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FUNDAMENTAL HUMAN RIGHTS
IN MEDIEVAL LAW



R. H. HELMHOLZ
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Fundamental Human Rights in Medieval Law

R. H. Helmholz*

Fundamental human rights have come very much to the fore in our law, and their recognition and proliferation during recent years have been the subject of consternation as well as enthusiasm among observers. Speaking in the House of Lords just last year, for example, the eminent judge Lord Hope noted, “the incorporation of the European Convention on Human Rights into our domestic law will subject the entire legal system to a fundamental process of review and, where necessary, reform by the judiciary.”¹ In the United States, our Constitution already guarantees many of the same rights that are found in the European Convention, and it is idle to suppose that the law of our own country will not be affected by this powerful current of thought. This makes it all the more appropriate – I do not assert that it is necessary – that we should know something about the history of the subject.

I was encouraged in this choice by the knowledge that one of the best of the Fulton Lectures in fact dealt with the history of human rights. It was a talk given by Professor Brian Tierney of Cornell University, subsequently published under the title, “Natural Rights – Before Columbus and After.”² Those of you who had the pleasure of hearing Professor Tierney on the day, as I did, will remember his theme: that the concept of a natural

* This is a revised version of a lecture delivered May 2, 2001. For comments helpful in making revisions, the lecturer thanks Albert Alschuler, David Currie, Jack Goldsmith, and Tracey Meares.

¹ Regina v. Director of Public Prosecutions, ex parte Kebilene, 2 A.C. 326, 374-5 (House of Lords 2000).

² Brian Tierney, *Natural Rights: Before Columbus and After* (University of Chicago Law School 1995).

human right was found in the medieval *ius commune*, the combination of Roman and canon law that governed legal education and much of legal practice at the time Columbus set sail for the New World.³ The prevailing view had long been to the contrary,⁴ but Professor Tierney showed that the idea of natural rights did not enter political life, as he put it, "with a clatter of drums and trumpets of the American Declaration of Independence or the French Declaration of the Rights of Man." Instead, "this central concept of Western political theory first grew into existence almost imperceptibly in the obscure glosses of the medieval jurists."⁵ It antedated Columbus by more than two centuries.

I am a student of those same obscure glosses, though a lesser one than Professor Tierney. Today I want to add what might be considered a footnote to his contribution to the history of legal thought. My hope is that it will put our understanding of the concept of rights into a sharper focus. It may qualify the concept as he presented it, but we are in agreement on the important points: the *ius commune* recognized the existence of human rights, the law of the medieval church was not in fact hostile to them, and individual men and women were given the ability to exercise them. Any disagreement that exists comes from the fact that, when the treatment of these rights in the works of the medieval jurists is examined more closely, it appears that the rights they recognized had a less fundamental character than do most of their modern counterparts. The

³ See generally, Manlio Bellomo, *The Common Legal Past of Europe, 1000-1800*, Lydia G. Cochrane trans. (Chicago 1995).

⁴ E.g., Walter Ullmann, "Historical Introduction" to Henry Charles Lea, *The Inquisition of the Middle Ages* (London 1963), p. 37: "the individual as a being endowed with indigenous . . . and independent rights was a thesis for which we shall look in vain in the Middle Ages."

⁵ See *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta, Ga., 1997), p. 344.

medieval *ius commune* held that there existed a right order of government on earth, one based upon natural law and one that included the diffusion of human rights. However, the reason for the existence of those rights was not to vindicate human choice or to promote the sacredness of human life. It was to vindicate and promote God's plan for the world. This was an objective way of thinking about rights, not a subjective one.⁶ The distinction between these two had important consequences in the ways in which fundamental rights were conceived and put into practice.

Welfare Rights

An initial example is the right of the poor to sustenance in times of necessity. As Professor Tierney showed at the outset of his scholarly career, in such circumstances the canon law took the position that "the poor had a *right* to be supported from the superfluous wealth of the community."⁷ There was not simply a moral obligation to give alms or to pay tithes. The canonists reached the conclusion that as a matter of right poor men and women could themselves demand to be supported if they would otherwise have starved. The *ius commune* thus recognized a forerunner of modern rights to welfare.

