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Natural Rights: Before and After Columbus

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NATURAL RIGHTS: BEFORE COLUMBUS AND AFTER

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*by Brian Tierney**

You may remember that three years ago—in 1992—we were celebrating the fifth centenary of the famous voyage of Christopher Columbus—that is, celebrating or denigrating according to taste. We had to endure everything from Columbus the high-souled hero to Columbus the monster, spreading disease and destruction through an idyllic Indian civilization. My own interest at the time was a bit different. I had been working on the early, medieval origins of the idea of natural rights, or human rights as we say nowadays, and I began to ask myself what impact the encounter with America had on the tradition as it had developed by about 1500. I did wonder for a moment whether this was an altogether suitable topic for a law school occasion. Lawyers associate the idea of natural rights with people like Hobbes and Locke, or later with Thomas Jefferson and the "certain inalienable rights" of the Declaration of Independence. My interest seemed to be more a theme of political philosophy than of law. Then, however, I remembered a saying of Frederic Maitland, the greatest of legal historians. He once wrote that, in its infancy, political philosophy is apt to look like sublimated jurisprudence. So it was, I would argue, within the tradition of natural rights.

Of course, the discovery of America influenced Western natural rights theories in many different ways. When John Locke wrote, "In the beginning all the world was America," he was thinking of a prepolitical society where men really lived in a state of nature, with real natural rights. However, for skeptics like Montaigne, the new knowledge of Amerindian societies led to a cultural relativism that eventually undermined all belief in a natural law common to all peoples and in universal natural rights. The most immediate impact of the discovery of America, though, was on the Spanish thinkers of the sixteenth century—people like Vitoria, De Soto, Las Casas, and Suarez. They debated passionately about the rights of the American Indians, sometimes opposing theories of universal natural rights to the revived Aristotelian doctrine of natural slavery. This immediate impact of America on Spanish thought is

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something I shall want to consider, though one must traverse a good deal of medieval ground to get to that point.

This is really a necessary approach, for everyone agrees that the first writers on America did not address their task with minds like Locke's blank sheets of paper. For a long time they tried to fit the new found facts of the New World into the preconceptions of the Old World—preconceptions derived from centuries of earlier European experience and, in Spain, specifically from traditions of medieval juristic thought and Aristotelian-Thomist philosophy. As Lewis Hanke wrote, "They looked at the New World through medieval spectacles." It is as a medievalist that I approach their work. Las Casas, late in his life, wrote that he had studied the law for forty years. By now I must have studied the law for forty years—and those same lawyers that Las Casas knew so well—Innocent IV, Hostiensis, Baldus, Bartolus, Johannes Andreae, Petrus de Ancharano and so many more. This gives one a different perspective on the intellectual life of the early sixteenth century.

Any approach to natural rights theories, though, involves some twentieth-century problems that I need to mention briefly at the outset. Those of you who are not specialists in this particular area of thought may not be aware that the field is in a state of considerable disarray. There is no agreement among the scholars who work in it. On the level of political discourse, a commitment to human rights seems mandatory. On the level of philosophical argument, however, the existence of such rights is often denied altogether. Alasdair McIntyre, for instance, has written that "There are no such rights and belief in them is one with belief in witches and in unicorns." By far the best philosophic argument for natural rights has come from Alan Gewirth at the University of Chicago. But his argument has evoked a chorus of dissent from other philosophers and from many different points of view. One recent author referred to a "welter" of current rights theories. There is just no consensus.

I suppose there are two basic arguments against natural rights nowadays. One is the cultural relativism I just mentioned. Hundreds of human societies exist. They all have different customs, different values. So there can't be one set of natural rights valid for all of them. The other objection comes, oddly enough, both from conservative Catholic thinkers and from left-wing Marxists. According to this argument, natural rights theories are based on mere selfish individualism. They ignore the moral value of community life. As Mary Ann Glendon wrote recently, "They put the self at the center of our moral universe." A historical approach cannot solve all such problems for modern theorists. But perhaps it can help us to address them in a more informed and sophisticated fashion.

