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Natural Human Rights: The Perspective of the Ius Commune

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NATURAL HUMAN RIGHTS: THE PERSPECTIVE OF THE *IUS COMMUNE*

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That men and women possess natural human rights is a matter about which most of us agree. How far those natural rights extend is more controversial, but it is widely assumed that we hold some rights not simply because the government of the day concedes them to us. We hold them because we are human. Natural human rights are enshrined in the American Constitution, and they have been expressed in numerous modern forms. For example, in 1948, the Universal Declaration of Human Rights sought to guarantee the recognition of human rights as principles that bind all nations,[1] and the notion that some form of human rights should be recognized in every part of the world has since been widely accepted. Our own government has made serious efforts to ensure their recognition in emerging nations, as well as to secure their enforcement under established treaties and laws.

The subject has a long history, and it has recently emerged as the topic of serious historical inquiry. This Article addresses the question raised in that scholarship: when and how did natural human rights come to be recognized within the Western legal tradition?

Up until a few years ago, most scholarship on the subject located the origins of natural rights in the eighteenth century, specifically within the thought of the Enlightenment era, although natural rights may have been foreshadowed in the writing of the jurists of the seventeenth century. Acceptance of natural human rights was, in any event, a product of new ways of thinking. It is not too much to speak of the emergence of rights as the result of emancipation from the hand of the past. Before the Enlightenment, little in the way of natural rights had been recognized. For example, the émigré Cambridge scholar and an influential figure in the field, Walter Ullmann, came to the conclusion that "the individual as a being endowed with indigenous . . . and independent rights was a thesis

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1. G. A. Res. 217 (III)(A), U.N. Doc. A/810, at 71 (1948), *in* 2 UNITED NATIONS RESOLUTIONS: SERIES I: GENERAL ASSEMBLY 135 (Dusan Djonovich ed., 1948-49).

for which we shall look in vain in the Middle Ages."[2] This view is reflected in much of the modern literature on human rights, as in this typical statement about the subject's history during the twelfth century and beyond: "[t]he revival and reception of Roman law hardly contributed to the cause of the fundamental rights of man."[3]

The canon law, which held a significant place in European legal systems prior to the Enlightenment, has also traditionally been widely regarded as indifferent to the idea of natural human rights. Ensuring that men and women held orthodox beliefs was the preeminent goal of the law of the church, and this goal entailed the exclusion of subjective rights. The church's acceptance of slavery, shared, of course, with the Roman law, is perhaps the most dramatic example of the church's indifference to natural rights. It is commonly said, therefore, that the language of human rights only "entered into philosophical writing in the seventeenth century in the work of Grotius and Locke. It was first invoked in practice by the leaders of the French and American revolutions in the interests of creating a new social and political order."[4]

This traditional view has been challenged during the last twenty years by a strand of revisionist scholarship. The movement has been led by Professor Brian Tierney, and he has been joined by able lieutenants. Together, they have examined the history of human rights and have found that the concept of natural rights in fact antedated the Enlightenment. In their view, its true origins are found within the medieval traditions of the *ius commune*, the amalgam of Roman and canon law that governed European legal education up to the time of codification and controlled much of the legal practice in the courts of church and state from the twelfth century to the eighteenth.[5] In a series

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2. Walter Ullmann, *Historical Introduction* to HENRY CHARLES LEA, THE INQUISITION OF THE MIDDLE AGES 37 (1963); *see also* Olivia F. Robinson, *Crime and Punishment and Human Rights in Ancient Rome*, *in* LE MONDE ANTIQUE ET LES DROITS DE L'HOMME 325 (Huguette Jones ed., 1998).

3. PIETER N. DROST, HUMAN RIGHTS AS LEGAL RIGHTS 14 (1951).

4. *See* HUMAN RIGHTS AND RESPONSIBILITIES IN BRITAIN AND IRELAND: A CHRISTIAN PERSPECTIVE 13 (Sydney Bailey ed., 1988).

