UNIVERSITY OF CAMBRIDGE

FACULTY OF HISTORY

POLITICAL THOUGHT AND INTELLECTUAL HISTORY
RESEARCH SEMINAR 2007-8
Series 1

Monday 12 November 2007 5:00 -6:45
Lloyd Room, Christ's College

Property as Natural Right, 12th-18th Century

Peter Garnsey

Jesus College,

University of Cambridge

PROPERTY AS NATURAL RIGHT: 12TH-18TH Century
Peter Garnsey

1. Introduction

When Aristotle was launching his enquiry into the End of political science, he resolved to consider first the opinions of ordinary people rather than philosophers, or at least 'those [opinions] which are most prevalent or have something to be said for them.'[1] Taking a leaf out of his book, I begin with a quotation from the *Guardian* of 10 January 2007:

> Isn't it funny how quickly new human rights get established? Once upon a time we used to make do with the right to life and property. Then came the right to drive (at any speed), and, more recently still, the right to fly (any distance). A generation ago, most people would have been content to plod along to Weston-super-Mare and hope for some August sun. Now a long-haul flight to Thailand or Barbados is such a God-given birthright that the prime minister himself thinks it is "a bit impractical" to ask families to consider holidaying closer to home for the sake of something so unimportant as global climate.

My interest is less in the proliferation and trivialization of human rights in the modern world (to which this citation bears eloquent witness)[2], than in the representation of property as an established natural right, worthy company for the right to life itself.
In this chapter I put this judgement or assumption to the test with the aid of philosophers, theologians, jurists and politicians from the middle of the twelfth century to the end of the eighteenth.

Natural or human rights, as they are understood today, are those basic entitlements that each and every person has, or is judged worthy of having, by virtue of their status as a human being, irrespective of gender, age, race, religion, background or social and economic status.[3] Rights of such a kind are to be distinguished from the legal rights considered in the preceding chapter, which accrue to individuals as full members of a civil society.

Ideas of what constitute natural/human and legal rights overlap to a degree. As regards the right to property, all democratic societies hold that there are certain basic legal rights that attach to the ownership of property (while equally acknowledging that these rights are qualified to an extent by considerations of public utility). Such rights and the means by which they may be exercised and defended are spelled out in national law codes. But in addition, the right to property is widely regarded as a human attribute, which a person should or must have if he or she is to live with freedom and dignity. In general, agreement is not to be expected as to what constitutes a human right, because rights reflect values that people hold to be important, and those values differ widely. Property turns out to be a case in point. It is a central argument of this chapter that the status of private property as anything more than a

[1] *Nic.Eth*.1.4, 1095a29-30.
[2] See e.g. Bobbio (1996), ch. 4. The bibliography of modern rights theory is large. The essays collected in Waldron (1984) are a useful introduction. For a recent critique of natural rights see Geuss (2001), ch.3.
[3] Hoffmann and Rowe (2006), intro.

legal right within civil society was regarded as suspect, and at best uncertain, from the Middle Ages through to the Age of Revolution. In the French Declaration of Rights of Man and Citizen of 26 August 1789, property appears in Article Two as one of the 'natural and imprescriptible rights of man', after liberty, and before safety and resistance to oppression. In Article Seventeen property is termed 'inviolable and sacred'. On the other hand, the preamble to the American Declaration of Independence, which along with the rest of the document was accepted by Congress on 4 July 1776, contains no reference to property among the 'inalienable rights' of man: 'We hold these truths to be self-evident, that all men are created equal, that they are endowed, by their Creator, with certain unalienable rights, that among these are Life, Liberty, and the pursuit of Happiness'. The list is avowedly incomplete ('*among these* [unalienable rights] *are*…'). Still, property is not present, and this was no slip of the pen, no oversight, on the part of Thomas Jefferson, who drafted the document.

The elevation of the right of property to the status of a natural right is often regarded as an achievement of the leading early Enlightenment philosophers of the seventeenth century, Hugo Grotius, Samuel Pufendorf and John Locke (not, however, Thomas Hobbes). However, Grotius and Pufendorf did not accord it the status of a primary natural right, one bestowed directly by God on man. Rather, they conceded that it was derivative, adventitious, fashioned by man himself, albeit in line with the wisdom of God as ascertained by reason.[4] Further, in order to make the case for property as a natural right, Grotius and Pufendorf – also Locke - felt impelled to bring to bear additional considerations,which happen to be far from telling. These were arguments from consent, formal or tacit, in the case of Grotius and Pufendorf. Locke considered that labour conferred on property the status of a natural right, without qualification.

Prior to the seventeenth century, the notion of property as a natural right received only tentative and sporadic support. The humanist jurist Donellus, an older contemporary of Grotius, held that nature had given each person four attributes, life, security, liberty and reputation, while property and obligation were creations of the civil law.[5] Property had been similarly classified by Gratian in his *Decretum* more than 500 years previously. Further, Gratian had pronounced that private property was the product of sin and contrary to natural or divine law. A succession of canon lawyers tried to soften or circumvent his message, but the best that they could come up with was a classification of private property as natural, but of a lower order than primary natural rights, which alone were inalienable. This was the line of thought taken up by Grotius and Pufendorf (amongst others) centuries later.

Further, the idea of natural rights itself is relatively new. Ancient classical societies did not have it. It began to evolve in the middle ages. My interest is not so much in writing a biography of natural rights theory, as in looking at the way the *content* of natural rights evolved, with special reference to the ambiguous status of property rights. It will emerge that the concept of natural rights was a slow developer, retaining an elemental, fledgling status well into the early modern period.

[4] Grotius, *Right of War and Peace* 1.1.10; cf. Pufendorf, *Law of Nature and Nations*, 1.1.7; for the earlier history of this idea, see below.
[5] Donellus, *Comm. on the Civil Law* 2.8.

2. Ancient and Medieval

The origins of natural rights theory are disputed. If we follow the account of Brian Tierney in his magisterial study *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (1997), and it is a very persuasive account, the theory in its earliest phase was a precipitate of a renaissant jurisprudential culture that arose in consequence of the rediscovery of Roman law (c. 1070) and the 'codification' of canon law in Gratian's *Decretum* (c.1140).[6] The prime movers were the Decretalists, the canon lawyers who pored over Gratian's work in the generations that followed its publication. They were provoked, amongst other things, by the denunciatory pronouncements he made therein about the status and origins of private property and its incompatibility with the law of nature. The Decretalists, striving to reconcile Gratian's stance with their own values and those of the institutional Church, noticed that he used *ius naturale* in several different ways, and saw the solution to the problem in separating out the many possible meanings of the term. This they proceeded to do with great industry and ingenuity. There is no need for us to survey their handiwork, but one distinction they came up with is of relevance to us. It was agreed that natural law laid down certain commands and prescriptions which it was the duty of humans to obey. However, the term *ius naturale* did not only refer to such mandates, which in any case did not govern the entire realm of human behaviour, but could also be applied to human conduct and relations which were permissible rather than mandatory. It was in this sphere of permissive natural law that canonists discovered a power or capacity to act, or not to act, with freedom and autonomy, with the aid of reason and within the limits set by the law of the land and divine law. One of the results of their rationalizations was the classification of property as both a *right* and *natural*: as a natural right, then, albeit one of a lower order. For Alanus Angelicus writing around 1200, it was a relative (*respectivum*) rather than absolute right, while Ockham about a century later called it 'supposititious', and derived it from a third class of natural law: 'In a third way, natural law is said to be what can be gathered by evident reason from the law of nations or some other law or from some act, divine or human, unless the contrary is established bv those concerned, and this can be called natural law by supposition.'The idea surfaces again in the Spanish Jesuit Suarez in the sixteenth century, in Grotius and Pufendorf in the seventeenth and in Hutcheson and Burlamaqui in the eighteenth, by which time the favoured word for the status of the right to property was 'adventitious' (apparently coined by Pufendorf)[7].

