

HISTORICAL ROOTS OF MODERN RIGHTS: BEFORE LOCKE AND AFTER

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INTRODUCTION

This paper will explore some of the historical roots of our modern culture of rights by considering the work of John Locke, the teachings he inherited, and his influence on modern political thought. In addressing these issues, it will move from very general comments to a discussion of specific themes concerning individualism and natural law in Locke's work, with a final glance at the persistence of these themes in contemporary rights theories. A principal purpose of the paper is to contest the view that Locke's doctrine of natural rights should be seen as an aberration from an older and sounder teaching on natural law. Instead, it is argued that Locke's characteristic ideas were rooted in a longstanding tradition of Western Christian thought, even though we now often encounter these ideas in distorted or exaggerated forms.

On the most general level, the whole enterprise of seeking for historical roots requires justification nowadays. Especially among medievalists, the current fashion emphasizes the "alterity," the otherness, of the past. The medieval world was, indeed, very different from ours, but medieval people were not just quaint aliens who believed in magic and witchcraft and improbable miracles. Their achievements were great; their thought is interesting; they helped to make the modern world what it is. And it has always seemed to me that one proper task of a historian—one reason for studying the past, even the medieval past—is to make our present-day world, the world we live in, more intelligible.

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This task is complicated by the fact that there does not exist at present any consensus about the philosophic or religious grounding of the rights that are asserted. Politicians typically pay lip service to human rights, but intellectuals are sometimes more skeptical. All the mainstream Christian churches now endorse the idea of human rights, and for Catholics, Pope John Paul II warmly embraced the principles of the United Nations *Universal Declaration of Human Rights*¹ when he addressed the United Nations in 1979.² Yet, nowadays, some conservative Catholics are among the most severe critics of modern rights talk. One critic, for instance, has observed that “Christianity actually has a deep resistance to the concept of human rights,”³ and he expressed some uneasiness about the current *Catechism of the Catholic Church* because it refers to the “inalienable rights of the human person.”⁴

It is not only the present status of human rights that evokes controversy; there is also disagreement about the early history of the idea. In *The Idea of Natural Rights*, I discussed the contributions of a series of thinkers from the twelfth century to the seventeenth century, and the historical contexts within which they worked.⁵ I thought that in doing this, I had indeed explored the historical roots of modern rights, but my book had an evident limitation. It ended with the work of Grotius at the beginning of the seventeenth century, and so it failed to address a substantial body of current scholarship which asserts that a distinctive concept of natural rights did not emerge until later, in the age of Hobbes and Locke. These thinkers, it is argued, made a decisive break with the past by introducing a novel concept of individual natural rights that was inherently incompatible with the established tradition of natural law. This view is accepted almost as an article of faith by the followers of Leo Strauss, but it is not limited to them. The French author, Michel Villey, who wrote very extensively on the early history of natural rights, also held that the

1. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948).

2. See generally Pope John Paul II, Address to the 34th General Assembly of the United Nations in New York (Oct. 2, 1979), in 24 THE POPE SPEAKS 297 (1979).

3. ROBERT P. KRAYNAK, CHRISTIAN FAITH AND MODERN DEMOCRACY: GOD AND POLITICS IN THE FALLEN WORLD 153 (2001).

4. *Id.* at 182 (citing CATECHISM OF THE CATHOLIC CHURCH ¶ 1907 (2d ed. 1997)).

5. BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW, 1150-1625 (1997).

modern notion of subjective natural rights was inconsistent with the classical idea of an objective natural right.⁶

I am inclined to agree that the work of Hobbes represents an aberration from earlier ideas about natural rights and natural law, though some scholars have seen his work as derived from late medieval scholasticism. In any case, his ideas have little to do with modern ways of thinking about human rights. Hobbes's characteristic teaching was that individuals have rights, but no duty to respect the rights of others. Modern codes of human rights enumerate rights that others are bound to respect. The situation is different with Locke. His rights involved duties to others, and it is widely agreed that Locke's work was an important influence in the formation of modern liberal ideas, including ideas concerning rights; but, if Locke influenced modern ideas only by making a break with the ideas of his predecessors, then an investigation of pre-Lockean thought would be only an antiquarian game, without any relevance for our understanding of modern concepts. Another possibility is that Locke's teachings were well-grounded in earlier juridical and philosophical thought. The issue evidently requires reconsideration.

I. INDIVIDUALISM BEFORE LOCKE

Certain specific doctrines of Locke, discussed below, have been seen as innovatory by various modern scholars. Their views typically rest on an underlying assumption that I want first to consider—the idea that, in the seventeenth century, a new individualism replaced the more corporative ethos of earlier Western society and introduced a new idea of natural rights into political thought. Especially in its more extreme forms, this argument fails to treat adequately either Lockean individualism or earlier corporatist ideas. Nonetheless, it is widespread in the modern literature among both earlier and more recent thinkers.

George Sabine, in his fine, old book on political theory, wrote that, in the seventeenth century, a new priority of the individual marked the principal difference between medieval and modern thought.⁷ Similarly, d'Entrèves asserted, "The new value is that of the

6. See MICHEL VILLEY, *LA FORMATION DE LA PENSÉE JURIDIQUE MODERNE* [THE FORMATION OF MODERN JURIDICAL THOUGHT] 227 (4th ed. 1975).