Looking further into the medieval law on this subject produces a complicated picture.⁸ For one thing, almost every point upon which the argument rests was a disputed one among the

⁶ See Annabel S. Brett, *Liberty, Right and Nature: Individual Rights in later scholastic thought* (Cambridge 1997), esp. pp. 10-48.

⁷ Brian Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and its Application in England* (Berkeley and Los Angeles 1959), pp. 37-38 (emphasis in original).

⁸ Ordinarily, they were supporters of a system of private property. See John McGovern, *Private Property and the Jurists, A.D. 1200-1500*, in: *In Iure Veritas: Studies in Canon Law in Memory of Schafer Williams*, Steven B. Bowman and Blanche E. Cody eds. (Cincinnati 1991), pp. 131-58.

jurists. For example, there was no compulsory system of poor relief,⁹ and no canonist supported the position that the poor were given a direct action (as we would say) to compel the rich to support them. Some said, however, that they could reach this result indirectly by making use of the procedure known as *denunciatio evangelica*. It allowed a poor man to “denounce” a rich man who refused to provide sustenance for those who were in need, and the church would in turn compel the rich man to do so by ecclesiastical censure, excommunication in the last resort.¹⁰ The availability of even this procedure was, however, a contentious issue. Some canonists held that giving alms was a matter of choice only.¹¹ Whatever right the poor might have, they thought, it should not be one enforceable by mandates issued by public courts. But let us ignore this complication. At the very least, under some circumstances, a case for an enforceable right to sustenance might be made out under the classical canon law.

What theory of rights this right rest upon? Was it an early-day recognition of the inherent right of each individual to flourish? The reasons given by the canonists do not suggest that it was. They do mention the biblical precepts in favor of charitable giving. They did denounce avarice. But these precepts could not be the foundation of the rights of the poor. They were not obligatory, except as to the tithe and certain

⁹ There was, of course, a considerable literature stressing the need for Christians to give alms for support of the poor. See the succinct and admirable sketch in Miri Rubin, *Charity and Community in Medieval Cambridge* (Cambridge 1987), pp. 54-74.

¹⁰ *Gl. ord.* ad Dist. 47 c. 8 s.v. *esurientium*; Panormitanus, *Commentaria in libros decretalium* ad X 5.18.3, no. 7. A fuller treatment of the canonists is found in Gilles Couvreur, *Les pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre († 1231)* (Rome 1961), pp. 108-15.

¹¹ E.g., Joannes de Turrecremata, *In Gratiani Decretum Commentarii* (Venice 1578), ad Dist. 47 c. 8, no. 9: “non cadit sub praecepto sed solum pertinet ad consilium.”

other traditional obligations, none of which was destined directly for the poor. No, instead the canonists put the right upon an argument from natural law, one they shared with the medieval civilians.¹² Before society was organized, the argument ran, all things had been held in common. In times of extreme want, when societal organization fell apart, something like that situation recurred. If this calamity occurred and there was no other recourse, the poor could then take from that common mass without being guilty of theft.¹³ They were only taking what was theirs anyway, because they were entitled to a share under natural law.

The text most often used by the jurists to buttress this theory came from the Rhodian sea law¹⁴. In a storm when some cargo must be jettisoned from a ship, all cargo holders have a right to share proportionately in what remains when the ship later docks. It is the doctrine of admiralty law called the general average. Now you may think, as I do, that this is a very strange sort of argument upon which to base a right to sustenance, but that is what they said. It was, I think, an attempt on their part to find within the existing body of law a reliable indication that in extreme circumstances the law required some sharing of the goods of the rich. There was no soft-hearted talk about the merits of the poor or the needs of distributive justice.

Consequences followed from this way of thinking. The most significant was that the right was limited to men and women in actual danger of starvation, as would have been true of death by drowning in a violent storm at sea, and that it was in any event a right not to be prosecuted for taking what was nec-

¹² *Gl. ord.* ad Dig. 1.1.5 s.v. *dominia distincta*.

¹³ *Gl. ord.* ad Dist. 47 c. 8 s.v. *commune*.