It is perfectly reasonable to begin the story of natural rights theory in the Middle Ages. But before we accept this, the conventional, view, it is worth considering the possibility that ancient societies made a contribution to the development of the theory. It is one thing to say that the concept of natural rights was absent in ancient societies, another that those societies made no contribution to its later development.

---

[6] The growth of a new juristic culture is seen as part of a more general 'renaissance and renewal', marked by 'a new emphasis on personalism or humanism'. See Tierney (1997), espec. ch.2, and the classic paper by Benson (1982). Tierney criticizes the thesis of Villey that natural rights theory had its origins in the fourteenth century nominalism of William of Ockham. He also rules out a seventeenth-century origin for the theory, linked to the stirring of an entrepreneurial economy.

[7] Alanus, qu.Tierney (1997), n.32; Ockham, see Tierney (1997), 175, using the text in Offler (1977); Grotius, *On the Rights of War and Peace* 1.1.10; Pufendorf, *On the Law of Nature and Nations* 1.1.7,8; F.Hutcheson, *A Short Introduction to Moral Philosophy* 4.147, with Wills (1978), 229-39; J.-J.Burlamaqui, *Principles of Natural Law* 1.4.1.

The claim or assumption that the concept was lacking in antiquity has been contested. Some have detected natural rights in Aristotle, or have seen the Stoics as proto-Hegelian in their thinking on persons and property, or have represented the Roman jurist Ulpian as a precocious humanitarian.[8] I see ancient societies as locked into a morality of duties and obligations rather than rights: duty to the polis, duty to walk in step with the forces of the universe, whether spoken of as providence, nature, gods or God; and I find that, when Stoic philosophers or early Christian theologians thought about what it means to act from moral principles, they put the emphasis on the duties of the agent rather than his rights or the rights of others. As for the Roman jurists who observed that by nature all men are equal, one has to ask what they meant by the word 'equal'. Equality, like liberty, is a slippery concept, whose meaning has not remained fixed over time. Ulpian and Florentinus were referring in all probability (the texts in question are mere scraps wrenched out of context) to a mythical age inhabited by *status-less* humans who shared with each other (only) a basic humanity. And one should ask what these jurists thought they were about when made their observation that slavery was a product of international and civil law not natural law. In my view they were not discussing whether or not slavery was unjust, much less whether the institution should be abolished. They are rather more likely to have been engaged in making distinctions between the different kinds of systems of law, and arranging those systems in a hierarchy.There is no question but that they ranked civil law, the *ius civile*, above natural law. Gratian eight centuries later took the opposite stance, with significant consequences for the status attributed to property rights in the canonistic discussions.[9]

It is worth pursuing the matter of slavery a little further. If one is inclined to take up a negative stance on the contribution of antiquity to natural rights theory, one might be tempted to back this up with an argument that ancient societies by their introduction of chattel slavery *blocked* or at least *held back* the development of natural rights.

*Slavery***:** Slave societies treated a significant proportion of the human race (perhaps thirty percent of the inhabitants of classical Roman Italy, for example) as things rather than people. The existence of slavery might be enough in itself to explain the failure of Greeks and Romans to develop the concept of natural or human rights.

Chattel slavery was invented in classical antiquity and passed on as a *damnosa hereditas* to later societies. The ancients bequeathed not just the institution of slavery, but a potent, supporting ideology: Aristotle's theory of natural slavery.[10] This was the idea that slavery was necessary and beneficial for some people because of their innate intellectual and moral weaknesses. Aristotle's dogma, paradoxically, received far more attention and active backing in later ages than had ever been the case in antiquity. Thus, for example, Thomas Aquinas endorsed it (thus adding substantially to its popularity), while William of Ockham at the very least missed the opportunity to distance himself from it.[11]The Aristotelian doctrine was influential among Christian

[8] Miller (1995) ; cf.Schofield (1999), 149-152 with nn ; Long (1997) cf. Frede (forthcoming); Honoré (2002). I broadly agree with Burnyeat (1994).
[9] Johnston (2000), 621-2, drawing on Levy (1949).
[10] See e.g.Garnsey (1996), with bibl.
[11] On Aquinas, see Finnis (1998),170, 184-5. For Ockham, see e.g. *Dialogus* 3, Tract 1 (McGrade/ Kilcullen 133-4).

humanists and scholastics of the sixteenth century and natural rights thinkers of the seventeenth. Christian Europe, itself by now virtually free of slavery, condoned the enslavement of the native peoples of the New World, bringing Aristotle into service for the purpose. It is a strange testimony to the persisting influence of Aristotle that Franciscus de Vitoria (d.1546) in his treatise *On the Indians* introduced Aristotle as an advocate *for the defence* of the indigenous peoples (arguing specifically for their right to own their property), with the use of remarkably twisted logic.

The slow movement toward abolition began to stir in the sixteenth and seventeenth centuries. [12]There was now an argument over slavery. Neo-Aristotelians had to justify their stance, and there were dissenting voices. Las Casas confronted Sepulveda in a famous debate of the mid 1550s, while around a century later, Pufendorf carved out for himself a relatively liberal position on slavery at the expense of Hobbes.

This was new. There had been no debate over the justice of slavery in antiquity. Aristotle produced his theory as part of a dialectical exchange of some sort. We only know what he tells us about it, which is very little. In any case, no one answered back. For that matter, as far as is known , no one in antiquity, not even those who were patently influenced by his theory, expressly cited it in support of their own arguments. The question of whether slavery was just or not aroused little interest among Greeks and Romans.[13]

A crucial factor in determining the attitude of Greeks and Romans was that slavery was deeply embedded in their economy, society, culture and mentality. They could not do without slaves.This being the case, it is not surprising to find that in their societies whether one was as slave or not was thought to be a matter of chance: justice had nothing to do with it. Being a slave was *tough,* everybody agreed about that. It was tough *luck* as well. And one's luck could change. Warfare, kidnapping, piracy or poverty could turn a free man into a slave from one day to the next. This was because slaves were in high demand. For Greeks and Romans, therefore, the necessity of slavery and the ever-present risk of enslavement blotted out any thought of a universal right to liberty.

This conclusion does not take us as far as might have been hoped, for it does not rule out the possibility of *any* kind of concept of human rights having existed in antiquity: it simply makes problematic the formulation of a natural right of *liberty,* and, moreover, of a natural right to property too. For slaves were property, 'corporeal' property, along with land, clothing, precious metals and so on.[14] Nor does it explain how it was that the idea of human rights was able to arise and make progress from the medieval period on. The fact is that the *physical liberty* of the individual was not under consideration as a natural right in the period from the middle ages to the Age of Revolution, although the liberty of *the subject* in the face of the arbitrary will of a sovereign or other political authority was actively canvassed and debated, notably in seventeenth-century England – with its advocates drawing support from the Roman

[12] It was only from around the middle of the 18th century that the tide turned against the traditional philosophical and theological arguments for slavery. See Davis (1966), 480. For the sixteenth and seventeenth centuries see Pagden (1982); Tuck (1999), 65-76. The citation from Vitoria is from *On the Indians* 1.335-6.
[13] See Williams (1993), 106-17.
[14] Gaius, *Inst.* 2.13.

historians Sallust, Livy and Tacitus.[15] Notoriously, slavery was not expressly prohibited in any Declaration of Rights before 10 December 1948, when the General Assembly of the United Nations proclaimed, in Article Four of the Universal Declaration of Human Rights:' No one shall be held in slavery or servitude: slavery and the slave trade shall be prohibited in all their forms.'[16]

Slavery, in other words, until well after our period, proved to be not incompatible with the development of human rights theory, though it is likely that it slowed down that process. It was an *underdeveloped* idea of natural rights which evolved in the period from the twelfth to the end of the eighteenth century, one that could and did coexist with an acceptance of slavery.

The way forward, in arriving at an assessment of the contribution (if any) of ancient societies to natural rights theory, is to look for ideas already present in antiquity which might have served as building blocks for the construction of the concept, as yet undeveloped, of a natural right. Promising candidates for such a role might include Roman law and natural law, as systematized by the Stoics and transmitted by the Christians.