5. For an introduction, see MANLIO BELLOMO, THE COMMON LEGAL PAST OF EUROPE 1000-1800 (Lydia G. Cochrane trans., 1995). The following citations to the texts of the Roman and canon laws are used throughout this Article:

D.1 c.1	DECRETUM GRATIANI, Distinctio 1, canon 1
C.1 q.1 c.1	----------, Causa 1, quaestio 1, canon 1
DE PEN.	----------, De penitencia
DE CONS.	----------, De consecratione
X 1.1.1	DECRETALES GREGORII IX, Book 1, tit. 1,cap. 1
SEXT. 1.1.1	LIBER SEXTUS, Book 1, tit. 1, cap. 1

of impressive articles, many of which have been collected into a book called *The Idea of Natural Rights*, Tierney argued that the idea of natural rights did not enter political life "with a clatter of drums and trumpets . . . like the American Declaration of Independence or the French Declaration of the Rights of Man."[6] Instead, "this central concept of Western political theory first grew into existence almost imperceptibly in the obscure glosses of the medieval jurists."[7] Scholars who have followed this lead recognize, of course, that the law of the Middle Ages did not embrace norms and rights identical to those of the twenty-first century. Most "women's issues," to take the most obvious example, were not among the human rights the medieval jurists endorsed,[8] and those jurists did not confuse natural legal rights with simple desires for a better life, as is sometimes done in modern society.[9] Differences, however, are only to be expected. They do not undercut the conclusion that the medieval

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d.a.	dictum ante (in DECRETUM GRATIANI)
d.p.	dictum post (in DECRETUM GRATIANI)
gl. ord.	*glossa ordinaria* (standard commentary on texts of *Corpus iuris canonici* and *Corpus iuris civilis*)
s. v.	*sub verbo* (reference to *glossa ordinaria* or other commentary on a legal text)
DIG. 1.1.1	DIGESTUM JUSTINIANI, Book 1, tit. 1, lex 1
COD. 1.1.1	CODEX JUSTINIANI, Book 1, tit. 1, lex 1
INST. 1.1.1	INSTITUTIONES JUSTINIANI, Book 1, tit.1, lex 1

6. BRIAN TIERNEY, THE IDEA OF NATURAL RIGHTS: STUDIES ON NATURAL RIGHTS, NATURAL LAW AND CHURCH LAW 1150-1625 344 (1997).

7. *Id.* Other explorations of the subject include: ANNABEL S. BRETT, LIBERTY, RIGHT AND NATURE: INDIVIDUAL RIGHTS IN LATER SCHOLASTIC THOUGHT (1997); ARTHUR P. MONAHAN, FROM PERSONAL DUTIES TOWARDS PERSONAL RIGHTS: LATE MEDIEVAL AND EARLY MODERN POLITICAL THOUGHT, 1300-1600 (1994); John T. Noonan, Jr., *Human Rights and Canon Law*, *in* CANONS AND CANONISTS IN CONTEXT 173 (1997); KENNETH PENNINGTON, THE PRINCE AND THE LAW, 1200-1600: SOVEREIGNTY AND RIGHTS IN THE WESTERN LEGAL TRADITION (1993); G. R. EVANS, LAW AND THEOLOGY IN THE MIDDLE AGES 85-118 (2002); 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 62, 66-76 (Peter Coss ed., 2000); A. S. McGrade, *Rights, Natural Rights, and the Philosophy of Law*, *in* CAMBRIDGE HISTORY OF LATER MEDIEVAL PHILOSOPHY 738 (Norman Kretzmann et al. eds., 1982); Charles J. Reid, Jr., *Canonistic Contribution to the Western Rights Tradition: An Historical Inquiry*, 33 B.C. L. REV. 37 (1991); RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979). *See also* Alan Harding, *Political Liberty in the Middle Ages*, 55 SPECULUM 423 (1955) (using a different group of sources).

8. *See* Johan D. van der Vyver, *Human Rights in the Twenty-First Century: A Global Challenge*, 8 EMORY INT'L L. REV. 787, 790-94 (1994) (book review).

9. *See, e.g.*, Wiktor Osiatynski, *Human Rights for the 21st Century*, 2000 ST.-LOUIS-WARSAW TRANSATLANTIC L.J. 29, 42-46 (2000).

canonists and civilians understood and endorsed the notion that natural rights existed and could be asserted by individuals.