¹⁴ It was included in the medieval *Corpus iuris civilis*: Dig. 14.2.2. It was cited, for example, by Panormitanus, *Commentaria* (above note 10) ad X 5.18.3, no. 6.

essary to save their lives. The need thus had to be extreme before all goods were to be held in common under the doctrines worked out by the canonists.¹⁵ Otherwise, taking the goods of others, even their surplus goods, was still theft, and it was rightly to be punished. Inequality of wealth was not sufficient to justify invocation of any right on behalf of the poor. But this is not the main point. That point is that the classical canonist did not approach the question by asking whether the poor *deserved* to be supported, then articulating how far the right extended, as does the modern Universal Declaration of Human Rights.¹⁶ They asked whether there was something in the natural law that would justify what would otherwise be theft. That they found it is to their credit. But it is a stretch to describe it as a welfare right inhering in each individual by virtue of being human.

Voting Rights

Another example of a right recognized under the *ius commune* is the right to vote. You may be surprised to learn that the medieval church made much use of elections, or that it makes any sense to speak of a basic right to take part in them. In fact, it did. Indeed it may be said with some justice that the early law of secular elections can be traced back to the system the medieval canonists evolved for choosing bishops, abbots, representatives of the clergy, and many humbler offices within the church. The method called for all members of the body which would be governed by the person elected to be brought togeth-

¹⁵ Panormitanus, *Commentaria* (above note 10) ad X 5.3.40, no. 5: "sed intellige quando est tanta necessitas quod fame periret si non caperet."

¹⁶ E.g., Art. 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services." in: Rebecca Wallace, *International Human Rights: Text and Materials* (London 1997), p. 653.

er and for each member to cast a vote. From this arose the *ius eligendi*, the right to participate and have one's vote counted with those of the others. It was also described as a *potestas eligendi* or a *libertas eligendi*,¹⁷ the terms emphasizing that "a theory of individual rights played a vital role in a central aspect of capitular governance."¹⁸ Safeguards were created in the canon law to protect the exercise of the right – principally a guarantee that the person holding the right to vote would receive adequate notice of the meeting lest the right be rendered ineffective. The canonists spoke of freedom in the exercise of the right, comparing it to the freedom to enter into a marriage.¹⁹ It seems very like a modern right.

When one looks a little further at the details of the law, however, the picture becomes a little murkier. The "individualistic aspect" of this right seems almost to vanish. Why did the right exist? Hostiensis, one of the ablest of the thirteenth century canonists, gave voice to the *communis opinio* by describing elections as "the calling of a *suitable* person to a dignity, following the canonical order."²⁰ His emphasis is on the procedural order to be followed and the suitability of the person to be elected, not on the exercise of an individual right.²¹ The electors could not choose just anybody. Their choice was limited and it was subject to reversal for cause by the judgment of their

¹⁷ X 1.6.52-53; X 3.9.3.

¹⁸ Charles Reid, "Rights in Thirteenth-Century Canon Law: An Historical Investigation," Cornell University Ph.D. Dissertation (1995), p. 280.

¹⁹ *Gl. ord.* ad X 1.6.23 s.v. *metuebant*.

²⁰ Hostiensis, *Summa aurea* (Venice 1574), Lib. I, tit. *De electione et electi potestate*, no. 1: "Electio est alicuius personae idoneae ad dignitatem vel fraternam societatem, servata forma cononice facta vocatio." This was the common definition; see, e.g., Angelus de Clavasio, *Summa angelica* (Nürnberg 1495), tit. *Electio*, rubr.