Roman law: In articulating the rights of the individual citizen of the Roman state, Roman law provided a platform and a paradigm for the construction of the rights of individuals as such. The rights and duties laid down by law of nature or divine law could be measured against and contrasted with the rights and duties prescribed by the civil law. Franciscans such as William Ockham were particularly anxious to specify the respective spheres and requirements of what he called the *ius fori* ('law of the forum') and the *ius poli* ('law of heaven').[17]The classical jurists, moreover, had provided a terminology which the medieval scholars could use. The language of *ius*, and more particularly, the expression *ius et potestas* ('right and power'), is important here. The conjunction (and virtual equivalence) of these terms in the writings of the medieval canonists is regularly regarded as a turning point in the development of the concept of subjective rights.Yet when Johannes Monachus, an early fourteenth century canonist, was defining a third meaning (among many) of *ius* as equivalent to *potestas* or *facultas,* he had beside him Justinian's *Digest* and Accursius's *Ordinary Gloss* on the *Digest*, both open at the title on guardianship. As it happens, the legal texts have a variant reading at this point, as between guardianship as *ius* and as *vis* ('violence' or 'force'). Accursius thought it appropriate to call guardianship 'violent power'. Johannes disagreed, preferring to construe *vis* as *vis intus* ('inner force'), from which he derived *virtus. Ius*, then, means 'virtuous power.' A certain kinship has been found between Johannes' 'virtuous power' and Ockham's 'licit power' – and indeed the modern philosopher Gewirth's 'rightful power'. The association of ideas is somewhat loose; still, it would be something to savour, if it turned out that this long trail leads back to a variant reading in an excerpt from a Roman juristic treatise of the early third century.[18] *Dominium* would have been an ideal model for the canonists,

[15] Skinner (1998).
[16] The Catholic Church did not pronounce that slavery was morally illegitimate until 1965. See Maxwell (1975).
[17] Ockham, *Work of Ninety Days* 65 (McGrade/Kilcullen 55-7). The distinction appears centuries earlier in Augustine, *Serm.* 355.
[18] *Dig* 26.1.1 cf. *Inst. Just*.1.13. For the passage from Johannes Monachus, see Tierney (1997), 41, n.95, where the link is made with Ockham and Gewirth (1978).

because ownership in Roman property law was absolute.[19] Johannes presumably went to guardianship rather than *dominium* because, as we have seen in Chapter Seven, there is no simple definition of the latter in the classical and post-classical texts. The entitlements of a Roman proprietor have to be pieced together from fragments scattered through the surviving sources. The job can be done – the late-medieval jurist Bartolus did it - and the French *Code Civil* reflects his handiwork.[20]

Natural Law: What is implied in the concept of natural law is a system of law which has its basis in the natural order and whose legitimacy is therefore established on the firmest possible foundations, because it is something eternal and out of time. Furthermore, natural law is universal in its outreach, transcending all accidents of social, ethnic and political identities; it is valid for the whole human race. We have seen that natural rights theory emerged out of debate among canon lawyers from the twelfth century over the meaning of *ius naturale*, natural law. Natural law theory, however, had ancient origins. The doctrine in its systematic form is a Stoic creation of the early third century BC. It is conveniently accessible, as is so much of Stoic moral philosophy, in the works of Cicero composed around two centuries later. In *Laws* Book One Cicero argues for the existence of such a natural system of law (*ius naturae*) which is the origin of the virtue of justice, itself to be identified with reason. The interlocking triad of reason, law and justice, further, is shared by gods and men, who participate in the same community. 'Hence we must now conceive of this whole universe as one commonwealth of which both gods and men are members.' This points to the cosmic city of classic Stoic doctrine, though Cicero's vision of that community is more sanguine than that of the Founding Fathers of Stoicism.The 'cosmopolis' of Zeno and Chrysippus did not include all mankind along with the gods, but only those who had achieved the goal of virtue, that is, wise men, and they were few: the rest of mankind were only potentially 'cosmopolitan', and no great optimism was felt about their prospects. The cosmic city was universal primarily in the sense that the wise men might be located anywhere. [21] However,the natural law certainly made moral demands on the whole human race, even if only a few wise men were able to satisfy them. Cicero writes in his *Republic* , in words ascribed to the Stoic Laelius:

> True law is right reason, in agreement with nature, diffused over everyone, consistent, everlasting,whose nature is to advocate duty by prescription and to deter wrongdoing by prohibition…There will be one master and ruler for us all in common, god who is the founder of this law, its promulgator and its judge. Whoever does not obey it is fleeing from himself and treating his human nature with contempt; by this very fact he will pay the heaviest penalties, even if he escapes all conventional punishments.[22]

There is no talk of rights in this passage, or anywhere else in Stoic or Stoicizing literature – only of duty, obligation and obedience.

---

[19] Birks (1985).
[20] The point that the Roman jurists provided later thinkers with a linguistic and conceptual base for their discussions could be elaborated, with reference to key terms such as *occupatio* ([first] acquisition) and *res nullius* (no one's property).
[21] Schofield in Rowe and Schofield (2000), at 452; cf. Schofield (1991). See Cic., *Laws* 1.1-35; the citation is from 1.22.
[22] Cic., *Rep*. 3.33.

Early Church Fathers such as Ambrose and Augustine absorbed the Stoic doctrine of natural law and at times were capable, in the manner of Cicero, of identifying natural law with reason as laying down universal principles of morality.[23] But in addition they Christianized the Stoic doctrine. For Ambrose (though not for Augustine), the Christian Church takes the place of the ideal republic of Cicero as a model of the cosmic city. In the thought of Thomas Aquinas, in whom Christian natural law doctrine reached its consummation, the Stoic cosmopolis becomes the great 'republic under God' in which the whole human race participates.[24] In Ambrose, the Stoic instruction to work in step with nature is characterized as Pauline, and is used to back up the apostle's order to the Christian women of Corinth to wear veils as they pray to God: for 'the veil is a natural thing.'[25]Again, Ambrose accepts that the Stoics 'believed that everything the earth produces is intended for man's benefit, and that men were created for the sake of other men', but claims that they cribbed it from Moses and David.[26] This is the passage (treated earlier in Chapter Five) in which Ambrose set about subverting Cicero's account of the origin of private property. Greedy men, he says, were responsible for introducing private property. Ambrose's target is Cicero for his views on the origin of private property rather than the Stoics, who are credited here with believing in natural communality. But this passage does hint at an inconsistency in the Christian treatment of the Stoic doctrine of natural law which is never resolved. For the Christians, natural law can be presented as an orderly nexus of causes associated with a rational and benevolent deity, or as a new covenant of grace for a fallen world, emanating from a loving God and embodied in Christ.

A full discussion of the contribution to the development under survey of these two creeds, both born in antiquity, is not called for here. The impact of Stoicism on the early Enlightenment (to single out one highly creative period in the development of natural rights theory) can be read in the major texts of the period. One could cite, for example, Grotius'evocation of the Stoic idea of *oikeiosis* (fellow-feeling) in introducing his own doctrine of sociability in *On the Right of War and Peace*, or the heavy use made by Pufendorf in *On the Law of Nature and of Nations* of late Stoic philosophers of the Roman period, not to mention Cicero, not himself a Stoic, but singularly important as a transmitter of Stoic doctrine.[27] As for Christianity, there are those for whom 'the Christian belief in the autonomous status and irreplaceable value of the human personality' is the source of the whole notion of natural or human rights.[28] An alternative view might be that natural rights theory could only mature and take on its modern form, as centred on rights rather than duties, once the hold of Christianity on the Western mind was broken, that is, from the period of the Enlightenment. Certainly Christianity made an indelible imprint on natural rights theory *in its developmental stage*, in respect of the two key elements of the theory identified above: a reading of natural law out of which a correlative concept of natural rights could be extracted, and a reading of *ius* as the subjective rights of an individual.