7. GEORGE H. SABINE, *A HISTORY OF POLITICAL THEORY* 433 (1937).

individual.”⁸ Leo Strauss maintained that Locke’s political thought was “revolutionary” because “the individual, the ego, had become the center and origin of the moral world.”⁹ C. B. Macpherson emphasized “a new belief in the value and the rights of the individual” that reflected the realities of seventeenth-century economic life.¹⁰ Jack Donnelly observed, more simply, that the rise of a market economy in the seventeenth century “created separate and distinct individuals.”¹¹ Modern communitarians criticize the Lockean idea of rights because, they argue, it was based on a new doctrine of atomistic individualism. Charles Taylor wrote that for Locke, “[p]eople start off as political atoms.”¹²

In spite of this consensus, I have always been somewhat skeptical of the idea that we must wait until the seventeenth century before we encounter an onset of individualism. In reading medieval sources for more than half a century, the idea never spontaneously occurred to me that the people I was reading or reading about were not real live individuals, aware of themselves as individuals. Other medieval scholars have apparently had the same experience. One popular book on twelfth-century culture was called precisely *The Discovery of the Individual*.¹³ Then Alan Macfarlane found origins of individualism in the lives of thirteenth-century English villagers.¹⁴ A more common view holds that individualism really emerged during the fourteenth century in the wake of Ockham’s nominalism. Others find the origin of individualism in the fifteenth century in the world of Renaissance humanism, or perhaps it was in the sixteenth century with Protestant ideas on private judgment. One might also mention the Spanish neoscholastics as a likely source. I especially like a passage written by Suarez. He argued that, even if the human race had remained in a state of innocence, it would still have increased and multiplied. His reason was that “a multiplication of persons confers beauty and dignity on the whole race through the diversity of many individual

8. A. P. D’ENTRÈVES, *NATURAL LAW: AN INTRODUCTION TO LEGAL PHILOSOPHY* 54 (8th ed. 1964).

9. LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 248 (1953).

10. C. B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBS TO LOCKE* 1 (1962).

11. JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 64 (1989).

12. CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 193 (1989).

13. COLIN MORRIS, *THE DISCOVERY OF THE INDIVIDUAL, 1050-1200* (1972).

14. See generally ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM: THE FAMILY, PROPERTY AND SOCIAL TRANSITION* (1978).

perfections.”¹⁵ One could go on and on. The truth is that, depending on whom you choose to read, you can find the individual discovered or invented in any century you look at from the twelfth century onward.

We need to remember, though, that these individuals always lived in communities. Indeed, the twelfth century, that has been called an age of individualism, also saw the emergence of many new centers of corporate life—guilds, colleges, monastic houses, confraternities, and communes. Medieval people did not see an antithesis between community loyalties and individual rights; they thought these two things reinforced one another.¹⁶ Whenever enough documentation survives to give us an insight into the inner workings of a medieval community, we find a world of individuals interacting with one another, sometimes disputing with one another. When a new commune was formed in the twelfth century by conjuration, a group of individuals covenanting together, it would typically, first of all, seek a recognition of various rights and liberties for its members. The reality was reflected in medieval jurisprudence, especially in canon law. The jurists did not philosophize about the one and the many. Instead, they developed a complex structure of corporation law that allowed for individual rights within corporate associations. In the field of political theory, Ptolemy of Lucca wrote, around 1300, that the end of government was to “preserve each one in his right.”¹⁷

In the twelfth and thirteenth centuries, we are in a world far removed from that of John Locke, but we can perhaps already discern some roots of the tradition that he would inherit. Locke also thought that the political community was a corporate association and that individuals had rights within it. As James Tully and others have pointed out, he did not really present individual persons as antisocial creatures, isolated atoms of humanity.¹⁸ Instead, Locke observed that

15. FRANCISCO SUAREZ, *De Opere Sex Dierum* [*On the Work of Six Days*], in 3 OPERA OMNIA 381 (D. M. André ed., 1856).

16. Jacques Maritain made a similar point in discussing modern society. See JACQUES MARITAIN, *THE PERSON AND THE COMMON GOOD* 55 (John J. Fitzgerald trans., 1947) (“[T]here is nothing more illusory than to pose the problem of the person and the common good in terms of opposition.”).

17. Ptolemy of Lucca, *De Regimine Principum* [*On the Government of Princes*], in 7 THOMAS AQUINAS, OPERA OMNIA 558 (Roberto Busa ed., 1980).

18. JAMES TULLY, *A DISCOURSE ON PROPERTY: JOHN LOCKE AND HIS ADVERSARIES* 11, 24, 49 (1980). For further references on this, see A. JOHN SIMMONS, *THE LOCKEAN THEORY OF RIGHTS* 111 n.127 (1992).

“God . . . designed Man for a sociable Creature”¹⁹ and wrote of man’s “love, and want of Society.”²⁰ In Locke’s work, it was not the existence of human society as such that called for an explanation, but the coming into existence of a specifically political community.

II. LOCKEAN PROBLEMS

Not all scholars agree that Locke’s work made a decisive break with the past. Many, probably most of them, acknowledge that it carried on an earlier tradition of natural law thinking. But this perception does not meet the objections of critics who assert that, although Locke referred to a law of nature, he went on to propound views on the state as an artificial construct of reason and will, and on individual natural rights, that were fundamentally incompatible with earlier concepts of natural law. Proponents of this view, however, often show little understanding of the earlier tradition that Locke supposedly abandoned. In this situation, we can best carry the argument further, not by general references to a preceding natural law tradition, but by specific inquiries into the historical background of some of Locke’s characteristic teachings. The topics to be discussed are (1) the idea of individual consent to government, (2) the idea of self-ownership or self-mastery, and (3) the existence of natural rights within a system of natural law thinking.²¹ Each theme involves, in one way or another, the ideas of individual rights and natural law. They are of central importance in Locke’s political thought, and each of them has been regarded by some scholars as radically innovatory.

1. *Individual Consent to Government*

The initial topic may seem to be a non-issue because, as is widely known, the idea of popular consent to government is often encountered in earlier sources; but the critics point out that, in these

19. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 402 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690).