²¹ So Innocent IV, *Apparatus in quinque libros Decretalium* (Turin 1581), ad X 1.6.42, no. 8 (noting that an election conducted contrary to the objective forms laid out in the law was *ipso iure null*).

ecclesiastical superiors, typically the archbishop.²² Indeed, if one of the electors knowingly voted for an unsuitable candidate, that elector lost the right to vote in the election, and it was seriously debated in the scholastic literature of the time whether it was a mortal sin for an elector to cast his ballot for someone he realized was not the best candidate for the office.²³

One of the other rules under the medieval law was that all the electors had to meet at the same time in the same place. It was to be a consultation and joint decision, although the votes were to be made secretly. What stood behind this rule? According to Hostiensis, it was that if the electors were allowed to cast their ballots singly and apart from each other, this would offend the Holy Spirit, who presided over every canonical election and who “did not love division or schism.”²⁴ His proof of the point came from Acts 2:1, recording the meeting of the apostles, “when the day of Pentecost was fully come, [who] were all with one accord in one place.” In other words, the canonical election should imitate that meeting insofar as possible. Electors were to await guidance from the Holy Spirit. The canon law did not envision the election primarily as a matter of voters meeting to exercise their individual rights. The exercise of the right to vote was dictated by the Bible’s example, and it meant that the electors should align themselves with God’s will in making their choice.

Consequences followed this way of thinking about the *ius eligendi*. For instance, if a majority of the electors chose an

²² Hostiensis, *Summa aurea* (above note 20), Lib. I, tit. *De elect.*, no. 9 (noting that although anyone not prohibited could be chosen, nonetheless, “many are prohibited.” See the long catalogue in Joannes Bertachinus, *Tractatus de episcopo* (Lyons 1533), Lib. II, c. 1; on his reading it precluded, for example, election of an *ambitiosus* to the episcopacy.

²³ *Summa angelica* (above note 20), tit. *Electio*, no. 21: “Utrum peccet mortaliter qui non eligit meliorem illi prelationi secundum iudicium sue conscientie?” See also Sext 1.6.18.

²⁴ *Summa aurea* (above note 20), Lib. I, tit. *De elect.*, no. 4.

unworthy candidate, and a minority a worthy candidate, the latter prevailed.²⁵ This strange result (by today's standards) was not regarded as violating the rights of the electors who had been in the majority. They were only a vehicle by which the proper choice would be made. Similar thought lay behind the exclusion of the laity from most elections within the church. The exclusion illustrates the fragility of the right. Either by privilege or prescription, before the twelfth century many laymen had established an apparent right to take part in choosing new bishops. This was not necessarily contrary to the *ius antiquum* of the church, which held that elections were to be made *per clericum et populum*. However, the classical canon law took the opposite tack, holding that either as a matter of policy, textual interpretation or even (in the case of Innocent IV) natural law itself, the laity's pretended rights were void. Lay participation in fact would invalidate a canonical election.²⁶

If the *ius eligendi* was regarded as a right in the canon law, therefore, as I think it was, it was not what we would call a fundamental human right. What was more important for the medieval canonists was following God's plan for governance of the church. That plan, they said, required finding the best candidate, and it excluded the laity from taking part in the choice of their bishops. To that plan, human rights – even human rights of great antiquity – must of necessity give way. In the course of time, even the right to elect bishops enjoyed by cathedral chapters was taken away in the interests of right governance of the church.²⁷

²⁵ X 1.6.22 and Panormitanus, *Commentaria* (above note 10) ad id., no 10.

²⁶ X 1.6.56.

²⁷ Geoffrey Barraclough, "The Making of a Bishop in the Middle Ages," *Catholic Historical Review*, 19 (1933), pp. 275-319.

Rights of Religious Freedom

A third example – one with the most immediate relevance to modern developments – was that of religious liberty, that is the right to choose whether or not to adhere to and practise a particular religion. Some of you, I know, will be astounded to hear that the medieval church and its canon law contained any mention of this basic human right, but this most definitely was the case. No one is to be brought to the Christian faith by force, proclaimed an ancient text incorporated into Gratian's *Decretum*, the first of the basic lawbooks of the medieval church.²⁸ No unwilling person is to be compelled to come to baptism, proclaimed a famous letter of Pope Clement III incorporated into the Decretals of Gregory IX, the second of those same lawbooks.²⁹ Persuasion, not force, was to be the medium by which the faith of Christ was to be spread throughout the world. The point was decisively and repeatedly stated.