This Article seeks to contribute to this revisionist strand of scholarship. It examines the reasons given for the existence of human rights in the medieval *ius commune* and tracks their results in legal practice. Broadly speaking, this Article supports the conclusion that the medieval jurists did understand and develop the notion that fundamental human rights existed. These rights did not depend upon a grant by the sovereign, and they could be exercised in fact. Further examination does, however, suggest limitations to this view. Most of the revisionist scholarship has concentrated on demonstrating that the medieval law contained a vocabulary of human rights and conceded it a place within the *ius commune*.[10] Less attention has been paid to the reasons the jurists provided for the existence of the rights and the qualifications that were imposed upon the rights as a consequence. Delving further into the literature of the *ius commune*, looking at those reasons and the specific ways that rights were exercised in practice, makes the overall picture look rather different. When examined more closely, it becomes clear that the medieval law took a decidedly less individualistic approach to rights than is common today. In medieval law, rights were based upon the tenets of natural and divine law, laws that God himself had created and implanted in men's consciousness. The objective order found in the natural law *did* include the grant of natural rights. The reason for the existence of those rights, however, was not to vindicate human choice, to promote the sacredness of human life, or to allow men and women to flourish as they chose.[11] It was to vindicate and promote God's plan for the world. This was a purportedly objective way of thinking about rights; it was quite distinct from the subjective approach that is characteristic of modern thought. The distinction between these two approaches had important consequences in fact. This Article hopes to clarify these differences by reviewing several specific examples of the legal rights found in the traditions of the medieval *ius commune*.

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10. *See, e.g.*, Charles Reid, Jr., *Thirteenth-Century Canon Law and Rights: The Word* Ius *and Its Range of Subjective Meanings*, 30 STUDIA CANONICA 295 (1996). That the language of natural rights can also be found in Roman law itself is the theme of Charles Donahue, Jr., *Ius in the Subjective Sense in Roman law: Reflections on Villey and Tierney*, *in* 1 A ENNIO CORTESE 506 (2001).

11. *See, e.g.*, CHRISTINE PIERCE, IMMOVABLE LAW, IRRESISTIBLE RIGHTS: NATURAL LAW, MORAL RIGHTS, AND FEMINIST ETHICS (2000) (discussing the historical view of natural law in a feminist context).

THE RIGHT TO WELFARE

The first example is the right of the poor to sustenance in time of need. In such circumstances, Professor Tierney concluded, the canonists held that "the poor had a *right* to be supported from the superfluous wealth of the community."[12] In traditional Christian thought, there was a moral duty, of course, upon all persons to give alms as they were able. Charity held a high place among the virtues.[13] As Tierney has convincingly shown, however, there was more than an endorsement of the merits of charitable giving in the *ius commune*. The canon law took the position that poor men and women could themselves demand to be supported in case of need. It was a matter of right. The principle extended even to small children.[14] Even though there was nothing like the modern welfare state in medieval Europe, the *ius commune* did contain a forerunner of modern rights to welfare. It established the principle. Modern writers have simply elaborated upon its foundations and taken its conclusions to a more advanced and practical level.

Closer examination of the canon law does not overturn this argument. It does, however, produce a more complicated picture.[15] Almost every point upon which the argument rests was disputed among the medieval jurists. For example, none of them supported the position that the poor were given a direct action, as we would say, to compel the rich to support them. The poor could not sue the church or the government to secure an adequate standard of living. Some suggested, however, that the poor could reach this result indirectly by making use of the procedure known as *denunciatio evangelica*. This procedure allowed a poor Christian to "denounce" a rich man who refused to share his assets with the poor, and the church would, in turn, compel him to do so by ecclesiastical censure, and as a last resort, by excommunication.[16] The availability of even this

12. BRIAN TIERNEY, MEDIEVAL POOR LAW: A SKETCH OF CANONICAL THEORY AND ITS APPLICATION IN ENGLAND 37-38 (1959).

13. *See, e.g.*, DE PEN. D.1 c.77.

14. X 5.11.1; *see also* Scott Swanson, *Rights of Subsistence in the Twelfth and Thirteenth Centuries: The Case of Abandoned Children and Servants*, *in* PROCEEDINGS OF THE TENTH INTERNATIONAL CONGRESS OF MEDIEVAL CANON LAW 675 (Kenneth Pennington et al. eds., 2001).

15. Ordinarily, they were supporters of a system of private property. *See generally* John F. McGovern, *Private Property and Individual Rights in the Commentaries of the Jurists, A.D. 1200-1500*, *in* IN IURE VERITAS: STUDIES IN CANON LAW IN MEMORY OF SCHAFER WILLIAMS 131-58 (Steven B. Bowman & Blanche E. Cody eds., 1991).

16. D.47 c.8 *s.v. esurientium*. 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) 108-15 (1961).

procedure was, however, a contentious issue. Some canonists held that giving alms was purely a matter of choice for the people affected. Whatever right the poor might have, it was not one that could be enforced by direct action in public courts. At the very least, under some circumstances, a case for an enforceable right to sustenance might be established under the classical canon law.