[23] See Colish (1990), with bibl. For later periods, see Finnis (1980); Hochstrasser (2000).
[24] Ambrose, *On Duties* 1.142: 'The Church is as it were the outward form of justice'; Aquinas, *ST* I-II q.100a.5c.
[25] Ambrose, *On Duties* 1.223.
[26] Ambrose, *On Duties* 1.132.
[27] Pufendorf's *On the Law of Nature and of Nations* has 155 references to Cicero, 109 to Seneca, 12 to MarcusAurelius and 34 to Epictetus. See Hochstrasser (2000), 62.
[28] Kolakowski (1990), 214.

[29] Both elements are present, for example, in the formula arrived at by Jean Gerson, Chancellor of the University of Paris in the early years of the fifteenth century, when he defined *ius* as a 'dispositional capacity or power, appropriate to an individual and in accord with the dictates of right reason.'[30]Significantly, but predictably, Gerson goes on to ground his theory in the 'sacred scriptures' and to explore specifically Christian concerns such as, whether we have the capacity or power to inherit eternal life, or a right to harm ourselves.

In the section that follows I present a short case-study of a particular natural right, the right to life, showing how it grew out of a particular Christian doctrine, the obligation to give alms. This example takes us to the heart of both natural rights theory and Christianity. The right to life is conventionally and properly regarded as the primary natural or human right, while the duty of Christians to give alms to the poor is, and has always been, a central plank of Christian doctrine. It will emerge that the recognition of the right to life, or self-preservation, has significant, negative, implications for the status of the right to property.

3. Right to Life – and Property

In the late fourth century, perhaps in 369, Basil, bishop of Caesarea, Cappadocia, in east-central Asia Minor, delivered a Homily on Luke 12:16-21, 'I will knock down my barns'.This was one of several sermons in which he pressed on the rich the duty of almsgiving.[31] Basil uses two principal arguments to undermine their complacency and whip them into action. They are, that the rich person is not so much an owner as a manager and distributor acting on God's behalf; and that what is withheld by the rich is *stolen* from the poor. First, man is the custodian and dispenser of property that is actually God's:

> Realise, man, who it is who has done the giving. Remember yourself, who you are, what you manage, from whom you received it, why you were chosen over many others. You have been made the servant of God in His goodness, the manager of your fellow-slaves. Do not imagine that everything has been prepared for your stomach. Look on what is yours to handle as if it were other people's property. These things give you pleasure for a short time. Then, having slipped through your fingers, they will have vanished, and you will be required to produce detailed accounts for them.

The ground prepared, Basil moves up a key, and aggressively targets the principle of first occupancy. In doing so he twists Cicero's image of the theatre (see Chapter Five) in such a way that the first occupant is calling 'mine' not just a single seat, ' his own', but the whole theatre:

---

[29] The central role of natural law theory in nurturing the early development of natural rights theory within a predominantly Christian intellectual culture is emphasized by Haakonssen (2002), Mäkinen (2006), Coleman (2006b) and Korkman (2006). Tierney (2006) is concerned lest the existence of 'subjective rights theory' in the formative period be overlooked or underemphasized.

[30] Qu. Tuck (1979), 25-6. See Gerson, *Oeuvres Complètes*, vol.3, 141.

[31] Rousseau (1994) on Basil; Finn (2006) is an exemplary study of almsgiving in late antiquity, its theory and practice; Basil is discussed at 223-38. The citations are *I will knock down my barns* 264-5, 276-7, transl. R.Finn. See *PG* 31; Courtonne (1935).

> ‘To whom am I doing an injustice’, he asks, ‘by keeping what is mine?’ Tell me, what kind of things belong to you? Where did you get them from, when you brought them into this life? It is as if someone catching a show in the theatre were to stop other people from coming in, in the belief that what was put on in public for everyone’s enjoyment was his property. That’s the rich for you. They get first hands on common property and make it theirs because they got it first.

Basil’s tone becomes ever more pugnacious, as the rich man, already found guilty of avarice, is invited to choose for himself the label of ‘atheist’ or‘robber’:

> If each person would only take for themselves what would meet their own needs and then relinquish what was left over to someone in need, noone would be rich, noone poor, noone in need. Were you not naked when you left the womb? Will you not be naked when the earth covers you again? Where do your present belongings come from? Say it is an accident of fate and you are an atheist, ignorant of the Creator, with no gratitude to show your benefactor. Admit, on the other hand, they come from God, tell us the reason why you got them. God is not unjust, is he, when he divides up unequally what keeps us alive? Why are you rich, but this man poor? Surely, above all, so that you may receive the reward for your goodness and trustworthy provision, while he is honoured with great prizes for enduring in patience. But do you think you are wronging nobody in depriving them of everything you sweep up into the bottomless pockets of your avarice? Who is a greedy person? The one who does not settle for self-sufficiency. Who is a robber? The one who makes off with everyone else’s property. Aren’t you greedy? Aren’t you a robber? Making your own private property what you took to administer? Isn’t the man who strips someone bare called a thief? And does the man who refuses to clothe the naked, when he is capable of doing so, deserve any other name? The bread you hold onto belongs to the hungry person. The cloak you guard in the store-cupboard belongs to the person who goes naked. The shoes rotting in your house belong to the person who walks barefoot. The silver you dug up and hoard belongs to the needy person. So you wrong as many as you could provide for.

When the issue of extreme poverty surfaces in the Middle Ages we encounter what is for the most part a familiar charge expressed in familiar rhetoric. In Gratian’s *Decretum* the obligations of private owners to the poor are expressed in dramatic (but Basilian) language: ‘A man who keeps more for himself than he needs is guilty of theft…The bread that you hold back belongs to the needy, the clothes that you store away belong to the naked ‘. One pronouncement stands out as different :‘When a person is dying of hunger, necessity excuses theft.’ The novelty is threefold: the situation is considered for the first time from the point of view of the poor man; the accusation of theft hangs over the poor man, not the rich man; and the poor man is transparently starving.[32]

[32] Gratian, *Decretum Dist*.c.21; 47 c.8;

The Decretalists took up the baton.[33] Huguccio (Hugh of Pisa, d. 1210) thought the starving man would not be guilty of theft. He had no explanation to offer, apart from the starving man's reasonable expectation that the rich man would respond positively: 'because he believes or should believe that the owner will grant him permission'.[34] Alanus (writing in the 1190s) took original communality as the starting-point, as Gratian had done, but understood this to imply that goods were shared in times of dire necessity: 'Since by natural *ius* all things are common, *that is, they are to be shared in time of need'*, he is not properly said to steal.'[35]Thomas Aquinas did not advance beyond this position. Writing in his massive *Summa Theologiae* (therefore sometime in the late 1260s or early 1270s), he declares that theft on behalf of the man in extreme want is permissible. For *in extremis,* property rights are in effect suspended, and everything reverts to common property, as in God's original dispensation.[36]

Thomas does not talk in terms of a moral right of the starving man, but his contemporary the canonist Hostiensis (Henry of Segusio, d. 1271) did, if rather tentatively:'He who suffers from dire necessity seems rather to be making use of his right than to be planning a theft.'[37] In another significant move Godfrey of Fontaines and John of Paris, colleagues at the University and Paris and writing in the 1280s, ascribe to the starving man *property rights* in the food that he takes in order to stay alive. The first quotation is from Godfrey, the second from John:[38]

> For the reason that each and every man is bound by the law of nature to sustain his life, which cannot be done without external goods, so also by the law of nature each and every man has dominion and a certain *ius* in the common external goods of this world, which right also cannot be licitly renounced.
>
> Human life is ruled by natural and positive law. Natural law never alters but positive law loses its force in certain cases where it does not remain in accord with the natural law upon which it is founded. Natural law does not determine that a thing be mine or yours, for natural law recognizes the common possession of all things…That everyone is bound to preserve his own life is natural; therefore, according to natural law, an individual who would not otherwise survive except by taking the property of others may do so. Positive law has no force in this case, and the property which he takes no longer belongs to others but becomes his own.This is true whenever he might not otherwise be able to provide for himself…And this resolves the

[33] Some medieval scholars investigated the right of self-preservation and its limits by way of another theme, whether the criminal who has been justly condemned to death has the right or duty to try to escape. The first main discussion is by Henry of Ghent (d.1293). The issue was still of interest to major philosophers of the seventeenth century. See Tierney (1997), 78.