What lay behind acceptance of this important principle of religious liberty? The evidence to sustain it did not begin with statements about the importance of individual choice. Instead, the jurists began with baptism. They took note that, under Roman law, an act done because of absolute coercion was a nullity, and they applied to same principle to baptism. "Nothing happened; no Christian character is imprinted" if no act of will on the part of the person baptised were involved.³⁰ From this it followed that forced conversion would be ineffective. Moreover, the canonists were fond of stressing that forced baptism could have no beneficial effect on the person involved. God knows our hearts, and the heart of the person converted

²⁸ Dist. 45 c. 5.

²⁹ X 5.6.9.

³⁰ Hostiensis, *Summa aurea* (above note 20), Lib. III, tit. *De baptismo et eius effectu*, no. 11: "Si vero coactio absoluta fuerit, nihil agitur, nec character imprimitur."

by an act of pure force will not in fact turn to God. The classical canonists knew that such baptism would be without any real point. From an objective point of view, therefore, it would be a waste of time to force any person to become a Christian.

What was missing from the explanations of the canonists is any attention to the personal interests of the individual being baptised. They did not approach the subject that way. The question was always the formal validity of the baptism, and if validly baptised, the person had no choice about what we might call religious affiliation.³¹ The person baptised as an infant, the adult once validly baptised who later changed his mind, the person baptised under some kind of conditional coercion – that is someone who had chosen baptism as the lesser of two evils – were essentially out of luck as far as choice of religion went. They could be compelled to adhere to the Christian religion, at least in its external manifestations,³² and under the classical canon law, that compulsion was effected by threats of a particularly horrible form of capital punishment. It is very far from the “inherent dignity of the human person” that is characteristic of a modern human right to religious freedom.³³

Few would today agree with the classical canonists on this point. But why did the canonists come down where they did after making such an auspicious start in stating a principle of religious freedom? The answer to that question is that they

³¹ Compare the modern European Convention on Human Rights, art. 9:1; it specifically guarantees to every person the “freedom to change his religion or belief.” See D. J. Harris, M. O’Boyle, and C. Warbrick, *Law of the European Convention on Human Rights* (London 1995), p. 356.

³² See Joannes de Turrecremata, *Commentarii* (above note 11) ad Dist. 47, c. 8, no. 9: “quod cogantur tenere quantum ad exhibitionem exteriorum operum, scilicet ut vivant secundum ritum Christianorum.”

³³ See Declaration on the Elimination of All Forms of Religious Intolerance, ch. 1 (United Nations 1993), in: Wallace, *International Human Rights* (above note 16), p. 166.

adopted an objective view of the effect of baptism. Only in circumstances where the party being baptised had clearly objected to its imposition was it invalid, and that is because (the canonists said) the baptism would have no effect anyway. It was not because their human rights had been violated. Taking their view of baptism, it could not be that the sacrament might be valid one day and invalid the next. It was a fact. One could not take the benefits of baptism without the burdens any more than a man today can renounce the fact that he has fathered a child. That too is a fact. Today, we would distinguish: the father cannot renounce the child because the rights of a third person have intervened, i.e. the child. But the canonists did not see it that way; or they may have considered God to have been the real party in interest, the third party whose interests could not be ignored simply because an individual happened to change his mind. It was, in all, a way of looking at the subject of religion that was much less concerned with preserving human freedom as a fundamental right than is the law of today.

This is the reason that, although one can find a *progenitor* of sorts to modern notions of religious liberty in the classical canon law, it did not amount to a human right in the modern sense. It was not grounded upon the idea of human freedom to make an individual choice. Unless this difference is taken into account, the classical canonists must seem to have been confused – or worse. On the one hand, they advocated religious freedom, but on the other hand, they also advocated putting to death men and women who sought to take advantage of that freedom.

Rights to Due Process of Law

A final example is an important and fundamental theme in the progressive recognition of human rights: the right to a fair

trial. It embraces the right not to be condemned without due process of law or to have one's property confiscated arbitrarily. One may be punished only in obedience to an existing law. The subject of due process in the *ius commune* has been ably investigated in recent work.³⁴ Although this was not an absolute right in the canon law, under ordinary circumstances the right to due process was an accepted norm in it, and the right was strengthened during the Middle Ages by the virtual exclusion from practice of proof by notoriety, which had been permitted in earlier canonical thought.

