41.65-66 (524): *Nam bruta animalia habent actus consumendi res usu consumptibiles, quarum tamen non habent dominium et proprietatem.* The text continues to point out that the *alienati a sensu* have an act of consuming which can be considered neither just nor unjust, as is the case with *pueri ante usum rationis*. (Although not stated explicitly, an “act of consuming” clearly entails a prior power of using.)

⁶⁷ *OND* 4.208-217 (333-34): *Ponatur igitur quod sit aliqua res, puta vestis, habita pro derelicta, quae in nullius bonis sit nec ad alicuius spectet dominium neque speciale neque commune: ista veste potest aliquis licite uti, saltem in necessitate extrema, licet nolit acquirere dominium quodcunque eiusdem vestis. Non enim ad hoc, quod licite utatur ipsa, est necesse quod acquirat dominium eius commune nec etiam dominium eius speciale; ergo ad hoc, quod licite utatur veste, sufficit potestas utendi data a Deo; et*

owned by someone, the situation is a little more complicated. Even in this case, however, for a use of fact to be licit, only two conditions generally (*communiter*) need to hold: (1) that such a use of fact is not prohibited to the one wishing to use; and (2) that the person have a license of using from one who can grant such a license. In other words, there need not be some sort of concession of individual or common lordship.⁶⁸ Ockham further explained that use under these circumstances did not entail the acquisition of lordship, which, he insisted, depended upon the will.⁶⁹ Unwittingly or not, this kept Ockham in line with the civil law interpretation favoured by John.⁷⁰ It is easy to see why using, say, a stick found in the wilderness is "licit," but obviously when the stick belongs to someone else, I cannot licitly use it whenever I wish. Hence the need for a license of using.

For when someone is impeded from using some temporal thing by this alone: that the thing is someone else's ... the permission of the one whose thing it is, which is declared through a license, is alone enough to use the thing by the law of heaven. Through a permission, moreover, and consequently through a license, only the impediment prohibiting the one who has a natural right of using to perform an act of using is removed; and no new right is conferred upon him.⁷¹

ita licitus usus facti vestis potest separari a dominio speciali et communi, licet non a potestate utendi, cui nemo potest renunciare. Cf. OND 65.248-251 (579). Ockham, of course, has in mind the legal notion of *res nullius*; cf. Dig. 41.1.3.pr. (1:690). See further Miller, "Property," 45 and 59; Tierney, *Idea of Natural Rights*, 135-37 and 163.

⁶⁸ OND 4.182-191 (333).

⁶⁹ OND 88.124-134 (657).

⁷⁰ In the case of acquisition of a *res nullius*, it is *occupanti conceditur* (Inst. 2.1.12 [1:10-11]), but *occupatio* itself, "acquisition of ownership by taking possession," implies intent to possess, for *possessio* includes both the factual possession and the desire to keep control over the thing (*animus possedendi*); see Berger, "Encyclopedic Dictionary," svv. "occupatio" (606) and "possessio" (637). See also Miller, "Property," 53-55 and 58-60.

⁷¹ OND 65.218-226 (578): *Ubi autem uti aliqua re temporali determinata aliquis per hoc solummodo impeditur, quod res illa est aliena ... sola permissio illius, cuius est res, quae per licentiam declaratur, sufficit ad hoc, quod iure poli utatur eadem re. Per permissionem autem, et per consequens per licentiam, solummodo removetur impedimentum prohibens habentem*

The license, therefore, allows one to employ his or her innate power of using; and it is also what makes it licit. The qualifier “licit,” however, is merely meant to specify not-illicit, not connote legally licit.⁷²

A license of using is actually a grace, a term borrowed from his theological writings.⁷³ The idea is, of course, that just as grace is supererogatory in that it is certainly a good thing to receive, but not something one can count on receiving,⁷⁴ so are the Franciscans supposed to be in an equally precarious situation: they are meant to hope for, not expect or demand, the kindness of strangers.⁷⁵ In this context, a grace is

that by which someone is often granted a licit power of using something, yet which—at the whim of the granter—someone can licitly be deprived of without any fault or cause of his own, [but] only because he [the granter] revokes the granted power. Thus, poor guests of a rich man have a licit power of using the food and drink placed before them, which the inviter could yet remove at his pleasure, and if he removed it, the guests could not on this account take him to court, nor would they have any action against him.⁷⁶

ius naturale utendi, ne exeat in actum utendi, et nullum ius novum sibi confertur. Cf. Tierney, “Hohfeld on Ockham,” in *Medieval Church Law*, 368.

⁷² OND 2.158-160 (302).