[34] Tierney (1997),71 n.92. Tierney, leaning on Couvreur (1961), gives a useful summary of the main canonistic discussions. See also the detailed account of Swanson (1997).

[35] Tierney (1997),73, n.98.

[36] *ST* 2.2ae.66.7.

[37] Tierney (1997),38; cf. 75. Thomas Aquinas' use of *ius* is much discussed. See Tierney (1997), 22,who argues against Villey that Aquinas sometimes used *ius* in a 'subjective sense'; elsewhere (e.g. 69, 258) he refuses to attribute to Aquinas 'the definition of *ius* as a subjective right'. Finnis (1998), 136, writes: 'Though he never use a term translatable as 'human rights', Aquinas clearly has the concept.'

[38] Godfrey: *Philosophes Belges* 4 (I1924), 105 (*Quodl*.8 q 11); John: *Commentary on the Sentences* 3.3ff. 130v-131, qu.Mäkinen (2006), 48-49.

> problem because whoever makes use of *his own goods and not another's* does not commit theft.

Godfrey and John had between them defined the category of a *natural property right*, an entitlement to the goods required to sustain life, in addition to and above the conventional *civil property right*, an entitlement to exclude others from the resources that are owned. This move was contested. The era of the Franciscan poverty dispute had arrived, or the first stage in that dispute, and this is reflected in Godfrey's language. The position of the Franciscans had come under critical scrutiny from secular theologians such as Godfrey. The Franciscans had renounced all *dominium* and other civil law rights over the food that they needed to stay alive. They had not renounced the right to life, and claimed licit access to necessary provisions (and other fungibles). Their argument was that the right to nourish, protect and preserve the body is a (natural) right of self-preservation, not a right to property. Their critics claimed in their turn that the Franciscan position was incoherent, because in order to exercise the undoubted and unrenounceable right to stay alive, they had to establish *dominium* over the very goods that would enable them to exercise this right. In the next round of the contest (in the 1320s and 30s) what had been a relatively civilized scholarly disagreement broke out into open warfare between Pope John XXII and the Franciscan Order. The point to be stressed here is that the leading opponent of the Pope, William of Ockham, while resisting any attempt to fuse the natural right to life with a natural right to property, was forced into a detailed analysis of the nature of *dominium* and its status as a right, and came up with a characterization of the right to property as natural in a subsidiary, conditional sense – his word (as we saw) is, 'supposititious'. In this he was tapping into a line of thought that can be followed from the twelfth century to the eighteenth. Its advocates included leading thinkers of the sixteenth and seventeenth centuries, whose views on the right to life and its relation to the right to property I now briefly sketch.

On the matter in question, theorists of the sixteenth century such as the Jesuit Suarez and the Dominican Vitoria on the whole walked in step with their predecessors, invoking above all the authority of Thomas Aquinas, to whom they appear to ascribe a doctrine of individual rights. A further sign of Vitoria's allegiance to the founder of his Order is his turning of Thomas' labelling of the unresponsive rich man as a murderer into the advice that the starving poor man could not just steal from a rich man who did not release food to him, but *kill* him.[39]

The primacy of the right of self-preservation received renewed emphasis in the seventeenth century. Grotius pronounced it the only universal moral principle on which the whole of humanity could agree.[40] For Hobbes, it was *the* right of nature:

> The right of nature, which writers commonly call ius naturale, is the liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own Life; and

[39] Suarez, *On the Laws* 3.2.17.2, 100; Vitoria, *Commentarios* 3: 64; 340; 5: 264-65 (cited Tierney (1997), 301.
[40] Tuck (1999), 9-10. For the relation between self-preservation and sociability in Grotius and Pufendorf, see Hont (2005), 173-8.

> consequently, of doing any thing, which in his own Judgement, an Reason, hee shall conceive to be the aptest means thereunto.[41]

Grotius' main innovation was his extension of the claims of necessity from the safety of individuals to the safety of states. Otherwise he stuck to traditional doctrine fairly closely. For example, he went along with the thesis that *in extremis* the original regime of communality made a temporary return at the expense of ownership rights. At such moments the poor acquired a property right in the superfluous resources of the rich in consequence of the failure of the latter to live up to their obligations, and this was done in full accordance with natural law.

Some natural law theorists found in this proposition a recipe for anarchy. Pufendorf manoeuvred his way by tenuous logic into a compromise position which took the pressure off the rich, whose duties to the poor were now characterised as 'imperfect' and less than obligatory, and allowed those *in extremis* access to necessary goods but no actual right to them.[42] Locke's attitude to the poor was similarly less than magnanimous. There was an obligation on the rich, but this was merely a side-constraint on existing property arrangements. It came into operation only in extreme necessity, and only as a last resort after the poor man had made an attempt to *work* his way out of trouble; further, only the bare necessities were to be furnished. Locke's long-term solution was the same as that of Adam Smith: economic growth. Through the achievement of higher productivity in the context of an expanding economy dire necessity could be brought to an end.The problem of the rights of the poor in the property of the rich would simply evaporate.

Having resolved to his own satisfaction the age-old problem of the right to life of the starving poor, Locke brought back that same right in a positive new role, that of establishing the status of property as a natural right. His argument is a simple one, resting on God, the creation, and the teleology of natural resources.

> God having made Man and planted in him as in all other Animals, a strong desire of self-preservation, and furnished the world with things fit for Food and Rayment and other Necessaries of Life, subservient to his design, that Man should live and abide for sometime upon the Face of the Earth, and not that so curious and wonderful a piece of Workmanship by its own Negligence, or want of Necessaries, should perish again, presently after a few moments continuance: God, I say, having made Man and the World thus, spoke to him (that is) directed him by his Senses and Reason…to the use of those things which were serviceable for his Subsistence, and given him as means of his Preservation….And thus Man's property in the Creatures was founded upon the right he had to make use of those things that were necessary or useful to his Being.[43]

---

[41] *Leviathan* 1.14.64 (Tuck 91).
[42] *On the Law of Nature and Nations* 2.6.6. On both Pufendorf and Locke, see Hont (2005), 424-35. Burlamaqui, *Principles of Natural Law and Political Law*, transl. Nugent (1763), 1.1. 7 (and see below) writing in the 1740s took a hard line on the issue: 'Thus, notwithstanding reason authorizes those who are destitute of means of living, to apply for succour to other men; yet they cannot, in case of refusal, insist upon it by force, or procure it by open violence.'
[43] *Treatise* 1.86.

> The Earth, and all that is therein, is given to Men for the Support and Comfort of their being. And tho' all the Fruits it naturally produces, and Beasts it feeds, belong to Mankind in common, as they are produced by the spontaneous hand of Nature…yet being given for the use of Men, there must of necessity be a means to appropriate them in some way or other, before they can be of any use, or at all beneficial to any particular Man.[44]

These paragraphs could have been written by one of a number of medieval –to-early-modern jurists steeped in natural law. But whereas others might have hesitated over questions that surfaced in these texts, Locke does not allow himself to be sidetracked. Original communality is mentioned, as is the private ownership that undermined it, but without comment. The slippery phrase 'God ...spoke to him (that is) directed him by his Senses and Reason'(*sc.,* to use and possess resources) glides over a major debate concerning the proper classification of the right to property. Later in the *Treatise* Locke unfolds his theory of labour as a trump card to dispel all doubts and suspicions about ownership. His broad strategy meanwhile is to expand those rights whose status as natural is beyond dispute to include the right to property. In this connection let us note the following passage on *liberty* :

> To understand political power right, and derive it from its original, we must consider, what state all men are naturally in, and that is, a state of perfect freedom to order their actions, *and dispose of their possessions and persons*, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man. [45]

Two chapters later Locke adds *security* for 'life, health, liberty or possessions'. The French Declaration of the Rights of Man and of Citizen is just around the corner.