That is my subject: to explain the origin of Western natural rights theories, their development up to about 1500, and the impact of America on their subsequent history. But when we turn to the historians of natural rights theories there is again no agreement. A United Nations document of 1949 optimistically declared that the concept of the rights of man "goes back to the very beginning of philosophy, East and West." Few historians would agree. All the great world civilizations have striven to establish justice and order, but most of them have not expressed their ideals in terms of individual natural rights. Think of classical China. It is hard to imagine a Confucian Hobbes or Locke. The emergence of a doctrine of natural rights is a contingent phenomenon. So the question a historian has to ask is: What historical context, or what set of circumstances, made the emergence of such a doctrine possible, or useful, or necessary? And what later historical contexts made the survival of the idea possible—including the context of the discovery of America? The problem is largely to understand how an ancient doctrine of natural law—*ius naturale*—became transformed into a theory of subjective rights inhering in individuals.

Even among those who agree that the idea of natural rights is distinctively Western in origin, there is still no agreement about the relationship of rights theories to the whole tradition of Western culture. There seem to be three distinct schools of thought, at least. Some, like Maritain, would hold that the idea of natural rights was always implicit in Judeo-Christian teaching on the dignity and value of the human person. Another school of thought maintains that modern rights theories had a specifically seventeenth-century origin. C. B. MacPherson associated such doctrines with the nascent capitalism of the age. Leo Strauss emphasized the scientific materialist philosophy of Hobbes and concluded that the idea of natural rights was alien to the earlier classical and Christian tradition. Disciples of Strauss, like Walter Berns, will still write, "The very idea of natural rights is incompatible with Christian doctrine." Yet a third school, represented by Michel Villey, who has written many books and articles on this theme, holds that the idea of subjective rights was indeed derived from Christianity but from a distorted and aberrant form of Christian thought, specifically from the fourteenth century nominalist and voluntarist philosophy of the Franciscan William of Ockham. Villey dislikes all the modern talk of rights. Like McIntyre, he sees it as only a form of mindless subjectivism. According to Villey, the good old tradition was represented by Thomas Aquinas, and it emphasized natural law and the common good, not selfish egotistical individual rights. Then along came Ockham. His nominalist philosophy naturally inspired an individualistic political theory. Ockham, Villey wrote, was the father of subjective right and, avoiding all sexism in the modern

fashion, he also stated that "the philosophy professed by Ockham is the mother of subjective right." Specifically, he argued, Ockham instituted a "semantic revolution" when he associated for the first time the two concepts, right and power, *ius* and *potestas*. Ockham, we are told, created a "monstrous hybrid" when he defined the word *ius*, that had originally meant objective right as a subjective power inhering in individuals.

This is, I would say, the reigning orthodoxy. Ockham is by far the favorite choice as originator of subjective natural rights for scholars who seek a pre-seventeenth-century origin of the doctrine. But none of the three positions I have sketched seems to me altogether adequate. As to the first, if an idea of individual rights has always been implicit in Christian doctrine it has most certainly not always been explicit. Christian authorities have suppressed rights in some contexts as well as affirming them in others. The whole problem is to understand when and how and why an old Judeo-Christian concept of human dignity found expression in a new doctrine of natural rights. The second view that finds the original source in Hobbes's supposedly atheistic philosophy seems to me clearly mistaken if only because there were major Christian natural rights theorists before Hobbes—Suarez and Grotius for instance. And, less obviously, a similar argument applies to the third view, which finds the origin of natural rights theories in Ockham. There really was no semantic revolution in his teaching on rights. It is true that Aquinas had no real theory of rights. But the use of the word *ius* to mean a subjective right was common in juristic writings before Aquinas, and long before Ockham. Specifically, the definition of a right as a power (Villey's semantic revolution) was widespread, especially among the canonists. Before 1200, the canonist Huguccio wrote concerning a bishop-elect, "He has the right to administer, that is the power to administer." Such usages were commonplace. And Ockham appealed often to canonistic sources in forming his own rights theories.