Upon what theory did this right rest? Was it an early recognition of the inherent right of each individual to flourish? The reasons given by the medieval jurists do not suggest that it was. They did, of course, mention the biblical precepts in favor of charitable giving. They did denounce avarice. These beliefs, however, could not be the foundation of the *rights* of the poor.[17] The precepts about giving alms were not obligatory except as to tithes and a few other traditional obligations, none of which was destined for the poor. When commentators on the law of the church spoke about the existence of a right to sustenance per se, they instead rested their discussion upon an argument from natural law, one they shared with the civilians.[18] Before society was organized, the argument ran, all things had been held in common. In times of extreme necessity, that situation recurred. When the worst did happen, the poor could take from that common mass without being guilty of theft.[19] Because they were entitled to a share under natural law, the poor would only be taking what had been theirs anyway, and the breakdown of society's order would have effectively dissolved the societal regime under which the riches of other men had been acquired.

The text most commonly used to prove this point came from the Rhodian sea law, a text commonly inserted in medieval copies of the Digest.[20] In a storm, when some cargo must be jettisoned from a ship, if afterward the ship reaches port safely, all cargo holders have a right to share proportionately in what remains. This doctrine of admiralty law is called the general average. The rule requires the sharing of loss occasioned by extreme conditions. This may seem to be a far-fetched argument upon which to base a right to sustenance for the poor, but it is in fact the textual support the commentators most commonly cited. They

17. There were enforceable duties that followed, the most important of which was the duty to pay tithes. None of the tithe, however, went directly to the poor. Indeed, the law of the church on this score is not favorable to a canonical poor law. The ancient canons devoted a fourth part of the tithe to the poor; in the developed classical law, however, that share was dropped, and all the tithe went to the clergy.

18. *Gl. ord.* ad DIG. 1.1.5 *s.v. dominia distincta.*

19. *Gl. ord.* ad D.47 c.8 *s.v. commune*; *see also* Swanson, *supra* note 14, at 680-82.

20. *See* DIG. 14.2.2.

were attempting to find, in established law, a reliable indication that under some circumstances the law required a surrender of property in favor of the unfortunate. There was no soft-hearted talk about the merits of the poor or the need for distributive justice. Still less was there any argument that the rich were ordinarily required to give up what they had in order to promote a human right held by all human beings.

Consequences followed from this way of thinking. The most significant was a limitation of the right to men and women in danger of death, as would have been the case during a storm at sea. Under the doctrines worked out by the jurists, the need had to be extreme before any goods were considered held in common. Otherwise, taking the goods of others, even their surplus goods, was still theft. It was rightly punished. Inequality of wealth was not sufficient to justify invocation of a right on behalf of the poor. This, however, is not the main point. The main point is that the canonists did not approach the question by asking whether the poor deserved to be supported because they were human beings or because greater equality in the distribution of human wealth was desirable to meet a need for human flourishing. Canonists asked, instead, whether there was something in the natural law that would justify what would otherwise be theft. That they found a source in natural law is to their credit, but they did not do so in order to guarantee individual autonomy or to promote humane values. Prohibitions against begging, for example, were not regarded as violations of the human rights of the poor.[21]

It is of course true that modern law does not often grant the poor a "direct" action to sue the rich to protect their own interests, and commentators have ceased speculating on the reach of the law of theft in circumstances of extreme need. Nevertheless, American constitutional law does recognize the existence of human rights of the poor in a variety of ways. Constitutional law prevents the poor from being disadvantaged in travel, litigation, and receipt of welfare benefits.[22] Protecting the welfare of the most disadvantaged citizens is regarded as a "fundamental" interest in the law.[23] Laws that fail to take the welfare of the poor into account are regarded with particular suspicion. Thus, a

21. *See, e.g.*, ROBERT JÜTTE, POVERTY AND DEVIANCE IN EARLY MODERN EUROPE 100-04 (1994).

22. *See, e.g.*, Boddie v. Connecticut, 401 U.S. 371, 374-83 (1971); Goldberg v. Kelly, 397 U.S. 254, 261-66 (1970); Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969).

23. *See generally* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659.

different spirit pervades American law than that which is found in the *ius commune*.