4. The Age of Revolution

Property is not among the inalienable natural rights listed in the preamble to the American Declaration of Independence of 4 July 1776; it *does* have a place in the French Declaration of the Rights of Man and Citizen of 26 August 1789. Why did the Americans leave it out and the French put it in?

America: It might have been anticipated that Thomas Jefferson, who drafted the American document, would include property. The Bill of Rights of Jefferson's home state of Virginia, passed on 12 June only a few weeks earlier, did find space for property, in a statement (drafted by George Mason) whose content is otherwise similar to Jefferson's:

> That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing happiness and safety.

[44] *Treatise* 2.26.
[45] *Treatise* 2.4.

Other states modelled their own Bills of Rights on that of Virginia in this respect.

Jefferson's omission of property was deliberate and highly significant.[46] His reasons, whatever they were (for no source informs us), were enduring, for as ambassador in Paris in the late 1780s he advised Lafayette, with whom he was in close contact, to drop property from *his* draft Declaration of Rights of June 1789. Jefferson put brackets around two phrases, thus:' Every man is born with inalienable rights; such are [the right to property,] the care of [his honour and] his life, the entire disposal of his person and industry, as well as his faculties, the pursuit of his own good, and resistance against oppression.'[47]

Lafayette stuck to his guns and retained *propriété* and *honneur* in his third and final 'projet de déclaration' of July 1789.

Jefferson was not alone in believing that property could or should be dispensed with in any catalogue of human rights. Among the advisory pamphlets submitted in the run up to the Declaration of Independence was one composed by James Wilson of Pennsylvania, entitled *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament.* The work was written in 1768 and published in 1774. It contains a statement of rights, and its content overlaps significantly with that of Jefferson. Again there is silence over property:

> All men are, by nature, equal and free: no one has a right to any authority over another without his consent: all lawful government is founded on the consent of those who are subject to it: such consent was given with a view to ensure and to increase the happiness of the governed, above what they could enjoy in an independent and unconnected state of nature. The consequence is, that the happiness of the society is the *first* law of every government.[48]

Jefferson's decision to leave out property might have had something to do with slavery. To accord property the status of a human right at a time when humans constituted a significant form of property in America, might seem to be legitimizing the institution. Jefferson, along with other Founding Fathers, was schizophrenic about slavery. He was a major slaveowner who was opposed to slavery. His draft document for the Declaration of Independence included a direct attack on slavery and the slave trade, characterized later by John Adams as a 'vehement philippic'.[49] Jefferson's comment on the excision of the paragraph in question by Congress is suggestive of the sensitiveness of the issue among the politicians of the time, Northerners as well as Southerners:

> The clause too, reprobating the enslaving of the inhabitants of Africa, was struck out in complaisance to South Carolina and Georgia, who had never attempted to restrain the importation of slaves, and who on the contrary still

[46] Huyler (1995), 247. thinks otherwise: 'Not very much need be made of Jefferson's decision to substitute "the pursuit of happiness" for Locke's own formulation of "life, liberty and property'. For a view on the omission of property which is quite different from mine see Bassani (2004).
[47] Jefferson, *Papers* (ed. Boyd), 15, 230, qu. Wills (1978), 230. For Lafayette's three 'projets', see Rials (1988), 528, 567, 590.
[48] Wilson, *Works* (ed. McCloskey (1967), 2, 723.
[49] Becker (1922), 212-34; Adams (1851-6), 2, 512.

> wished to continue it. Our Northern brethren also I believe felt a little tender under these censures; for tho' their people have few slaves themselves, yet they had been pretty considerable carriers of them to others.[50]

Slavery might be sufficient explanation for the absence of property in Jefferson's document. But there were also the 'Indians' (Native Americans).[51]American leaders could not stop settlers from taking over Indian land, nor did they want to. Jefferson writing in 1801 as President to the Governor of Virginia spoke of his dream that white farmers would 'cover the whole northern if not the southern continent, with a people speaking the same language, governed in similar forms, and by similar laws; nor can we contemplate with satisfaction either blot or mixture on that surface.'[52] Jefferson himself together with associates had been acquiring Indian land from the 1760s. As for Indians who did not cede their lands peacefully, they could be forced to do so in a 'just war'. Warfare was in progress on the frontiers of Virginia just when Jefferson was preparing his draft for the Declaration of Independence – fomented, he charged, by the British. At the same time Jefferson and many other leading politicians did not agree that the Indians, though primitive peoples, had no natural rights, including the 'right of soil'. However, if there was a natural right to property, virtually all property held by descendents of European settlers would have been put under suspicion. Jefferson was as inconsistent over the Indians as he was over slavery.

Slaves and Indians might sufficient explanation for Jefferson's reluctance to include property.Alternatively, or in addition, Jefferson was swayed by the writings of a natural law theorist. This was not John Locke, whose influence on the American Revolution has been strongly asserted and as strongly denied[53], but Jean-Jacques Burlamaqui (1694-1748). Burlamaqui was Professor of Natural and Civil Law at Geneva from 1723 until his death, and wrote up his lectures as *Principes du droit naturel* (*Principles of Natural Law*, 1747) and *Principes du droit politique* (*Principles of Political Law*, 1751). He was a disciple of Jean Barbeyrac of Lausanne (1674-1745), the eminent translator and commentator of Grotius and Pufendorf. [54] Burlamaqui's work was translated into English and circulated widely among American politicians in the decades leading up to the Revolution. James Wilson owned a copy in the original French. In his influential position-paper of 1774, *Considerations,* there is a quotation from Burlamaqui in the paragraph that follows the statement on natural rights cited above. In his law lectures, and *On the Law of Nature* in particular, he quotes Burlamaqui in the text, and refers to him repeatedly in the footnotes. Jefferson knew and drew on Wilson's *Considerations*. He too had a copy of Burlamaqui (in French) in his library.

---

[50] Qu. Becker (1922), 171-2. The Virginians confined rights to those deemed to be members of society ('when they enter society'), thereby excluding slaves. In this way they showed a willingness to make the distinction between slave and free, but not to make the distinction explicit. The Americans in their unwillingness to make the distinction were employing a deeper level of evasion. The explanation of the difference lies in the different constituencies, situations and attitudes of the decision-makers.

[51] See e.g. Wallace (1999); Sheehan (1973).

[52] Wallace (1999),17.

[53] For the debate see Huyler (1995), with bibliography.

[54] For Burlamaqui in his Genevan setting, see Rosenblatt (1997), and in general, Gagnebin (1944). The 'American connection' was first observed by Chinard (1926) and studied in detail by Harvey (1937). White (1978), 213-28 gives a penetrating analysis. Huyler (1995), 247-8, is a recent endorsement. See also, with special reference to 'the pursuit of happiness', Korkman (2006).

Jefferson and Wilson would have found in Burlamaqui a very clear message about property and rights. Following in the tracks of earlier natural law theorists, Burlamaqui distinguishes between the primitive and original state of man 'in which man finds himself placed by the very hand of God, independent of any human action', and adventitious states 'wherein he finds himself placed by his own act'. The ' property of goods' is one such adventitious state. The natural state of man comprises both primitive and adventitious states. He goes on:

> Let us not forget to observe…that there is this difference between the primitive and adventitious states, that the former, being annexed as it were to the nature and constitution of man, such as he has received them from God, are, for this very reason, *common to all mankind. The same cannot be said of the adventitious states*, which, supposing an human act or agreement, *cannot of itself be indifferently suitable to all men*, but to those only that contrived and procured them.