We can now at last come to the real historical origin—as it seems to me—of the medieval teaching on natural rights that Vitoria and Las Casas would inherit, and find some answers to the question I posed. What was the historical context that made the new teaching possible? It was, I have been arguing in a series of recent articles, the culture and jurisprudence of the late twelfth century. You must not think of that as a static age. Historians now see the twelfth century as a major turning point in Western history. The demographic curve turned upward. New networks of commerce grew up. This was the age of the first great gothic cathedrals and the first universities. In religious thought there was a new emphasis on the individual human person—on individual intention in assessing guilt, on individual consent in marriage, on individual scrutiny of con-

science. Above all the twelfth century was an age of legal renaissance. First came the recovery of the whole corpus of ancient Roman law, then (about 1140) an immensely influential codification of the canon law of the church in the work known as Gratian's Decretum. At the same time in England the first seminal principles of Anglo-American common law were taking shape. Then generations of great jurists in the universities of Europe worked to apply the old texts they had recovered to the new life of their age. Maitland wrote that there was never a time when so much of the sum total of the human intellect was devoted to the study of law as in the twelfth century. And of course in the every day life of the time there was an intense concern for rights and liberties. Bishops and barons asserted their rights against kings. All over Europe, merchants and craftsmen in the newly emerging communes sometimes bought their rights from overlords, and sometimes fought for them.

Of course all these rights were rights of particular persons or classes; they were not at first conceived of as natural rights. Sometimes this is thought to be the essential difference between medieval and early modern rights theories. Villey indeed thought there could be no jurisprudence of natural rights before Ockham had invented a philosophy to justify the doctrine. But in fact, the everyday use of the work *ius* to mean a subjective right, a rightful power or claim, soon infected the academic language of the jurists when they came to write of natural right. The Latin term *ius naturale* had formerly meant natural law or objective justice. The canonists who wrote around 1200, reading the old texts in the context of their more humanist, more individualist culture, added another definition. In their writings *ius naturale* was now sometimes defined in a subjective sense as a faculty, power, force, ability inhering in individual persons. There are echoes of Stoic language here but also a shift in meaning. Stoic teaching on natural law never led on to a doctrine of natural rights; medieval teaching did so, and quickly. By the middle of the thirteenth century the lawyers were beginning to develop a whole series of natural rights—a right to self-defense, a right to consent to government, a right of the destitute poor to be supported from the surplus wealth of the rich, a right to due process in law courts. About 1250, Pope Innocent IV wrote that to own property was a right derived from natural law. Even infidels enjoyed this natural right according to Innocent. Three centuries later, in defending the American Indians, Las Casas appealed to this text and to all the rights I have mentioned, with innumerable explicit citations of the medieval legal sources.

This means that by 1250 a sophisticated legal language existed in which a doctrine of natural rights could be expressed. But it is a long way from 1250 to 1500 and the opening up of America. There was no certainty that the new

doctrine would survive. Most non-Western cultures, I have said, have not expressed their deepest intuitions about morals and politics in the language of natural rights. Nor did traditional Christianity before the twelfth century. But, as it happened, new historical contexts arose, new circumstances in which the rights language of the lawyers was preserved and applied in new ways.

The next such context was a great controversy over Franciscan poverty and property at the beginning of the fourteenth century. The Franciscans claimed that they had abandoned all forms of ownership and all rights to property. The pope of the time, John XXII, denounced this doctrine. He said that there could be no licit use of anything without a right of using. The Franciscans for a time defied the pope and defended their own understanding of evangelical poverty as a system altogether without rights. A substantial literature of argument and counter-argument grew up, much of it focused on the concept of natural rights. In it, the language of lawyers was drawn into the writings of eminent philosophers and theologians for the first time.