THE RIGHT TO FREEDOM IN MARRIAGE

The second example comes from the medieval law of marriage. Here, the contribution of the *ius commune* to the development of natural human rights was the establishment, at least in principle, of the right of men and women to choose for themselves whom they would marry. This view may be regarded as a forerunner of the modern right vindicated by *Loving v. Virginia*,[24] the case in which the U.S. Supreme Court struck down a state statute prohibiting interracial marriages. In *Loving*, the Court declared that "[m]arriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."[25]

Some may think this "right" was made up out of whole cloth, but in fact it had definite antecedents in the medieval law. The *ius commune* recognized a human right to freedom of choice in marriage, and it took this position in circumstances opposed by the normal assumptions of society. In the medieval context, the family – rather than a statute like the one at issue in *Loving* – normally presented the greatest obstacle to free choice on the part of the young people involved. Arranged marriages were common, and the line between an arranged marriage and a coerced marriage was a very thin one. No doubt, in most circumstances parental authority would have been hard to resist because it was a legitimate authority and, naturally, deserving of respect.

The *ius commune* nonetheless set its face against coerced marriages. The Roman Law *Codex* contained an imperial rescript declaring that all marriages should be free.[26] Penalties could lawfully be attached to exercise of the right to marry, or to remain unmarried, only under very limited conditions.[27] Similarly, Gratian's *Decretum*[28] and the Gregorian *Decretals*[29] stated squarely, "No one is to be joined to another [in marriage] except by free will."[30] Marriages entered into under coercion

24. 388 U.S. 1, 12 (1966).

25. *Id.* at 12.

26. COD. 8.39.2.

27. COD. 5.1.5. Bartolus said that any penalty, however small, was void. *See* COMMENTARIA ad DIG. 45.1.134, no. 4 ("Dic quod omnis pena conventionalis quantumcumque modica non valet.").

28. d.p. C. 31 q. 2.

29. X 4.1.29.

30. d.p. C. 31 q. 2 ("His auctoritatibus evidenter ostenditur, quod nisi libera voluntate, nulla est copulanda alicui.").

could be dissolved under the canon law if the coercion had been strong enough to move a "constant man" or a "constant woman."[31] Despite the legal force the canon law routinely ascribed to oaths, persons who had sworn an oath to marry were only to be warned to fulfill their oath; they were not to be compelled.[32] Although the realities of life in medieval society doubtless prevented the canon law's freedom from becoming fully realized, the canon law of marriage was, in theory, intended to create "[a] giant democracy in which everyone might marry anyone."[33]

If it can be taken as proved that the *ius commune* envisioned a right or freedom to marry, as these texts suggest, the natural question is why it did so. Upon what foundation did the right depend? When one examines the law and commentaries, one quickly finds that the reason most often given was very simple: "[u]nwilling marriages usually have bad results."[34] That phrase, included in Gratian's *Decretum*, became a kind of refrain among jurists who sought to give a justification for the right not to be coerced into marrying. They repeated it on innumerable occasions. In all canonists' discussions of what lay behind freedom in marriage, they said nothing about the dignity of the individual or the centrality of individual "life-choices" for human happiness. To the contrary, human happiness was rarely mentioned.

What, then, were the "bad results" to which coerced marriages usually led? A review of the commentaries has revealed two such results. The first was that forced unions easily led to sin, specifically the sin of adultery, because spouses who had no affection for the persons they had been forced to marry would be easily tempted to commit adultery.[35] The birth of legitimate children, one of the goods of marriage, would also be rendered more difficult by the fact of coercion, or so it was assumed.[36] In other words, the objective needs of church and society would be endangered by coercion in marriages. The second reason was that forced marriages perverted the symbolism of the marriage bond. Marriage, to use the words of the *Book of Common Prayer*, symbolized "the mystical

31. X 4.1.28.

32. X 4.1.17.

33. *See* Noonan, *supra* note 7, at 430-31. For further commentary, see Charles J. Reid, Jr., *"So It Will Be Found That the Right of Women in Many Cases Is of Diminished Condition": Rights and the Legal Equality of Men and Women in Twelfth and Thirteenth-Century Canon Law*, 35 LOYOLA L.A. L. REV. 471, 491-98 (2002).

34. d.a. C.31 q.2 q.1. ("[Q]uia invitae nuptiae solent malos proventus habere.").