⁷³ Cf. Baudry, *Lexique philosophique de Guillaume d'Ockham: Études des notions fondamentales* (Paris: P. Lethielleux, 1958), 105-06. See 4 *Sent.* q. 11 (OTH 7:213): *Ideo dico quod duplex est gratia: una est qualitas absoluta informans animam, alia est gratuita Dei voluntas. Primo modo loquendo de gratia, dico quod eadem est gratia gratum faciens et gratia virtutum et gratia sacramentalis cuiuscumque sacramenti.*

⁷⁴ I owe Peter King thanks for helping me understand the significance of this point. For the role of grace in Ockham's theological thought, see especially Rega Wood, “Ockham's Repudiation of Pelagianism,” in *Cambridge Companion to Ockham*, 350-73.

⁷⁵ See, e.g., *Regula bullata* 6.1-6 (231-32), and especially *Regula non bullata* 7.13, 9.6 (255 and 259).

⁷⁶ OND 2.160-169 (302): *qua saepe alicui conceditur potestas licita utendi re aliqua, qua tamen ad libitum concedentis absque omni culpa sua et causa licite privari potest solummodo quia concedens concessam revocat potestatem. Sic invitati pauperes a divite habent licitam potestatem utendi cibis et potibus positis ante se; quos tamen invitans ad placitum suum poterit amovere, et si amoverit, non aliquam actionem habent contra ipsum.* He cited *Gl. ord. ad C. 10 q. 3 c. 7*, s.v. ‘sumptus’ and *Gl. ord. ad X 1.5.4*, s.v.

Perhaps we should clarify that a license *can* be a grace, for there are irrevocable licenses—he mentioned monk’s license from a religious superior to enter a different order.⁷⁷ But a license of using was different in that it permitted the license-holder to use the thing in question, but it did not imply any correlative duty on the part of others, particularly the owner(s), to refrain from arbitrarily revoking the license at some point.⁷⁸ To carry the example of the stick a little further, should I grant you a license of using it, you would now be free to employ your innate power of using, and by the grace of the license, the resulting use would be licit. However, I may at any time, for any reason, or for no reason whatsoever, revoke the license; at which point, any subsequent use would cease to be licit, and while you would have no legal recourse if you desired to continue using the stick, I would be within my rights to prosecute you if you continued to do so.⁷⁹ Such a license, furthermore, has no essential connection to positive law. As Ockham argued, a “license which can be revoked at the pleasure of the granter by the law of the forum, is hardly

‘de gratia’, to bolster this distinction. Cf. Ockham’s point that a privation of grace *potest esse sine culpa*: 4 *Sent.* q. 11 (OTh 7:195).

⁷⁷ OND 61.89-94 (560). In fact, Ockham might well have added that there are also “intermediate” licenses, which are revocable with cause, e.g., the *licentia ubique docendi*. Cf. Nicholas III’s remarks in *Exiit* about the *licentia praedicandi*: *quam quidem licentiam praefati ministri revocare et suspendere valeant et arctare, sicut et quando id eis videbitur expedire* (2:1119). Christopher Gray, “Ockham on Trusts,” *Franciscan Studies* 46 (1986): 151-52 has a very useful discussion of licenses and privileges.

⁷⁸ Tierney, “Hohfeld on Ockham,” 370-74, recently analyzed this conception of a revocable license in terms of a Hohfeldian conception of “right,” which corroborates the account given here: “A license is merely a *permission* to do an act which *without such permission* would amount to a trespass” (italics Hohfeld’s). Cf. Ockham’s remarks in AP 7.41-43 (OPol 1:253-4), citing X 4.5.4 (2:683): *unusquisque in traditione seu collatione sive donatione rei suae potest legem, quam vult, imponere, dummodo nichil imponat, quod sit lege superiori prohibitum*; cf. AP 9.30-33 (OPol 1:258). For Hohfeld, see also Charles Reid, Jr., “The Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry,” *Boston College Law Review* 33 (1991): 60-72.

⁷⁹ In a way, St. Francis reflected this idea when he had all the brothers leave a hut because another man wished to stay there with his ass: see Thomas Celano’s *Life of Saint Francis* 16.44-46 (in *Francis of Assisi: Early Documents*, ed. Regis J. Armstrong, J.A. Wayne Hellmann, and William J. Short, 3 vols. [New York: New City Press, 1999-2001], 1:221-22).

to be thought of as a law of the forum.”⁸⁰ And because they are not actionable, they cannot be considered rights.⁸¹ This is significant since one of Ockham’s goals was to argue for a general separation of positive law and morality. The existence of a non-actionable license of using explained how a friar could employ a licit power of using a thing without first having a right to do so; now all that remained was for Ockham to show that such an action could still be “just.”

4 THE DISJUNCTION OF LAW AND MORALITY

John, we remember, had posed this problem: Use conceded by a license must be just, unjust or neither.⁸² The pope concluded that this argument proved use had to be just, which meant that any act of using, even that done by the grace of a license, had to have a right of using.