It was this controversy that inspired the political writings of William of Ockham. Ockham did make some distinctive contributions. He had an interesting doctrine of contingent natural rights, related to basic human needs but varying according to the conditions of particular societies. It is a notion that might be applied to some modern problems of cultural relativism. Ockham also turned the old concept of Christian freedom found in St. Paul's epistles into an argument for natural rights. Even the pope, he wrote, could not injure "the rights and liberties conceded by God and nature." The point is that in all this Ockham was not embarking on a "semantic revolution." He was carrying on an established tradition of juridical discourse. In his political works he hardly ever referred to his nominalist philosophy, but he constantly quoted earlier legal sources. A French scholar, Georges de Lagarde, once counted the citations in one book of Ockham's *Dialogus*. He found 3 references to Thomas Aquinas, 12 to church fathers, 65 to Scripture, and 313 references to canon law. If you want to reflect on jurisprudence sublimating into political philosophy, you can see it taking place on the pages of Ockham's political writings.

The Franciscan controversies eventually died away; in the end nearly all the friars reluctantly accepted the pope's rulings. Again the doctrine of natural rights might have faded away too. But it did not. There was, for instance, one other historical context which led to the vigorous reassertion of the doctrine before the discovery of America. This was the conciliar movement of the years around 1400, a movement aiming to reform the church and to end the great schism in the papacy. The most important figure for us is the French theologian, Jean Gerson. He gave a very influential definition of a right as "a faculty or power

belonging to anyone according to right reason," and from this definition he derived a natural right of self-defense against a tyrannical pope and a natural right of liberty through which each individual Christian could seek his own salvation even in a corrupt church. But Gerson also had a very strong doctrine of the church as an ordered organic community, a mystical body in theological language. It did not occur to him to find a fundamental opposition between individual rights and community values. He cherished both. Gerson's definition of a right was often quoted by the Spanish authors of the sixteenth century—by Vitoria for instance and also by De Soto and Suarez. Gerson's teachings were very much alive in the University of Paris a century later, when Vitoria went from Spain to study there in 1507, when the first news of the American discoveries was filtering into the consciousness of Europe.

A tradition of natural rights was thus quite old and quite widely diffused in both legal and theological writing at the time of the discovery of America. But there was a disquieting development. The tradition was becoming moribund. The scholastic debates about natural rights of that time are full of philosophical subtleties, but they have little to do with the real world. They do not apply to anything in particular. They seem like arguments for the sake of argument, clever intellectuals playing clever intellectual games. For instance, in earlier natural rights theories and again in those of the seventeenth century it was often asked whether a right to property—dominion—came from natural law or civil law. When John Major addressed the question at Paris about 1500 he took a deep breath, so to speak, and said to his students that, to begin with, there were *eight* kinds of dominion to consider. They were: dominion of the blessed, dominion of the damned, original dominion, natural dominion, gratuitous dominion, evangelical dominion, civil dominion and canonical dominion. The students must have been very impressed if not completely baffled. The argument based on these distinctions went on and on; and most of it had nothing to do with any real problem of just ownership in the real world.

Metaphysical problems arose. What is a right? Is it an aspect of personality? Not exactly. Is it a thing then? No, not exactly. A right is rather a kind of relationship between a person and a thing. But according to the prevailing nominalist philosophy abstract relationships have no real existence. Only individual entities exist. So perhaps rights do not exist either. The author concluded cautiously that perhaps it is better not to apply metaphysical distinctions to legal problems.

Teasing conundrums were propounded. A companion and I go into the wilderness. My companion has a loaf of bread. He sets it down between us. There

is just enough bread to feed one person. Do I have a natural right to take the loaf? It seems not, because the bread belongs to my companion by civil law, and by natural law to he has a right to use it in a state of necessity. But then, surely I am more obliged to preserve my own life than his; and the law of nature works as well for me as for him; and positive human law does not apply in the wilderness, and the bread is not actually in his possession. So I can take it. But, the author adds, the opposite conclusion is also probable. It is just the kind of tired scholasticism that the humanists were trying to laugh out of existence. You must remember that it is perfectly possible to make coherent political theories without the concept of natural rights, and Renaissance writers often did so. There is no talk of natural rights in Thomas More's *Utopia*, written about this time, still less in Machiavelli. Perhaps the whole doctrine of natural rights—reduced to this late scholastic word-play, far removed from real life—would have been swept away in the new world of Renaissance thought.