20. JOHN LOCKE, TWO TREATISES OF GOVERNMENT 352 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

21. In discussing these themes I am in part summarizing the results of a group of recent and forthcoming articles. See Brian Tierney, *Permissive Natural Law and Property: Gratian to Kant*, 62 J. HIST. IDEAS 381 (2001); Brian Tierney, *Natural Law and Natural Rights: Old Problems and Recent Approaches*, 64 REV. POL. 389 (2002); Brian Tierney, *Corporatism, Individualism, and Consent* (forthcoming) [hereinafter Tierney, *Corporatism*]; Brian Tierney, *Dominion of Self and Natural Rights* (forthcoming).

earlier theories, consent was always the consent of a corporate community; while for Locke, individuals were the source of political authority. James Tully, for instance, wrote that Locke's "premise of political individualism . . . is one of the major conceptual innovations in early modern political thought."²²

This argument runs into an obvious objection. In Locke's teaching, the consent that instituted a government was precisely the corporate consent of a community. Locke argued that a political society came into existence when a group of people "incorporated" and formed themselves into "*one Body Politick*."²³ A collection of separate individuals could act together only with the agreement of each person which, Locke observed, was "next impossible ever to be had."²⁴ Once they were incorporated, however, the members of the community could act by the consent of a majority to institute a government for themselves.²⁵

To be meaningful at all, then, the argument that Locke introduced a novel doctrine of individual consent must refer to the initial consent to establish a political community. This is, indeed, one of the points where Locke is said to have made a break with past teachings. Charles Taylor observed that in earlier thought, it was understood that a community could institute a government, but the existence of the community itself was taken for granted; the important change in the seventeenth century was that the existence of the community itself had to be explained by assuming a prior consent of individuals.²⁶ Michael Zuckert also held that in pre-Lockean thought, "The collectivity, or the corporation, is the original home and source of political power . . . and not the individual, as in Locke."²⁷ Zuckert also maintained that Locke rejected the central doctrine of Aristotelian and Thomist political philosophy, the naturalness of political life, and envisaged instead a state of nature where a political community had to be created by human artifice.²⁸ But, the argument continued, earlier thinkers who accepted the Thomist view could not have imagined such a condition of humanity in which people lived under

22. JAMES TULLY, AN APPROACH TO POLITICAL PHILOSOPHY: LOCKE IN CONTEXTS 15 (1993).

23. LOCKE, *supra* note 20, at 349.

24. *Id.* at 350.

25. *See id.* at 348-51, 355. Locke uses the word "incorporate" repeatedly in discussing the origin of government.

26. TAYLOR, *supra* note 12, at 193.

27. MICHAEL P. ZUCKERT, NATURAL RIGHTS AND THE NEW REPUBLICANISM 226 (1994).

28. *Id.* at 229.

natural law but without any political institutions. This was because, as Zuckert put it, “natural law mandated and provided for political life.”²⁹ For medievals, then, political society was natural; for Locke, it was a work of human artifice. There is, apparently, a gulf between the two positions.

This whole argument is based on a misunderstanding of medieval thought about natural law and human nature. According to the natural law that medieval jurists and philosophers knew, humans were by nature free and equal. For many of them, as for Locke, it was the fact of subordination under a government that called for an explanation. The Aristotelian teaching that the *polis* was natural to man in the sense that humans could flourish best in a political society was widely accepted. Locke himself thought that life in a political community was best for humans, but it was not taken to mean that such societies just came to exist naturally without any human initiative.

Giles of Rome made the point clearly in a very widely-read work written toward the end of the thirteenth century. Although political society was natural to man in one sense, Giles wrote, it was not natural in the same way that it was natural for a stone to fall or fire to heat. Natural law did not drive men willy-nilly into politically ordered communities. Many people, Giles noted, still did not live in that way. The fact that the *polis* was natural in Aristotle’s sense did not exclude the necessity for a political society to be actually brought into existence through “the work and industry of men” and “by human artifice.”³⁰

There are various examples in the centuries before Locke of writers who envisaged a beginning of political society through individuals consenting together to enter into compacts with one another. Already in the twelfth century, the canonist Rufinus envisaged a state of affairs after the fall of Adam when humans lived without any ordered government and with only the law of nature to guide them. He depicted the human condition as brutish and savage rather in the manner of Hobbes. However, Rufinus wrote that men retained enough sense of justice to come together and enter into compacts and covenants with one another and establish a body of law

29. *Id.* at 230. Others who have contrasted Locke’s individualism with an earlier tradition of corporate consent include Cary Nederman, Francis Oakley, Patrick Riley, and Paul Sigmund. On their views see Tierney, *Corporatism*, *supra* note 21.

30. AEGIDIUS ROMANUS, DE REGIMINE PRINCIPUM LIBRI III [THREE BOOKS ON THE GOVERNMENT OF PRINCES] 320 (1556).

by which they could live.³¹ This is perhaps reminiscent of Cicero's *De Inventione*³² but with a significant change. In Cicero's argument the scattered individuals were brought together by the skill of a great orator.³³ In Rufinus's account, they came together voluntarily to enter into compacts with one another.

In the next century, Duns Scotus took up a similar theme. He imagined a group of strangers coming together to build a city. There would be no patriarchal or political authority among them, but they would feel the need of some governance. And so, Duns wrote, they could consent together that each individual would submit himself to the whole community or to a ruler whom they would choose.³⁴ Vitoria also envisaged individuals uniting to form a political community, and he observed that they would all at first be equal since each had a natural right of self-defense.³⁵ Prior to Locke, Suarez provided the most detailed account of individuals consenting together to institute a political society. Among a group of scattered persons, he wrote, there would be no inherent ruling authority; but, once the individuals had come together to form a political body, then the community could establish for itself any form of government it chose. The community itself, Suarez emphasized, could be brought into existence only by "the special will and common consent" of the individuals who composed it.³⁶ If Locke had chosen to look for some earlier texts to substantiate his argument about individual consent, he would have found no shortage of authorities.