35. C.31 q.2 c.3.

36. *Panormitanus, Commentaria* lists this reason as separate from the prior reason. PANORMITANUS, COMMENTARIA ad X 4.1.14, nos. 7-8.

union that is betwixt Christ and his Church."[37] The institution of marriage was meant to be a union founded upon freedom, not force, just as was the union between the church and its founder. Therefore, the commentators said, the law should require that marriages themselves reproduce the freedom that was essential to the nature of the church.

These reasons cannot seem very compelling today. One might even be tempted to say that they "miss the point" of the rule guaranteeing freedom to marry, or one might suppose that they provided cover for what must have been the "real" reasons. The inescapable fact, however, is that they *were* the reasons; no others were given. If one attempts to take what the church said seriously, as one should,[38] then the conclusion must be that the right to marital freedom was based upon a desire to seek and fulfill objective goals found within the law of the church. The voluntary nature that was said to inhere in the Christian religion and the avoidance of sin were "givens" in the *ius commune.* These "givens" were the justifications that provided substance to the legal right to choose a marriage partner free from coercion. The aspirations for personal autonomy of the young people involved had very little to do with this particular guarantee.

Again, consequences followed from this way of thinking about the subject. When the right to marry came into conflict with other goals of the law, the right to marry more easily gave way. In other words, the objective nature of the right to marry led to its limitation. There were several examples. Most prominently, if a vow to lead a life of chastity preceded the choice to marry, the right to marry was lost. Instead, one would be compelled to fulfill the prior vow.[39] If the opposite situation occurred, that is, if the marriage had come first, the rule was not applied so rigorously; exceptions were created, seemingly induced by the belief that monastic life was a higher calling than marriage. Another example was recognition of a parent's right to disinherit a child who took advantage of the freedom to marry. If the child acted against the express wishes of the father, the child incurred "the vice of ingratitude" and could be disinherited, although the ordinary rule in the *ius commune*

37. *The Form of Solemnization of Matrimony*, *in* BOOK OF COMMON PRAYER 300 (1928).

38. *See generally* D. L. d'Avray, *Peter Damian, Consanguinity and Church Property*, *in* INTELLECTUAL LIFE IN THE MIDDLE AGES: ESSAYS PRESENTED TO MARGARET GIBSON, 71-80 (Lesley Smith & Benedicta Ward eds., 1992) (examining the church's prohibition of consanguineous marriages in medieval Europe).

39. C.27 q.1 c.1.

allowed children to take a share of the parent's estate.[40] Thus, the law recognized that the freedom to marry should not become a constitutional trump card, justifying defiance of the legitimate authority of a father. Finally, marriage between a Christian and a non-Christian was prohibited.[41] Indeed, if it were contracted *de facto*, it was invalid *de iure*. The canonists reasoned that such a union would be a poor symbol of the unity between Christ and his church. Hence, the freedom to marry was restricted by the overriding goals of the church itself. In practice, the freedom to marry was something less than a natural right according to the modern understanding of the term.

THE RIGHT TO VOTE

The third example of a modern right that was found in the medieval *ius commune* is the right to vote. It may seem surprising that the medieval *ius commune* made any contribution to the law of elections, but in fact it did. Indeed, the modern law of elections can be traced back to the system the medieval canonists developed for choosing bishops, abbots, and many humbler offices within the church. The canon law called for all members of the body who were to be governed by a leader to be brought together and for each person to cast a vote. From this system arose the *ius eligendi*, the right to participate and to have one's vote counted. It was also described as a *potestas eligendi* or a *libertas eligendi* by the commentators,[42] these terms demonstrating that the right to take part in capitular governance had "a remarkably subjective quality."[43] Safeguards were created in the canon law to protect the exercise of the right – principally, a guarantee that the person holding the right would receive adequate summons and notice of the meeting, lest the right be rendered ineffective. The jurists spoke of freedom in the exercise of the right, comparing it with the freedom to enter into marriage.[44] The franchise was, therefore, a protected right under the *ius commune*.

Although exploring the medieval commentaries undoubtedly contributes to understanding the origins of human rights, when one looks at the details, the apparently subjective quality of this right seems to

40. *See, e.g.*, HOSTIENSIS, SUMMA AUREA, Bk. IV, tit. *De matri.* No. 27 (Venice 1564) ("Quicquid leges dicant, incurrit tamen filia vitium ingratitudinis nisi voluntati patris consentiat.").

41. C.28 q.1 c.15.

42. X 1.6.52-53; X 3.9.3.

43. *See* Reid, *supra* note 7, at 68.