The discovery of America changed all this. Quite suddenly the abstract scholastic discourse became relevant to a great new world-historical problem, the possible justifications of colonialism, the rights of indigenous peoples. A great debate grew up in Spain which reached a climax in the confrontation of Las Casas and Sepúlveda in 1550. One of the first major participants was Vitoria, who had heard all those arid scholastic debates about the theory of rights during his years of study in Paris. Indeed he summarized some of them in his own commentary on Thomas Aquinas. We are still, it seems, in the world of dusty late medieval scholasticism. But when Vitoria gave his first *Relectio de Indis* two or three years later there was a sharp change of tone. "I will pass over what I have written about rights and dominion elsewhere," he said; there were much more important matters to be considered. At this time, it was enough to say that dominion, ownership, was a right, not just naked power. For Vitoria it was a right that inhered in man because he was made in the image of God. The whole question was whether the Indians had this right of dominion. Most certainly they did, Vitoria insisted. And so the argument moved on to the famous discourse about the unjust titles and possibly just titles of Spain in the New World.

Some modern authors have argued that Vitoria and Las Casas were such faithful followers of Thomas Aquinas that they always defended the Indians in terms of objective justice and the common good, not in terms of individual subjective rights. But it is not so. Las Casas repeatedly referred to the natural rights of the Indians, rights that belonged to them by natural law: a right to liberty, a right to property, a right to self-defense, and a right

to choose their own rulers. He added elaborate references to the supporting texts of medieval jurisprudence to back up his argument.

The nature of the argument of Las Casas can be well illustrated by considering just one example, the fundamental right of liberty. According to one modern scholar, André-Vincent, when Las Casas defended the cause of the Indian peoples, he never asserted a subjective right to liberty, a right inhering in individual persons. In fact, however, Las Casas did insist specifically on this conception of rights when, in his last major work, he discussed the need for the Indians to consent if they were to give up their liberty and so legitimize Spanish rule over them. Here he deployed the medieval legal phrase, *quod omnes tangit* ("What touches all is to be approved by all"), a doctrine of Roman private law that had been developed into a broad constitutional principle by the medieval canonists. Las Casas now applied it to his American Indians. Whenever a free people was to accept some new obligation or burden, he explained, it was fitting that all whom the matter "touched" should be summoned and should freely consent. Then Las Casas added, now restating earlier canonistic doctrine in considerable technical detail, that a group of people could have a right either as a corporate whole or as separate individuals. In the first case the consent of a majority was sufficient; in the second case the consent of each individual was required. Las Casas maintained that this latter kind of consent—individual consent—was needed to legitimize Spanish rule over the Indians. Where the right to liberty was concerned, the consent of a whole people could not prejudice a single person withholding consent. The case was "common to all as single individuals." It would detract from the right of each one (*iuri uniuscuiusque vel singulorum*) if they all lost "sweet liberty." Rather than a majority prejudicing a minority in such a case, the opinion of the minority dissenters should prevail. This was a really extreme doctrine of individual natural rights and specifically of the right to liberty. It perhaps illustrates how crotchety Las Casas would grow in his old age; but it also illustrates the jurisprudential foundation of early modern rights theories.