On rights, Burlamaqui lays down with equal clarity a parallel distinction between natural and acquired rights. 'The former are such as appertain originally and essentially to man, *such as are inherent in his nature, and that he enjoys as man,* independent of any particular act on his side. Acquired rights on the other hand are *those which he does not naturally enjoy,* but are owing to his own procurement.' He gives illustrations. They are, of a 'natural' right, the right of self-preservation, and of an 'acquired' right, 'sovereignty, the right of commanding a society of men'. He might equally have cited the right to property as an exemplary 'acquired' right.[55]

Jefferson left out property (with the connivance of colleagues) because he held that to designate it as an unalienable human right was philosophically unjustified and politically unwise. [56]

France: It was not a foregone conclusion that the National Assembly of France would issue a 'Déclaration des droits de l'homme et du citoyen' in 1789. The demand for a Declaration of Rights came out of the Lists of Grievances ('cahiers de doléances') brought to the King by the Deputies of the Three Estates, and these typically addressed themselves to the rights of *citizens.* The 'cahier général du Tiers de Nîmes' is representative:

> The purpose of the laws being to safeguard *for all citizens*, under the protection and through the vigilance of the monarchy, the blessings that they

[55] Burlamaqui, *Principles of Natural Law and Political Law*, transl. Nugent, 2nd ed. Rev./corr. (1763), vol.1, pt.1,ch.4 and 7, pp.36-44, 71-3. Wills (1978) argues forcefully, but not to my mind persuasively, that the main influence on Jefferson came from the Scottish Enlightenment, and in particular from Francis Hutcheson. Burlamaqui was doubtless influenced by Hutcheson as well as by Grotius and Pufendorf., but what is at issue is their respective popularity among the Founding Fathers. I find it significant that James Wilson though a Scot and educated in Scottish Universities cites with regularity Grotius, Pufendorf and Burlamaqui, but of the Scottish thinkers only Thomas Reid. See Hamowy (1979) for a devastating attack on Wills's thesis.

[56] It is of interest that Abraham Lincoln wrote in a letter of April 6, 1859 to H.L.Pierce and others, of 'the Jefferson party formed upon the supposed superior devotion to the personal rights of men, holding the rights of property to be secondary only and greatly inferior'. See Lincoln, *Collected Works* (ed. Basler), 2, 374-6.

> bestow on society in common, the deputies shall never lose sight of the fact that the laws must be conducive to the preservation among men of the liberty to act, to speak, and to think; of the property in their persons and goods; of their honour and of their life; of their tranquillity, and finally, their safety. Nor shall they forget that the highest point of perfection in the laws is to procure for those who are placed under them the greatest summation of happiness that is possible.[57]

Some 'cahiers' talk in terms of 'des droits de l'homme et du citoyen'. In addition, men of influence such as the Marquis de La Fayette, the Abbé Sieyès and Jean-Joseph Mounier in their Draft Declarations ('Projets de Déclarations') issued in the run-up to the period of concentrated debate in the National Assembly (late July through August) had addressed the rights of man and citizen.[58] Nevertheless, a number of the around thirty declarations that were submitted to the Assembly for discussion limited themselves to the 'rights of mankind *in society'*, in effect, to the rights of citizens. The committee of five under the Comte de Mirabeau that was entrusted by the Assembly on 12 August with the task of finding a route through the maze of proposals, reported back on 17 August with a 'Projet de Droits *de l'homme en société'*. Article Eleven of their proposal guaranteed '*to every citizen* the right to acquire, possess, manufacture, trade, employ his abilities and his industry and dispose his properties as he wishes.'

Mirabeau's report fell flat, satisfying neither supporters of a Rights Declaration nor its critics, of whom there were a significant number among the 1200 deputies.[59] In introducing his document Mirabeau adopted a defensive tone. His committee's task, he says, had been to lay out some general principles which were applicable to all forms of government. What was needed was a formula of conspicuous simplicity on which all could agree and over which one could harbour no doubts. In fact, the ancient and decrepit state of the existing political order and the need to take account of local circumstances dictated that only a 'relative perfection' could be hoped for. To arrive at a Declaration of Rights in such circumstances was 'a labour fraught with difficulty'. Specifically, his committee had found it difficult to distinguish 'that which belongs to the nature of man from those modifications introduced on his behalf in one society or another'. Mirabeau evidently thought that to impose such a distinction was not worth the effort, and he illustrated his point with reference to liberty.'Liberty has never been the fruit of a doctrine arrived at by means of philosophical deduction, but rather out of everyday experience.' A side-glance at the American revolutionaries follows : 'they deliberately steered clear of "science", preferring to present the political truths that they wanted to enact in a form that could easily be taken up by *a people*. For liberty matters only to a people, and only by a people can liberty be maintained.[60] Mirabeau had betrayed a certain lack of interest in human rights as early as April 1788, when he circulated his own 'projet de déclaration'. After a terse opening - 'all men are free and equal'- Mirabeau got down to the business that

[57] AP 240; Rials (1988), 115.
[58] See Rials (1988), Dossier nos.17,27,33 (Lafayette); 34,38 (Sieyès); Mounier (35), and ch.1 for the sequence of events of spring and early summer 1789. For biographies of the 'Constituents' see Lemay (1991). The events of July and August 1789 are well covered by Rials (1988) ch.2; Baker (1990); Tackett (1996).
[59] See Jennings (1992) on the critics.
[60] AP 8, 438. Also on America, see espec. AP 8, 452 and 518. See, briefly, Lefebvre (2001), 140. The classic comparative work is Palmer (1959-64). The Virginian and French Declarations are placed side by side in Appendix 4.

interested him, which was to set out the rights of the citizen in civil society. [61] When the Deputies showed their displeasure at his report, Mirabeau retaliated by proposing that the drafting of the Declaration be postponed until other parts of the constitution had been settled. We can sympathize with his attitude. As the Old Order entered its terminal phase, the moderate reformers in the Assembly moved to counter the threat of revolution from below and counter-revolution from above. The priority, in the eyes of many of them, was to spell out in concrete terms the rights of citizens within the protective framework of a new constitution. And they had within their ranks or readily at hand a battery of lawyers armed with the expertise that was needed for this specific task.[62]

In the event, after the disappointment of the Mirabeau report, the movement for a comprehensive Declaration of Rights picked up again, and the Assembly after only a week's debate reached a successful conclusion. What drove the 'Rights Movement' then, as before, was the desperate state of France. In the summer of 1789 the situation had worsened through a sudden combination of political tensions and acute food shortages. Poor harvests, a dramatic rise in the price of bread (peaking on 14 July), and the 'Great Fear' of a conspiracy to stop the revolutionaries in their tracks by denying them food, resulted in a dramatic rise of the level of violence in the countryside and on the streets of Paris. The National Assembly responded to the emergency by abolishing seigneurial privileges and ending the tithe – and the fate of Church properties lay in the balance. This was the deputies' main business in early August; it is remarkable that they were able to give any attention at all to Rights and a Constitution. But now (in mid-August) the nation was in greater turmoil than ever. To single out property, a matter close to the hearts of the landowners who were steering the Revolution, the Assembly's own measures had if anything increased disruption on the land. Further, one issue which had helped trigger the revolution, taxation and the national debt – Who had the right to levy taxes? Who had the right to maintain or repudiate the national debt? – still had to be confronted.[63] This was an appropriate time, or rather, there was an urgent need, to step up the campaign for the security of property and the rights of citizens in general. By coupling citizen rights with human rights, by formulating a set of universal principles underlying a Declaration of Rights and a new Constitution, the reformers hoped to give their creations an air of sacrosanctity and make them the more impregnable.