2. *Self-Ownership and Self-Mastery*

Locke wrote, famously, that "every Man has a *Property* in his own *Person*. This no Body has any Right to but himself."³⁷ Locke also wrote that humans belong ultimately to God, that "they are his

31. MAGISTER RUFINUS, *SUMMA DECRETORUM* 4 (Heinrich Singer ed., 1902).

32. CICERO, *DE INVENTIONE* (H. M. Hubbell trans., Harvard Univ. Press 1949).

33. *See id.* at 7.

34. JOANNIS DUNS SCOTUS, *Quaestiones in Quartum Librum Sententiarum* [*Inquiries Regarding the Fourth Book of the Sentences*], in 18 *OPERA OMNIA* 266 (4.15.2) (Luke Wadding ed., 1894).

35. FRANCISCO DE VITORIA, *De Potestate Civile* [*On Civil Jurisdiction*], in *OBRAS DE FRANCISCO DE VITORIA* 147, 159 (Teofilo Urdanoz ed., 1960).

36. FRANCISCO SUAREZ, *Tractatus de Lege et Deo Legislatore* [*A Treatise on Law and God the Legislator*], in 5 *OPERA OMNIA* 181, 183, 184 (3.2.4, 3.3.6, 3.4.1) (Carolo Berton ed., 1859).

37. LOCKE, *supra* note 20, at 305.

Property, whose Workmanship they are."³⁸ The two ideas are not contradictory. In discussing the origin of property in general, Locke noted that it was held under the supreme dominion of God, and John Simmons has rightly argued that Locke conceived of ownership of self in the same way, as a sort of trust from God.³⁹

Both ideas, self-ownership and divine ownership are important to Locke's argument. Self-ownership expressed an idea of human autonomy. A man belonged to himself so he was not subject to anyone else except with his own consent; he was naturally free, endowed with a "Liberty of acting according to his own Will."⁴⁰ He owned himself and his actions and he could licitly acquire property by his own labor, but because a man belonged also to God he was not free to destroy or injure himself or another person.⁴¹

Locke's idea of self-ownership is another aspect of his work that has sometimes been seen as innovative. C. B. Macpherson found in it a new kind of possessive individualism where "[t]he relation of ownership . . . was read back into the nature of the individual."⁴² Michael Zuckert, emphasizing a supposed contradiction between God's ownership and self-ownership, thought that Locke's doctrine "points toward his break with the entire premodern tradition."⁴³ In fact, the complex of ideas regarding self-ownership and divine ownership that we find in Locke has a long prehistory in previous thought going back at least to the thirteenth century.

An initial difficulty in tracing this earlier history arises from the fact that the Latin word "*dominium*," commonly used in pre-Lockean discourse, could mean either ownership or mastery, understood as control or rulership. Locke used the English word "dominion" in both senses and he too wrote of self-mastery as well as of self-ownership. For instance, Locke wrote that man was "Master of his own Life"⁴⁴ or "Master of himself, and *Proprietor of his own*

38. *Id.* at 289.

39. *See id.* at 186 (noting that "in respect of God . . . who is sole Lord and Proprietor of the whole World, Mans Propriety in the Creatures is nothing but that *Liberty to use them*, which God has permitted"); SIMMONS, *supra* note 18, at 102. Aquinas had taught the same doctrine centuries earlier. *See* THOMAS AQUINAS, *Summa Theologiae*, in 2 OPERA OMNIA 612 (2.2ae.66.1) (Roberto Busa ed., 1980).

40. LOCKE, *supra* note 20, at 327.

41. *See id.* at 289, 306.

42. MACPHERSON, *supra* note 10, at 3.

43. ZUCKERT, *supra* note 27, at 276.

44. LOCKE, *supra* note 20, at 401.

Person,⁴⁵ here implying both relations, of mastery and of ownership. In tracing more remote anticipations of Locke's doctrine, we need to consider both ideas.

I will begin with Aquinas since he is so often regarded as a prototypical medieval thinker. Aquinas expressed his own doctrine of autonomy in his teaching that humans are by nature free and equal, not subordinated to one another as a means to an end. "Nature made us all equal in liberty For by our nature no one is related to another as to an end."⁴⁶ Aquinas also wrote of "human dignity, by which a man is naturally free and exists for himself."⁴⁷ He made various references to man's dominion of his acts or dominion of self. In these contexts he expressed the idea of human freedom, understood both as free will, the ability to make choices between different courses of action, and freedom from unjust subjection to another. According to Aquinas, humans differed from all other creatures precisely because "they have dominion of their actions through free choice."⁴⁸ In other discussions, Aquinas also taught that humans' self-dominion made possible their ownership of external things. The various threads of argument were brought together in a passage from *De Perfectione Spiritualis Vitae*, where Aquinas was discussing renunciation of property and self-abnegation.

Nothing is more pleasing to man than the liberty of his own will, for through this man is owner [*dominus*] of other things . . . through this also he masters [*dominatur*] his own actions . . . so in foregoing the judgment of his own will, through which he is master [*dominus*] of himself, he is found to deny himself.⁴⁹

In the texts of Aquinas, *dominium* is usually best translated as mastery, though there is occasionally some ambiguity. Other thirteenth-century authors, including Peter John Olivi and Henry of

45. *Id.* at 316.

46. THOMAS AQUINAS, *In Quattuor Libros Sententiarum* [*Commentary on the Four Books of the Sentences*], in 1 OPERA OMNIA 255 (2.44.1.3) (Roberto Busa ed., 1980); see also *id.* at 613 (4.38.1.4) ("There are some things in which a man is so free that he can act even against the command of the pope.").