For his reply, Ockham pointed out that we can speak about justice in three different ways.⁸³

- J1 A particular virtue, distinct from the other three cardinal virtues, according to which a man acts justly toward another;
- J2 A general virtue, namely “legal justice,” which orders all acts of virtue toward the common good;

⁸⁰ OND 65.69-70 (574): *licentia, quae iure fori potest a concedente ad placitum revocari, est de iure fori minime reputanda*. Cf. John Morrall, “Some Notes on a Recent Interpretation of William of Ockham’s Political Philosophy,” *Franciscan Studies* 9 (1949): 345.

⁸¹ OND 64.21-31 (571-72).

⁸² John, of course, thought all use required *ius* for it to be just (cf. Tierney, “*Ius dictum*,” 462), but he granted the premise that a license was not the same as a *ius* to show that the Michaelist position still failed.

⁸³ OND 60.120-129 (557): ... *nomen ‘iustitiae’ tripliciter accipi potest. [1] Uno modo accipitur pro quadam virtute particulari distincta ab aliis tribus virtutibus cardinalibus, habente materiam specialem distinctam a materia cuiuslibet alterius virtutis cardinalis, secundum quam homo iuste operatur ad alterum. [2] Secundo accipitur iustitia pro quadam virtute generali, quae vocatur iustitia legalis, quae omnes actus virtutum ordinat ad bonum commune. [3] Tertio accipitur iustitia pro debita ordinatione actus ad rationem vel aliam operationem, et ita secundum quosdam vocatur iustitia metaphorice sumpta.*

J3 The appropriate ordering of an act to reason or some other operation, and thus, according to some [e.g., Aquinas] it is called “justice taken metaphorically.”⁸⁴

Acts, therefore, may be said to be just or not according to the same scheme.⁸⁵ With this threefold distinction, Ockham responded to John’s challenge in two ways. First, he showed that the pope had confused “legally just” with the (more generic) cardinal virtue; second, he showed that even according to the pope’s own authority for his argument, we can say that acts are “just” in yet another way. That is, according to J1, an act of using can be neither just nor unjust, for there are many meritorious acts, and vice versa, which are neither just nor unjust, and yet are good or bad, praise- or blameworthy. Alternatively, in the case of J3, someone justly uses a thing with a license of using when this action conforms to right reason.⁸⁶ That is, the person *does* use “by right” (*iure*), but

⁸⁴ Ockham goes on to quote from *STh* 2a2ae.58.2 ad 1 (9:11). Ockham’s purpose is clear: Aquinas, whom John canonized, and who served as John’s source for the dilemma he had posed, would agree with the Michaelists on this point, not the pope.

⁸⁵ *OND* 65.143-160 (557): *Ex hiis patet quod actus potest dici iustus tripliciter: [1] Vel quia est actus elicited a iustitia particulari; et sic sunt multi actus humani liciti et meritorii, qui non sunt iusti, sicut actus castitatis, fortitudinis, misericordiae, liberalitatis et multi alii. [2] Aliter dicitur actus iustus, qui elicited vel imperatur a iustitia legali, qua vult aliquis legi obedire; et sic secundum philosophiam moralem Aristotelis multi sunt actus aliarum virtutum, etiam exteriores in comparatione ad alterum, qui licet possint esse iusti, quia possunt imperari a iustitia legali, possunt tamen non esse iusti, ipsis existentibus virtuosus; quia possibile est quod de illis nulla sit lex humana penitus instituta. [3] Aliter dicitur actus iustus a iustitia tertio modo dicta, sive illa iustitia debeat metaphorice vocari iustitia sive etiam proprie; et isto modo omnis actus licitus est iustus, quia est bonus et verae consonus rationi. Et sic patet differentia inter usum licitum et usum iustum. Quia accipiendo iustum primo modo et secundo modo, sicut proportionaliter accipitur iustitia, multi sunt usus liciti, qui non sunt iusti; tertio modo accipiendo iustum, omnis actus licitus est iustus secundum eos, qui ponunt quod omnis actus humanus est bonus vel malus moraliter. Cf. *OND* 65.163-167 (577).*

⁸⁶ Cf. *Quodl.* 3.15.89-94 (*OTH* 7:261): *Dico igitur quod deformitas [here a ‘carentia rectitudinis quae debet inesse actui’] non est carentia iustitiae vel rectitudinis debitae inesse actui, sed est carentia rectitudinis debitae inesse ipsi voluntati; quod nihil aliud est dicere nisi quod voluntas ob-*

this is by the law of heaven, not the law of the forum.⁸⁷ In other words, the pope's point that for acts to be just one must have at least a right of (ab-)using fails because regardless of their legal status (J2), such acts are neither just nor unjust (J1), *and* can easily be just (J3). That is, the justness of an act according to J2 may be one consideration, but it pales in comparison to the larger question of whether the act is, or can be, just in the sense of J1 or J3.