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

disappear. Why did the right exist? Hostiensis, one of the most prominent of the thirteenth century canonists, defined elections as "the calling of a *suitable* person to a dignity, following the canonical order."[45] He emphasized the procedural order and the suitability of the person called, not the exercise of a right by the electors. For instance, the electors could not choose just anyone. Their choice was limited and subject to reversal by the judgment of their ecclesiastical superior, typically the archbishop. Indeed, if one of the electors knowingly voted for an unsuitable candidate, that elector lost the right to vote in the election.[46]

One of the main procedural rules in the law of elections held that all electors had to meet at the same time and in the same place. The election was to be a consultative and joint decision, although the votes themselves were to be made secretly. What stood behind this rule? According to Hostiensis, if the electors were allowed to cast their ballots singly and separately, such a system would offend the Holy Spirit, who presided over every canonical election and who "did not love division or schism."[47] His proof was the evidence from Acts 2:1, recording that the apostles, "when the day of Pentecost was fully come, were all with one accord in one place."[48] In other words, the ordinary canonical election should imitate that biblical meeting insofar as possible. The electors must meet together and await guidance from the Holy Spirit. The canon law, thus, did not envision the election primarily as a matter of voters exercising their individual rights. The form of their meeting was dictated by an early example and all but excluded a concept of meaningful subjective rights.

Concrete consequences followed this way of thinking about the *ius eligendi.* The exclusion of the laity from all canonical elections was of the most immediate significance to many at the time. The process by which they were excluded illustrates the fragility of the right. Either by privilege or prescription, by the eleventh century, many laymen had established a prescriptive right to take a part in the election of their bishops. Such a prescriptive right was not contrary to the *ius antiquum* of the church, which held that elections were to be made *per clerum et populum.*[49] The classical canon law took the opposite approach, however. Either as a matter of policy, textual interpretation, or even, in

45. SUMMA AUREA, Lib. I, tit. *De electione*, no. 1 (emphasis supplied).
46. X 1.6.25.
47. SUMMA AUREA, Lib. I, tit. *De electione*, no. 4.
48. *Acts* 2:1.
49. D.63 c.13.

the case of Innocent IV, natural law itself, the canon law held that the laity's pretended right to participate in canonical elections was void. Lay participation would, in fact, invalidate an election under the view at which the canonists arrived.[50] If the *ius eligendi* was regarded as a right in the canon law, therefore, it was not what we would call a natural human right. What was most important for the medieval canonists was discovering and following God's plan for the church. That plan, they said, excluded the laity from taking any but an acclamatory part in the choice of their chief pastors. Individual rights, even the rights of great antiquity, had to yield to the institutional needs of the church and to the right ordering of society.

THE RIGHT TO RELIGIOUS LIBERTY

The fourth example, a good example of the ancestor of a modern right, is that of religious freedom, the right to choose whether or not to adhere to a particular faith. Many modern readers may find it quite astonishing that the medieval church and the Roman and canon laws contained any mention of this basic human right. The Spanish Inquisition seems a more apt representative of the church's policy. However, that is not so. The canon law most definitely stated a principle that closely resembles the modern right. An ancient text incorporated into Gratian's *Decretum* proclaimed that no one was to be brought to the Christian faith by force.[51] A decretal letter of Pope Clement III, incorporated into the Decretals of Gregory IX, declared that no unwilling person was to be compelled to come to the baptismal font.[52] An imperial decree placed in the Roman law Codex stated that Jews were not to be molested or persecuted in the exercise of their religion.[53] Persuasion, not force, would be the means by which the Christian religion would be spread throughout the world. The point was decisively and repeatedly stated in the *ius commune*.[54] A human right to religious freedom existed.

What lay behind acceptance of this important principle of religious liberty? In their treatment of it, the medieval canonists focused on the law of baptism, examining the legitimacy and effectiveness of compelled

50. X 1.6.56.
51. D.45 c.5.
52. X 5.6.9.
53. COD. 1.9.4.
54. *See generally* Pier Giovanni Caron, *Non asperis sed blandis verbis ad fidem sunt aliqui provocandi*, *in* I DIRITTI FONDAMENTALI DELLA PERSONA UMANA ET LA LIBERTÀ RELIGIOSA 397 (1985); Herbert Grundmann, *Freiheit als Religiöses, Politisches und Persönliches Postulat im Mittelalter*, 183 HISTORISCHE ZEITSCHRIFT 23 (1957).