There is one further point. Las Casas was indeed a fervent Thomist. He interwove the teachings of Aquinas on natural law with his juridical arguments for natural rights. This raises the whole question of the relationship between law and philosophy in their historical development. Michel Villey maintained that metaphysics always preceded jurisprudence. There had to be a nominalist philosophy before there could be a jurisprudence of rights. The truth is more complex and more interesting. In the twelfth century, Gratian assimilated elements of the Stoic philosophy of law in his great canon law collection, the Decretum. Then Aquinas made quite extensive use of Gratian; then from about

1300 on the canonists began to cite Aquinas in their commentaries; then Ockham in turn drew on the canonists. What is involved is not a simple dependence of one discipline on the other but a constant interplay between jurisprudence and philosophy from the twelfth century onward.

The discovery of America, then, did not lead suddenly to the creation of a new tradition of natural rights. It gave new life to an old tradition, one that on the eve of the discovery was becoming exhausted. In Vitoria, the tired old arguments begin to glow with new meaning, in Las Casas they catch fire in a passionate polemic for the rights of the Indians. And once the old tradition was revived, it was never lost. In the work of Suarez, the concept of subjective rights was drawn into a broader synthesis of political and social theory; and from Suarez it passed to Grotius and so into the mainstream of Western political thought.

I said that a historical approach might help us to address some modern problems in a more informed fashion. We might learn, for instance, to appreciate better the variety of cultural environments within which a doctrine of rights could take root and flourish. Medieval society was Christian and Western, but in many ways it was more like the society of an underdeveloped country nowadays than like a modern industrial state. We might learn from Gerson that individual values and community values don't have to be in conflict. They can exist in a state of symbiosis, even synergy. Individual rights flourish best in healthy communities. Finally we can learn that the idea of individual natural rights is not some late nominalistic or atheistic aberration from an older sounder medieval tradition of law. Rather it is rooted in the very foundations of Western jurisprudence, in the twelfth century when all the great legal traditions of the Western world were taking shape—English common law, the canon law of the church, and the revived and reinterpreted Roman law.

There is a final irony in all this. The principal beneficiaries of all the new thought about natural rights stirred up by the discovery of America were not the hapless Indians. They were later generations of Western people. As for the Indians, the battles of words that were sometimes won in Madrid or Salamanca were too often lost amid the hard realities of life in Mexico or Peru. But in Europe the idea of natural rights, the rights of man, was persistently reasserted. It was used to define the rights of Englishmen in the seventeenth century, then of English colonists in North America, then of Frenchmen. The demand for rights, human rights as we say nowadays, remains a battle-cry of the oppressed in many parts of the world in our own era.

I said earlier that the idea of subjective natural rights seems to be of distinctively Western origin. That does not mean that it is necessarily irrelevant for everyone else. Marxism too was a doctrine of distinctively West European

origin, but it found its widest acceptance in other parts of the world. It is always possible that the ethical norms of all other cultures might be reformulated and transposed into our Western idiom of human rights. It is even possible that this might be of value for the human race. If so, the world will owe a great debt of gratitude to Vitoria, Las Casas, Suarez and other Spanish scholastics who preserved the ideal of human rights and transmitted it to the modern world. And the discovery of America, which helped to shape their thought, will perhaps seem a fortunate event in the history of mankind after all.

This is a revised version of the Maurice and Muriel Fulton Lecture delivered at the University of Chicago Law School on November 17, 1994. It also includes material originally prepared for the Ninth International Conference on Medieval Philosophy. The arguments discussed above are presented in more detail, with full references to the sources, in the following articles: "Villey, Ockham and the Origin of Individual Rights" in J. Witte and F. S. Alexander, eds., *The Weightier Matters of the Law: A Tribute to Harold J. Berman* (1988) 1-31; "Origins of Natural Rights Language: Texts and Contexts," 10 *History of Political Thought* 615 (1989); "Conciliarism, Corporatism, and Individualism: The Doctrine of Individual Rights in Gerson," 9 *Cristianesimo nella storia* 81 (1988); "Aristotle and the American Indians—Again: Two Critical Discussions," 12 ibid. 295 (1991); "Natural Rights in the Thirteenth Century: A Quaestio of Henry of Ghent," 67 *Speculum* 58 (1992).