This scholarship has made a valuable contribution to the history of the *ius commune* and the Western rights tradition. I want only to look at the subject from a slightly different angle: at the reasons given for the requirement, in particular the reason that were given by contemporaries for the right to be properly summoned and then be allowed to present a defense in response to the charge. The medieval canonists insisted that trials should be no Kafkaesque charade, where the defendant scarcely understands what is happening to him. Was this out of a belief in the fundamental right of each individual to life and property, as it is in the modern law?³⁵

That seems possible, but it is not the justification the canonists gave for the requirement of summons and trial. When giving their reasons for it, they cited the story of Adam and Eve from the Book of Genesis. When Adam had eaten the fruit of the tree, something God had expressly forbidden him to do,

³⁴ Kenneth Pennington, *The Prince and the Law, 1200-1600: Sovereignty and Rights in the Western Legal Tradition* (Berkeley and Los Angeles 1993); Charles Reid, Jr, "The Canonistic Contribution to the Western Rights Inquiry: An Historical Inquiry," 33 *Boston College L. Rev.* 37 (1991); Paul Hyams, "Due Process versus the maintenance of order in European law: the contribution of the *ius commune*," in: *The Moral World of the Law*, Peter Coss ed. (Cambridge 2000) esp. pp. 66-76.

³⁵ See *Law of the European Convention* (above note 31), pp. 163-73 for fuller discussion.

Adam was not punished summarily. Instead “the Lord God called unto Adam, and said unto him, Where art thou?” Then God asked Adam to say whether he had eaten of the forbidden fruit, and he even listened to Adam’s feeble attempt at self-justification, or mitigation as the canonists saw it, that is Adam’s effort to shift the blame to someone else.

In this biblical story, the canonists saw the origins of the right to a fair trial. God knew that Adam was guilty of the crime. It could not have been otherwise. He knew likewise that Adam had no adequate defense. Nonetheless he took the trouble of summoning Adam – by calling out to him in the Garden of Eden – and God listened patiently, if briefly, to what Adam had to say in exoneration. So, it followed, were human judges bound to do in their courts. In other words, the canonists recognized these rights not because of any merit or human right resting in defendants, but because the biblical example required it. God himself had established an *ordo iuris*. That is what men must follow.

Today of course, this kind of reasoning seems quite fanciful (even mildly amusing). One is tempted to write it off as simply a proof text used to add a religious tone to a rule arrived at for other and better reasons. So it seems. But the fact is that the canonists themselves preferred the explanation they gave to an explanation based upon subjective rights. It is not that they *added* this proof text to their other reasons. It *was* their reason. The benefits that accrued from allowing defendants to defend themselves – such as greater fairness in sentencing – were the consequences of the fair trial rule. They were not its origin.

This approach made a difference in fact. For example, the formal law required a three-fold admonition before a defendant could be excommunicated for contumacy, but this was soon shortened in practice to one peremptory admonition.³⁶

³⁶ See Innocent IV, *Apparatus* (above note 21) ad X 5.1.22, no. 3.

No more had been given to Adam. Another relevant biblical incident came from the 18th book of Genesis. Hearing accounts of the sins prevalent in Sodom and Gomorrah, God said, "I shall descend and see whether they have done according to the *clamor* that has come unto me." From this the canonists concluded that the *ordo iuris* must encompass proceedings based upon *clamor*, or *fama publica*, a technical term they developed to describe widely based rumor.³⁷ It was otherwise a violation of canonical process to summon a man before a judge without something like probable cause, but that requirement could be fulfilled if the *clamor* were sufficient to meet the standard established by God himself in Genesis 18:21. If you accept the Old Testament as a manifestation of God's will, as the medieval jurists of course did, this was an objective way of thinking about the subject of defendants' rights. It was not based upon the inherent dignity of the individuals in the Garden of Eden, still less on any fundamental rights of the inhabitants of Sodom and Gomorrah. It was based on an example provided by God himself.