47. AQUINAS, *supra* note 39, at 610 (2.2ae.64.2).

48. *Id.* at 355 (1.2ae.1.2).

49. THOMAS AQUINAS, *De Perfectione Spiritualis Vitae* [*On the Perfection of the Spiritual Life*], in 3 OPERA OMNIA 560 (Roberto Busa ed., 1980). The idea that self-dominion made possible the ownership of external things was commonplace in late medieval thought. There are occasional references to labor as a source of property right but Locke's "mixing" metaphor is original with him.

Ghent, treated self-dominion more overtly as self-ownership. Olivi, by chance, used a phrase almost identical with one of Locke's. Locke noted that a man was "Lord of his own Person and Possessions."⁵⁰ Olivi wrote that "each one is lord of himself and of his own," *dominus sui et suorum*.⁵¹ Olivi also added a qualification like Locke's; a man was only lord of himself in things that were not contrary to God.⁵²

Henry of Ghent addressed the issue of self-ownership by asking whether a criminal justly condemned to death had a right to escape if he could do so in order to preserve his life. Henry argued that two persons could have power over the same thing in different ways; one might have property, and the other, use. In this case the judge had a right to use the body of the criminal by imprisoning and even executing him, but only the criminal had property in himself under God. "Only the soul under God has power as regards property in the substance of the body."⁵³ The conclusion of the argument was that the criminal's property right in himself prevailed; he could and should escape if an opportunity offered.⁵⁴

Among the later writers who addressed this theme, I will mention especially Vitoria. His work is interesting because he first used the idea of self-ownership as a theological concept and then deployed it in a political context to defend the rights of American Indians. While discussing problems concerning property rights in his commentary on the *Summa Theologiae* of Aquinas, Vitoria encountered an argument of Richard FitzRalph.⁵⁵ According to FitzRalph, since all *dominium* came from God, a person who excluded himself from divine grace by falling into sin could not be a true owner of anything. Vitoria replied by appealing to the doctrine of self-ownership. If FitzRalph was right, he argued, then a sinner would not be the true owner of his body or his acts, and so the sinner would sin again in performing any bodily action, which Vitoria evidently regarded as absurd. Vitoria went on to argue here that man was the owner of his spiritual goods and of his "natural goods," such as his life and limbs. As owner of his own

50. LOCKE, *supra* note 20, at 368.

51. PETER JOHN OLIVI, *Quodlibet I, Q.17* (Amleto Spicciati trans.), in 73 STUDI FRANCESCANI 317, 319 (1976).

52. *Id.* at 321.

53. HENRY OF GHENT, *Quodlibet IX*, in 13 OPERA OMNIA 309 (R. Macken ed., 1983).

54. *Id.*

55. 2 FRANCISCO DE VITORIA, DE JUSTITIA [ON JUSTICE] 107-09 (R. P. Vicente Beltrán de Heredia ed., 1934).

body, Vitoria argued, man could use it as he pleased; otherwise he would be a slave. Here again the natural freedom of choice was associated with freedom from servitude. Then Vitoria raised a problem that would recur in Locke's work. How could a man be owner of himself when he belonged to God who was "lord of life and death"? Vitoria replied that, "[a]lthough God is the prime owner, still he grants dominion to man . . . not for every kind of use, but for licit ones."⁵⁶ Self-ownership did not permit a man to kill or injure himself or another person.

When Vitoria turned in a later work to a defense of Indian rights, he argued that God had granted dominion over worldly things to the whole human race, but he had to respond to an argument asserting that the Indians were incapable of ownership because they lived in a state of sin.⁵⁷ Vitoria replied by reformulating the argument he had used against FitzRalph. If sin took away all rightful ownership then a sinner would lose his natural ownership of his own body and his own acts.⁵⁸ Vitoria argued that this was evidently not the case. A sinner still had the right to defend his own person.⁵⁹

Another argument that Vitoria refuted asserted that, according to Aristotle, all barbarians were natural slaves; hence, the Indians were slaves and, as slaves, could not own anything.⁶⁰ Here again Vitoria introduced the concept of self-ownership. Even if the Indians were inferior in intellect, which Vitoria did not concede, and so could be called natural slaves in Aristotle's sense, as better fitted to serve than to rule, still this did not mean that they naturally belonged to others and had no ownership of themselves or of their property.⁶¹ That would be a condition of penal servitude. No one was such a slave by nature, Vitoria insisted.⁶²

Suarez also referred to ownership or mastery of self in various contexts scattered throughout his works and he too used the concept to assert man's natural freedom. Suarez wrote that, as a rational creature, man was *dominus* of his acts; accordingly, he was "naturally

56. *Id.* at 109. FitzRalph used the word *dominium* to mean both rulership and ownership, but in the contexts discussed above Vitoria was discussing specifically property right.

57. FRANCISCO DE VITORIA, *De Indis Recenter Inventis Relectio Prima* [*The First Discourse on the Recently Discovered Indies*], in *OBRAS DE FRANCISCO DE VITORIA* 665 (Teofilo Urdanoz ed., 1960).

58. *Id.* at 654.

59. *Id.*

60. *Id.* at 665.

61. *Id.*

62. *Id.*

free and not a slave.”⁶³ In arguing against the supposed tyranny of King James I of England, Suarez maintained that human freedom was grounded on the natural dignity of man and that this natural freedom included a power of ruling oneself but excluded involuntary subjection to another. Hence, legitimate government had to be based on consent, on “human institution and election.”⁶⁴ Locke argued in the same way when he wrote against the supposed tyranny of James II.

Subsequently, the idea of self-ownership was taken up by Grotius and then by the English Levellers. Among them, Richard Overton wrote, most strikingly, “To every individual in nature, is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himself, so he hath a self-propriety”⁶⁵ When Locke took up this same theme he was continuing in his own way a long-standing tradition of thought.