The point here was that we cannot make a strict identification of positive law with morality.⁸⁸ In fact, rather than say that an action must be legally just for it to be morally good, Ockham seems to have thought it would be better if the opposite were true.⁸⁹ In this sense, an act of using may be morally good and consonant with right reason, and therefore just in the third sense, *even if* (and Ockham had his doubts about this) civil law were to demand that use and lordship of a thing cannot remain forever separate.

5 CONCLUSION

We may say by way of conclusion then that there is no foundation to the claim that "although [Ockham] contested every position he was still accepting the pope's doctrine and the pope's arguments as the basis of his own replies."⁹⁰ Rather, if we had to summarize Ockham's general problems with the pope's arguments, it would be that John was wrong to try to account for the entire theory of *usus* within the scope of positive law. According to the version of John's theory presented here, his strict definition of use meant that one must have at least a right of using, or, in the case of consumables, since

ligatur aliquem actum elicere secundum praeceptum divinum quem non elicit. Et ideo rectitudo actus non est aliud quam ipse actus qui debuit elici secundum rectam rationem.

⁸⁷ OND 65.171-173 (577).

⁸⁸ This point has been made before: e.g., Morrall, "Some Notes," 348, and Leff, *William of Ockham: The Metamorphosis of Scholastic Discourse* (Manchester: Manchester University Press, 1975), 620.

⁸⁹ Kölmel, "Das Naturrecht," 85.

⁹⁰ Leff, *Heresy*, 250.

that use could not exist at all, one must have the right to the ab-use, or consumption. This understanding also controlled his understanding of licit use, which had to involve the same rights in order to avoid being considered unjust use.

For his part, Ockham thought all of this was nonsense. There was no essential connection between law and morality. As positive law came about through agreements (*pactiones*) between people,⁹¹ or have their source in a ruler's decree (*ordinatio*), this law is not necessarily related to right reason, which is what *is* intimately tied to questions of morality.⁹² Thus, actions may easily be "just" in some sense of the word without reference to positive law; in fact, some actions may even be "indifferent" as far as positive law is concerned.

Such is the case with the "license of using." Naturally, licenses can fall under the purview of positive law, but not all need to. As Ockham saw it, a license had by the grace of someone else could operate "outside" of the jurisdiction of positive law, provided, of course, that they do not violate existing laws. On the analogy that a prince is "freed" from his own laws,⁹³ the granter of a license is likewise not bound by the conditions he sets. Licenses are therefore revocable at the whim of the granter. But a license of using does not grant a right of using; nor are the terms equivalent. The difference is simple: a right of using offers recourse to legal action, while a license does not.

All a license offers is the opportunity to make use of our "most general power of using."⁹⁴ This power is present whenever we make use of something, and it is the accompany-

⁹¹ Or between God and man, as certain examples of the Old Testament testify.

⁹² That is, acts in themselves are morally neutral, and it is the agent's intentions which are good or bad: *Quodl.* 1.20 (OTH 9:99-106); cf. King, "Ethical Theory," 229, and McGrade, *Political Thought*, 186.

⁹³ See, e.g., *OND* 61.78-88 (560). This is a term liable to misconceptions; for a proper analysis of the phrase *princeps legibus solutus est* (Dig. 1.3.31(30) [1:34]), see Kenneth Pennington, *The Prince and the Law: 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley: University of California Press, 1993), 77-106, and Tierney, "The Prince Is Not Bound by the Laws: Accursius and the Origins of the Modern State," *Comparative Studies in Society and History* 5.4 (1963): 378-400.

⁹⁴ *OND* 4.192-217 (333-34).

ing circumstances which allow us to describe it in different ways. When we make use of something as its owner or as the usufructuary, then this licit power of using is accompanied by a right of using. If our use is impeded, the reason we have recourse to the courts is not because the power of using is something protected by law, but because our claim as owner or usufructuary is. When we make illicit use of something (like a thief does), we are not convicted as such because we have employed this power of using, but because, by doing so, we have infringed upon the rights and claims of others. When we are granted only a license of using and all the limitations this entails, when we use our innate power of using, if our use is impeded there is precious little we can do about it (other than complain).

In other words, Ockham was arguing that (1) because positive law necessarily had to exist “within” natural law in so far as the former can never legitimately contradict the latter, and (2) because there are actions whose justness or liceity depends only on natural law, not all actions need rely on the ordinances or pacts of positive law. A license of using, then, which is “permitted” under natural law, could be licit and just outside of the concerns of positive law. Our power of using, however, is always present—even if it is only licit while the one granting a license of using says it is.

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