Conclusion

What conclusions emerge from this evidence? I myself would say that a compelling case can be made that the medieval *ius commune* recognized a number of fundamental rights that protected the interests of individual men and women. It is also clear that those who held these rights were given the power to exercise them in courts of law. What looking further at the medieval *ius commune* does, however, is to raise doubt about the connection between this evidence and

³⁷ See *gl. ord. ad C. 2 q. 1 c. 20 s.v. inquirat*; X 5.1.24. See Larry Poos, "Sex, lies, and the church courts of pre-Reformation England," *Journal of Interdisciplinary History* 25 (1995), pp. 585-607.

modern notions of human rights. The canonists did not think about them in the same way we do.

In the medieval canon law, human rights were based upon a purportedly objective assessment of the teachings of natural law and the Christian religion. They were not the “trump cards” of modern civil rights law.³⁸ It is noteworthy how easily the rights that existed were qualified. A poor person’s right to support was reduced to the most extreme case, and even there it was controversial. The right to vote was surrendered in large measure to the needs of the institutional church. The right to religious liberty was all but swallowed up as a practical matter by the principle of the objective validity of baptism. The right to be free from criminal prosecution was diminished by the need to still *fama publica* and to punish criminals.

Few rights are absolute of course. Not today. Not then. But it is a measure of the difference between the basic rights recognized by the classical canon law and our own that they so often and so easily gave way before other pressing needs that were regarded as coming either from natural law, or from God’s will, or from both. Human rights were recognized in the medieval *ius commune*. However, their source was not the inalienable right of individual human beings. The medieval jurists would have been uncomfortable with so subjective a foundation for human rights. The rights they recognized were not the sorts of fundamental rights we take for granted as protections of our persons and our interests. Whether they should be seen as antecedents of the concept of rights we have developed today is a matter of legitimate difference of opinion, but we ought certainly to keep in mind how significant the changes have been.

³⁸ The expression comes from Ronald Dworkin, *A Matter of Principle* (Cambridge, Mass. and London 1985), p. 198.

At the same time, it is useful to remember that the objective view of rights did not wholly disappear from the law with the Enlightenment. The Second Amendment to the U. S. Constitution, for example, was stated in terms of objective right. That fact might usefully be remembered in the current debate about gun control and the obstacle to it presented by the Constitution.³⁹ It is even true that the medieval way of thinking of rights has not entirely vanished from today's law. It is present in the ways in which we treat freedom of speech. We revere it not only because it promotes the expression of individual opinions, but also because we think it promotes discovery of the truth. In other words, freedom to express an idea fosters better government and a better society.⁴⁰ From that principle can come limits. The law of Germany, for example, contains some quite sweeping statements about protection of the human right to free speech, but it also contains a proviso that excepts from constitutional protection any speech asserting the Nazis committed no racial crimes against the Jews.⁴¹ It does not allow freedom of speech to "trump" the objective order that is regarded as necessary for the preservation of the democratic system of government.

It is not surprising that this medieval way of looking at human rights should have retained a place in modern thought about rights. There is something to be said in its favor, quite apart from its affinity with the views of Leo Strauss. In aspiration at least, it avoids the situation we are too often in today – where whatever a large enough group of people wish to have for themselves is stated in terms of a human right. Whatever its

³⁹ See, e.g., Steven J. Heyman, "Natural Rights and the Second Amendment," 76 *Chicago-Kent Law Rev.* (2000), pp. 237-90.

⁴⁰ See, e.g., Robert H. Bork, "Neutral principles and some First Amendment Problems," 47 *Ind L.J.* 1 (1971).

⁴¹ StGB § 130 (3); BVerfG, Beschl. 9/6/1992, 1 BvR 824/90, as reported in 1993 NJW 916.

merits, however, it is not something we can call back into life in its full medieval form. It is too late for that. It would not be advisable either. It had its bad side. If the jurists of the *ius commune* used Adam's citation in the Garden of Eden as a demonstration of the necessity of guaranteeing due process to those called before its tribunals, they also used Adam's expulsion from the same Garden to justify the procedures used by the Spanish Inquisition.⁴² We should not wish for that.

⁴² This derivation is worked out at great length in: Ludovicus a Paramo, *De origine et progressu officii sanctae inquisitionis* (Madrid 1598), Lib. 1, tit. 1, c. 1, continuing up to tit. 2, c. 5.