3. *Natural Rights and Natural Law*

After individual consent and self-dominion, a final theme we have to consider is a supposed opposition between traditional natural law and natural rights. Ernest Fortin, for instance, has maintained that the move from natural law thinking to an assertion of natural rights in the seventeenth century was not only a paradigm shift but “*the* paradigm shift in our understanding of justice and moral phenomena generally.”⁶⁶ On this view, natural law is seen as a higher law that dictates the way we should live with its commands and prohibitions; while natural rights express a principle of human autonomy, of individual self-assertion, and the two doctrines are held to conflict with one another. Jack Donnelly wrote, “Liberties and entitlements distinguish rights from law so fundamentally that we can say that law and rights point in different directions.”⁶⁷ Walter Berns stated the argument in an extreme form when he wrote that “to espouse the one teaching [natural law] is to make it impossible reasonably to espouse

63. SUAREZ, *supra* note 36, at 183 (3.3.6).

64. FRANCISCO SUAREZ, *Defensio Fidei Catholicae* [A Defense of the Catholic Faith], in 24 OPERA OMNIA 210 (3.2.11) (Carolo Berton ed., 1859).

65. RICHARD OVERTON, AN ARROW AGAINST ALL TYRANTS 3 (The Rota 1976) (1646).

66. ERNEST L. FORTIN, *Human Rights and the Common Good*, in 3 COLLECTED ESSAYS 19, 20 (J. Brian Benestad ed., 1996).

67. Jack Donnelly, *Natural Law and Right in Aquinas' Political Thought*, 33 W. POL. Q. 520, 529 (1980).

the other [natural rights].”⁶⁸ Other scholars, including Knud Haakonssen and L. W. Sumner, have argued that the only rights that can exist within a framework of natural law are rights to obey the mandates of the law, but, as Michael Zuckert observed, this implies nothing about “a realm of personal sovereignty or of free choice.”⁶⁹ Law directs our actions; rights leave us free to choose. A system of thought based on natural law must, then, be antithetical to one based on natural rights. Yet, Locke certainly asserted a doctrine of natural law while also maintaining that humans are endowed with natural rights.⁷⁰ It seems, then, that we must either regard Locke’s whole structure of thought as incoherent or embrace the Straussian doctrine and assume that Locke did not really believe in the doctrine of natural law that he overtly presented.⁷¹

But here again we are dealing with a misunderstanding of the earlier tradition of natural law. Pre-Lockean theories of natural law included an idea of natural rights. We have already seen that medieval and early modern thinkers before Locke were much concerned with human freedom, understood both as free will and as freedom from subjection to others. Locke’s way of expressing this was to state that we are free to exercise our rights “within the bounds of the Law of Nature”⁷² or “within the permission of the *Law of Nature*.”⁷³ In writing like this, Locke was again adhering to an old tradition of thought, one in which natural law was not seen as opposed to human freedom but as defining it. The ideas of natural law and natural rights had coexisted harmoniously enough for centuries before Locke. From the twelfth century onward, it was commonly held that natural law did not only command and forbid, but also left to humans a wide range of discretionary behavior where they were free to choose their own courses of action and had a right to

68. WALTER BERNIS, *IN DEFENSE OF LIBERAL DEMOCRACY* 8 (1984). In fact not all modern rights are based on human autonomy. Some are grounded on need or various entitlements. But “choice rights” represent the principal area where a conflict is said to exist between traditional natural law and modern natural rights.

69. MICHAEL P. ZUCKERT, *LAUNCHING LIBERALISM: ON LOCKEAN POLITICAL PHILOSOPHY* 185 (2002).

70. LOCKE, *supra* note 20, at 289 (“The *State of Nature* has a Law of Nature to govern it . . .”).

71. See ZUCKERT, *supra* note 27, where this point of view is presented most completely.

72. LOCKE, *supra* note 20, at 287.

73. *Id.* at 370.

act as they chose.⁷⁴ This tradition of thought flourished from the twelfth century to the eighteenth century, when it was still vigorously asserted, especially among the professors of natural law in German universities. In the generation after Locke, Christian Wolff wrote, "The law of nature is called permissive . . . when it gives us a right to act."⁷⁵

Here again I can point to only a few steps in the earlier development of the doctrine. The idea of a permissive natural law first emerged in the writings of twelfth-century canonists who commented on Gratian's *Decretum* when they considered the origin of individual property. According to Gratian, by natural law all things were common. How then could one justify the private property that actually existed? One solution argued that the law involved here was merely permissive. Natural law did not actually command that all property always be held in common, but only indicated that this was a legitimate state of affairs. It left humans free to choose either community of property or individual ownership as they saw fit.⁷⁶

Subsequent generations of jurists and philosophers used the idea of permissive law to carve out, so to speak, a sphere of human freedom and autonomy within the realm of natural law itself. In one early development, the fourteenth-century canonist Johannes Andreae distinguished different kinds of permissive law. Such law, he argued, could leave certain types of behavior unpunished, or it could forbid others from impeding a permitted behavior, or it could actually lend support to the permitted act.⁷⁷ Duns Scotus approached the idea differently when he considered divine law. He wrote that in principle we are obliged to God in everything we do; but, he added, God does not ask so much of us; he demands only that we do not violate the precepts of the Ten Commandments. The conclusion of Duns Scotus was that, where God does not specifically impose an

74. See SIMMONS, *supra* note 18, at 53, 77, 171 (discussing the "wide 'domain of autonomy'" in Locke) (footnote omitted).

75. CHRISTIAN WOLFF, *Institutiones Juris Naturae et Gentium* [*The Institutions of the Law of Nature and of the Nations*], in 26 GESAMMELTE WERKE Abt. 2, 24 (Marcellus Thomann ed., 1969) (accessed by the author).