For this, a contribution from philosophy was required. Some deputies would have nothing to do with philosophy. Mirabeau was at best lukewarm, as we saw. Dominique Garat, a deputy from the Basque country, was expounding a theoretical distinction between the rights of individuals and of corporations such as the clergy, when he was interrupted by cries of 'We don't need philosophy'. Others encouraged the speaker with shouts of: 'Go on! Go on!'[64]Adrien-Cyprien Duquesnoy of Lorraine noted in his Journal under 18 August that the task of arriving at a formula of rights 'lends itself too readily to vague and metaphysical musings.'He went on: 'There is not a single point, not a single word, that is not open to dispute and wrangling, not one on

[61] Rials (1988), 519-22.
[62] Kaiser (1994) makes a powerful case for the contribution of Old Regime jurisprudence to the redefinition of property relations in the revolutionary era.
[63] See Sonenscher (1997) for an exhaustive study. See e.g. 87: 'Servicing the debt amount to encroaching upon the property of the people.'
[64] AP 8, 394.

which one could not write volumes. Yet the rights of man are quite transparent, they are engraved on every heart.'[65]

The philosophical background to the French Revolution is a dense fog. The influence of the Physiocrats, Rousseau, Locke, among others, is well-established. Blandine Kriegel believes that the contribution of the natural law tradition was significant and has been underrated.[66]There are documents that support her case. It was an issue among Assembly members whether a Declaration of Rights should take the form of a reasoned exposition of principles or simply a list of articles. In the end they opted for the latter. However, several examples of the former were produced, and they are of exceptional interest. The edited Proceedings of the Assembly contain a statement by Jean-Paul Rabaut de Saint-Etienne, a Protestant pastor from Nimes, entitled 'Idées sur les bases de toute constitution.' Under the heading of 'The Rights of Men', he writes:

> In order to understand the rights of man, it is necessary to understand the end for which he was created and of which he never loses sight: his preservation. Everything conducive to his destruction he flees, everything that works to maintain him, he seeks out. This sentiment comes to him from the right that he has to existence: to live, to live well, to live as long as he can, this is his primitive and inalienable right. All the rest simply follow.
>
> It follows therefore that no other man may prevent him from procuring the means by which he can stay alive; that he himself retains the right to stand against the wrongs that others might inflict on him in this regard; that he has therefore the right to preserve himself, and to do whatever he judges necessary to achieve that end. This is called the right to liberty.
>
> But every man has this right, as much as and as completely as his fellows. This linking right is called equality, that is equality of rights.
>
> Finally, man may possess such things as are appropriate to preserve himself and satisfy his needs; it is over these things that his right to liberty is exercised in all its fullness. This is called property. The end of communal association is to put all these rights, as they apply to individuals, under the protection of everyone. That is called security.
>
> One may conclude from all that has just been stated, that the rights that men bring into society revolve around these three: liberty, equality, property; and from this it follows that the end of guardian laws should be to guarantee the security of these rights.
>
> A bad constitution is one which violates rights; a good constitution is one which renders them secure; an excellent constitution is one which allows them the opportunity to develop to the greatest possible extent.[67]

This statement draws on a long and continuous tradition of natural law theory. Jurists, philosophers and theologians from the Middle Ages to the eighteenth century had advanced self-preservation as the first and basic natural right, from which any others were derived, of higher or lower station. John Locke comes towards the end of this

---

[65] Qu. Rials (1988), 210.

[66] See Kriegel (1994); (1995a,b); cf. Gauchet (1989). See the account of the vigorous debate among contemporary French thinkers in Souillac (2006), with reference to Kriegel, Gauchet, Ferry and Balibar. Ferry and Renaut (1984) provide a useful account of political philosophy at the time of the Revolution and its aftermath.

[67] AP 8, 403-4.

line of succession, and his influence is conspicuous in the document before us. The appearance of property as one of a chain of interlocking rights, in conjunction with life, liberty and security, was above all his doing.

Briefer contributions along the same lines are recorded in the Proceedings.[68]A particularly arresting document (not in the Proceedings) comes from the pen of Sieyès and belongs to July 1789. When the deputies resumed their discussion of Rights after the Mirabeau débâcle, they turned to earlier statements such as those of Lafayette, Mounier and Sieyès. In the judgement of Marcel Gauchet, the influence of Sieyes on the final document was paramount. [69]. His 'projet de déclaration' consists of an introduction of 'Observations', an extended 'Reconnoissance et exposition raisonnée' and finally a catalogue of Thirty-Two Articles. The 'Reconnoissance' includes the following paragraphs on property:

> Ownership of one's person is the first of one's rights. From this primitive right is derived the ownership of one's actions and one's labour; for labour is simply the constructive use of one's faculties; it clearly emanates from the ownership of one's person and one's actions.
> Ownership of external objects, or real property, is likewise a consequence and as it were an extension of personal property. The air we breathe, the water we drink, the fruit we eat, are transformed into our own substance, through the work of our body, involuntary or voluntary.
> Through analogous operations, though this time more dependent on our will, I appropriate to myself an object which belongs to nobody, and which I need, by a labour which modifies it, which prepares it for my use. My labour was mine, and it still is. The object on which I fixed it, which I invested it in, belonged to me as it belonged to everyone. Indeed it belonged to me more than to others, since I had in it, more than others did, the right of first occupant. These conditions suffice to make of this object my exclusive property. Civil society then gives it by means of a general convention a kind of legal consecration; and one must include this last act in one's reconstruction in order for the word property to embrace the full extent of the meanings that we are accustomed to attach to it in our orderly societies.

There was much in Locke's political philosophy to attract the French Revolutionaries: his opposition to authoritarianism, his insistence on contract and consent as the basis of government, his assertion of the rights of individual citizens, and the formula of rights that he came up with. His highly individual account of the manner in which a natural property right is acquired (see Chapter Seven) was surely an optional extra. However, it appealed to Sieyès, and through his mediation – for his exposition is clearer and more compelling than Locke's own – may well have secured other admirers among the more influential deputies of the National Assembly. One group that might fruitfully be followed up in this connection (but not here) are the lawyers. Jean-Etienne-Marie Portalis, the Father of the *Code Civil*, was not a Constituent, but like Sieyès (whose political career had taken a downturn from 1790) was influential under Napoleon. Following in the track of lawyers such as Germain Garnier (who was a Constituent), Portalis argued vigorously for a natural right to property, and in doing

[68] AP 8, 431-2; 457; etc..
[69] Gauchet (1988). For Sieyès, see e.g. Bastid (1939); Bredin (1988); Sonenscher (1997).

so took over Locke's argument and his central image:'The principle of the right [to property] is in us', he wrote.'It is not at all the result of human convention or positive law; it is in the constitution of our being and in different relationships with the objects around us.' Humans in the state of nature 'mixed' their labour with the resources of the earth and made them theirs, inasmuch as they contained 'quantities of labour'[70]

5. Conclusion

It is understandable that historians should herald the Revolutions in America and France as the beginning of the modern age. I see the revolutionary era as Janus-faced, looking both ways. If one follows the historical development of human rights as I have been doing, one is struck by how firmly the discourse of human rights in the revolutionary age was rooted in the past. Natural rights theory evolved out of natural law theory, which arose in antiquity, reached its apogee in the middle ages, and was still going strong in the early Enlightenment. It had a following among men of influence in France in the Revolutionary age. However, the Terror proved that no Declaration of Rights however carefully tuned could protect the persons and property of individual citizens in the face of a ruthless government. The 'Human Rights Movement' fell into disrepute, from which it did not really recover until the middle of the twentieth century in consequence of the experience and the defeat of Fascism.[71] Modern human rights theory is a different creature altogether. This is not because the rights in question are for the first time subjective, in the sense of being attached to the individual as subject in virtue of his or her intrinsic nature and capacity as a human being, for this idea had already been arrived at in the medieval period.The essential difference lies in the degree of emphasis given to rights as distinct from duties. Rights and duties are correlative terms.[72] As long as natural law theory reigned, and as long as Christianity acted as incubator for the emerging theory of natural rights, there was (at the least) ambiguity as to where the priority lay as between rights and duties. Modern rights theory is unequivocally rights-based.[73]

[70] Portalis (1844), 211. The citation comes from an edition of Portalis' papers produced by his grandson, Etienne-Frédéric-Auguste Portalis. See also Garnier , *De la Propriété* (1792), 87, with Kelley (1984), 207-8. Portalis' allegiance to natural law theory is stressed by D'Onorio (2005), 201-13.

[71] On the domestic critics see Jennings (1992). For Burke, Bentham and Marx, see Waldron (1987). On 19th century liberalism and Human Rights, see Ferry and Renaut (1984), 130-8.

[72] As noted by.Burlamaqui (1748), 1.7.6.

[73] The difference between a rights-based and a duty-based theory is set out clearly in e.g. Dworkin (1977), 171.