76. For the relevant canonistic texts, see TIERNEY, *supra* note 5, at 67, 142-43.

77. JOHANNES ANDREA, IN TITULUM DE REGULIS IURIS NOVELLA COMMENTARIA [A NEW COMMENTARY ON THE TITLE ON THE RULES OF LAW] 64-65 (1581).

obligation on us in the Decalogue, he leaves us to the liberty of our own wills.⁷⁸

In the sixteenth century, Vitoria made an explicit connection between permissive law and individual rights. Vitoria was trying here to extract a doctrine of natural rights from Aquinas's teaching on law, and he quoted Aquinas's statement that "law is the ground of right."⁷⁹ Vitoria took this to mean that a right was what the law permitted. He continued, "And so we use the word when we speak for we say, 'I have not a right (*ius*) to do this,' that is it is not permitted to me or again, 'I have a right,' that is, it is permitted."⁸⁰

Suarez also explored the relation between rights and permissive law when he faced an objection to the whole concept of permissive law that would also be raised by later critics. The nature of law is to impose obligation, but permission is opposed to obligation. Suarez replied that even permissive law created obligation, not on the one who chose to act or not act in accordance with the permission, but on others.⁸¹ Specifically, it imposed an obligation on judges not to punish the permitted act. Suarez noted here that positive civil law sometimes had to permit behavior that was intrinsically evil; he mentioned fornication and adultery.⁸² Such permission meant only that the behavior was not prohibited by law. On the other hand, law permitting acts that were blameless in themselves conferred "a positive faculty or license or right."⁸³

Suarez argued in a similar fashion when he considered the realm of natural law and the old problem of private property. Like the canonists, he maintained that a permissive natural law justified the acquisition of individual property, but he added an intricate argument to prove that the law also gave rise to a natural right.⁸⁴ In another discussion, he explained that many things could be done rightfully in accordance with natural law that were not commanded

78. JOANNIS DUNS SCOTUS, *Quaestiones in Quartum Librum Sententiarum* [*Inquiries Regarding the Fourth Book of the Sentences*], in 19 OPERA OMNIA 161 (26.1) (Luke Wadding ed., 1894).

79. 1 FRANCISCO DE VITORIA, DE JUSTITIA [ON JUSTICE] 64 (R. P. Vicente Beltrán de Heredia ed., 1934).

80. *Id.*

81. SUAREZ, *supra* note 36, at 57 (1.14.5), 62 (1.16.12).

82. *Id.* at 60 (1.15.6).

83. *Id.* at 62 (1.15.11).

84. *Id.* at 140-41 (2.14.16-17).

or forbidden but that were natural rights, and, he added, reason shows us what is permitted as well as what is commanded.⁸⁵

Suarez emphasized humans' freedom to make their own maps of life in another context when he considered Aquinas's argument that the goal of life on this earth is felicity or happiness and that this goal is ineluctable. According to Aquinas we cannot not want to be happy.⁸⁶ Suarez did not dispute this, but he argued that the doctrine applied only to the one final goal and that there were many other particular goals where humans were free to choose.⁸⁷

The tradition of permissive natural law that developed by the seventeenth century did not assert only a right to obey the mandates of the law. It did not maintain, as one modern critic has argued, that we must ask permission of the law before acting.⁸⁸ Rather, the natural law left large areas of human conduct undetermined by its commands and prohibitions; it recognized a realm of human autonomy where persons had a natural right to act as they chose. That is what Locke meant when he affirmed a doctrine of natural law and of natural rights "within the permission of the *Law of Nature*."⁸⁹

III. RIGHTS AFTER LOCKE

The historical contingency that helped shape Locke's teaching on rights was the constitutional crisis of the 1680s in England. Reflecting on an old tradition of thought in these new circumstances, Locke made his own distinctive contribution to the developing doctrine of natural rights, especially in his treatment of religious liberty. However, the development of a modern theory of human rights was far from complete in Locke's day. When we consider any living tradition, we are dealing with growth and change, but change in which each generation builds on the work of its predecessors. Modern human rights, though, are so different from anything that was envisaged in Locke's day in their scope and content that we have finally to consider whether anything of the earlier tradition really has persisted into the modern world.

85. *Id.* at 163-64 (2.18.3).

86. AQUINAS, *supra* note 46, at 199 (2.25.1.2).

87. FRANCISCO SUAREZ, *De Necessitate et Contingentia Efficientium* [*On the Necessity and Contingency of Effects*], in 25 OPERA OMNIA 713 (Carolo Berton ed., 1861).

88. See KRAYNAK, *supra* note 3, at 123.

89. LOCKE, *supra* note 20, at 370.

The story is certainly not one of uninterrupted progress. New movements of thought in the nineteenth century—Marxism, utilitarianism, anthropological relativism—eroded belief in any natural rights common to all people. Then, in the years after World War II, there came a sudden new flourishing of concern for universal rights, now called human rights. The historical contingency that led to the change is well understood. The new enthusiasm for human rights grew out of a horrified reaction to the atrocities of the Nazis in World War II. As Michael Ignatieff succinctly observed, referring to the United Nations *Universal Declaration of Human Rights* of 1948, “Without the Holocaust, then, no Declaration.”⁹⁰ Ignatieff saw the *Declaration* itself as “a studied attempt to reinvent the European natural law tradition,”⁹¹ and he quoted Isaiah Berlin as stating, “Because these rules of natural law were flouted, we have been forced to become conscious of them.”⁹² The point is that, within the old tradition of natural law there was embedded a doctrine of natural rights, and it was that aspect of the tradition that was revived. Moral outrage does not have to be expressed in a language of rights. But, in this case, a centuries-old tradition of natural rights already existed. It was “historically available” as Ignatieff again remarked, ready at hand to be taken up and applied to the circumstances of a new age.⁹³ That is why an awareness of the old tradition can help us to understand modern movements of thought.

We can finally ask how far the three specific strands of thought that we discussed—individual consent, self-dominion, and permissive law—have survived in the multifarious modern theories of rights. As to the first, modern political scientists no longer base their theories of consent to government on a Lockean state of nature. But the idea of humans deliberating together in a prepolitical society has been reinvented, one might say repristinated, in John Rawls’s idea of an “original condition” and applied in a novel way in his very influential theory of justice.⁹⁴

Our second theme, the idea of self-dominion, is surprisingly prevalent in the modern literature, and it is currently used to mean both self-ownership and self-mastery. Some writers, following C. B. Macpherson, attack the idea as a form of the possessive individualism

90. MICHAEL IGNATIEFF, *HUMAN RIGHTS AS POLITICS AND IDOLATRY* 81 (2001).

91. *Id.* at 66.

92. *Id.* at 80-81.

93. *Id.* at 83.

94. *See* JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

that has led to all the alleged abuses of modern capitalism. Libertarians commonly take self-dominion as the foundation of their doctrine with frequent references to Locke and even an occasional mention of Aquinas. Some left-wing authors have even used the idea of self-ownership as the starting point for socialist or egalitarian theories of society.⁹⁵

Our third theme, the idea of rights within a permissive natural law, invites comparison with the modern idea that rights are based on human autonomy. The issue is complicated. Medieval and early modern thinkers had their own ideas about autonomy, but there is no generally accepted modern theory to compare them with. Susan Brison, for instance, has discussed six different theories of autonomy in the current philosophical literature.⁹⁶ However, although the language of natural law is not fashionable nowadays, it is still generally agreed that all rights are limited by law, either by civil law or by moral considerations inherent in the concept of the right itself. Robert Nozick presented a libertarian view of society, but still he treated rights as constraints on behavior because they limit the ways we can act toward other right-bearers. "My property rights in my knife allow me to leave it where I will," he wrote, "but not in your chest."⁹⁷ Nozick added here that we are only free to choose among "acceptable options."⁹⁸ Earlier thinkers, Emerich de Vattel for instance, expressed the thought by writing of a right to act within the realm of what is morally permissible. Others, in still more old-fashioned language, had written of rights within the permission of the law of nature. Looking at the whole modern picture one can only conclude that, although much has changed, something still survives from an older tradition in the modern welter of rights and rights theories.⁹⁹

There remains one last problem. As Mary Ann Glendon pointed out in *Rights Talk*, a language of rights has become so widely diffused and often abused, that it threatens to infiltrate the whole of

95. For an example of each of these approaches, see DAVID BOAZ, *LIBERTARIANISM: A PRIMER* 95 (1997) (referring to Aquinas); ATTRACTA INGRAM, *A POLITICAL THEORY OF RIGHTS* (1994); PHILIPPE VAN PARIJS, *REAL FREEDOM FOR ALL: WHAT (IF ANYTHING) CAN JUSTIFY CAPITALISM?* (1995); Douglas B. Rasmussen, *Why Individual Rights?*, in *INDIVIDUAL RIGHTS RECONSIDERED* 113, 127 (Tibor R. Machan ed., 2001) (referring to Aquinas).

96. See Susan J. Brison, *The Autonomy Defense of Free Speech*, 108 *ETHICS* 312 (1998).

97. ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 171 (1974).

98. *Id.*

99. On the modern "welter" of rights, see LOREN E. LOMASKY, *PERSONS, RIGHTS, AND THE MORAL COMMUNITY* 4 (1987).

our moral discourse and to impoverish it.¹⁰⁰ It is this abuse of rights language, I suppose, that has led some conservative Christians to characterize our whole culture of rights with phrases like “corrosive selfishness”¹⁰¹ and “narcissistic atomization.”¹⁰² But some persons have always been selfish and narcissistic. The existence of such people is not just a product of a modern culture of rights—one could find plenty of examples in the Old Testament. So we ought to consider the proper use as well as the abuses of modern rights language. Mary Ann Glendon provides good guidance here. She effectively skewered the abuses of “rights talk” in an early book, but she does not regard such abuses as inherent in the idea of human rights itself. In a later work, she argued that the abuses are not built into the founding program of the whole modern rights movement, the United Nations *Universal Declaration of Human Rights*, a document that Glendon, along with Pope John Paul II, has warmly praised.¹⁰³ The *Declaration*, she points out, does not assert a selfish and atomistic individualism.¹⁰⁴ It is grounded on the “inherent dignity” of the human person; it affirms that the “family is the natural and fundamental group unit of society,” and it declares that “[e]veryone has duties to the community.”¹⁰⁵ Perhaps it is inevitable that abuses will arise, but they do not have to be embraced. They can always be resisted. The principle we should apply here, I think, is the medieval adage *abusus non tollit usum*: abuse does not take away rightful use.

The notion of natural rights or human rights had a long history in Christian thought before it assumed its more secular modern forms. The idea has always expressed an ideal, never fully realized in practice, but it has provided a strong weapon against various forms of oppression in the past. Given the less amiable proclivities of human nature, we should do well to preserve the ideal for future generations. They too may find it useful to have such a notion “historically available” in the contingencies of their times.

100. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991).

101. KRAYNAK, *supra* note 3, at 167.

102. FORTIN, *supra* note 66, at 23.

103. See Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. U. J. INT'L HUM. RTS. 5 (2004), at <http://www.law.northwestern.edu/journals/jihr/v2/5>.

104. See *id.* ¶ 20 (describing the *Declaration* as “an integrated document where rights are meant to be seen in relation to each other and to certain over-arching principles, including the rule of law”).

105. *Universal Declaration of Human Rights*, *supra* note 1, at 71, 74, 76.