baptism. They discouraged the use of force in baptism because force was inconsistent with the character of the Gospel. But what if it happened? What if force was nonetheless used? In discussing the question of the effectiveness of forced baptism, they drew a distinction, one that seems to have been taken from the Roman law, between different forms of compulsion. In the Roman law, if a person entered into a contract without any volition to do so, as when unconscious or insane, or in cases in which the person's hand was forcibly guided by someone else, the transaction was invalid. In those circumstances, no affirmative volition existed.[55] If, however, a person made a contract because he was placed under fear of dire consequences if he refused – say, by the threat of a lawsuit or loss of an inheritance – then the contract was valid.[56] There might be a separate action against the coercer on other grounds, but the contract itself would be enforceable. In such circumstances, the rule stated that "[c]oerced volition is still volition."[57] Therefore, a *stipulatio* entered into under duress was legally valid.[58]

The canonists drew this same distinction with regard to baptism. If one were forcibly baptized, the baptism was invalid. Such a baptism lacked any volition on the part of the person baptized. If the person, however, had been offered a choice between baptism and something else, such as the loss of his property or deportation, and had chosen the former option, the baptism was valid. The person baptized would have become subject to the laws of the church. "Coerced volition is still volition"[59] even in the choice of a religious faith. Of course, the canon lawyers recognized that forced baptism might have no beneficial effect on the person involved. God knows our hearts, and the heart of the person converted by force will not truly turn to God. To state it formally, the baptism would lack efficacy. A lack of efficacy, however, did not indicate a lack of validity. The person baptized would still be forced to conform to the dictates of the Christian religion.

What is missing from the discussion of the canonists is attention to the rights of the individual being baptized. If validly baptized, the person had no choice as to his or her religious affiliation. People baptized as

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55. *See* DIG. 4.2.21; *gl. ord.* ad DIG. 23.2.22 *s.v. invitos*.

56. These threats were contrasted with threats of death or enslavement in developed Roman law. If these threats were backed with the ability to carry them out, the transaction was treated as invalid. *See generally* REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 650-54 (1990).

57. DIG. 4.2.21.5.

58. INST. 4.13.1.

59. *Gl. ord.* ad X 1.40.2 *s.v. coactus*.

infants, adults validly baptized who later changed their minds, and persons baptized under some variety of "conditional coercion" were essentially out of luck.[60] They had exhausted their religious freedom and could be compelled to adhere to the church's law. Under classical canon law, that compulsion was effected by the threat of a particularly horrible form of capital punishment. The analysis that yielded this result was very far removed from recognizing the "sacred rights of the person" that have sometimes been extolled as among the core teachings of the Christian religion. The Spanish jurists were able to propose, without blushing, that the religious freedom of the native peoples in the New World consisted of a human right to become Christians.[61] Once exercised, it included no right to convert back.

Few of us would assent to such an understanding of religious freedom in baptism, much less admire it. Modern distaste for this view fails to explain how the jurists of the medieval *ius commune* adopted it after making such an auspicious start in stating a principle of religious freedom. The explanation is that they took an objective view of the effect of baptism. To them, baptism was a fact.[62] Only in circumstances where the person being baptized had clearly been unwilling to proceed was a baptism considered invalid. That result was based on the entire absence of the person's will, not on a violation of his or her right to make a free choice in matters of religious faith.[63] Taking an objective view, it simply could not be true that baptism might be valid one day and invalid the next. Once one had chosen Christianity, it was a final choice. One could not take the benefits without the burdens any more than a man can renounce the fact that he has fathered a child.

Today, we would distinguish: a father cannot renounce the child because the rights of a third person have intervened, but the canonists did not recognize this distinction. They may have considered God to have been the real party in interest, the party whose interests could not be ignored simply because an individual happened to change his mind. It was an objective way of considering the subject of religious choice, one much less concerned with preserving human freedom as a basic right

60. *Gl. ord.* ad C.15 q.1 c.1 *s.v. compellitur*. Marriage was treated as a special case in the canon law.

61. *See* JUAN GOTI ORDEÑANA, DEL TRATADO DE TORDESILLAS A LA DOCTRINA DE LOS DERECHOS FUNDAMENTALES EN FRANCISCO DE VITORIA 346-52 (1999).

62. *E.g.*, HOSTIENSIS, SUMMA AUREA, Bk. 3, tit. *De baptismo*, no 16 ("Ratio quia character semel receptus amitti non potest.").

63. *See* PANORMITANUS, COMMENTARIA ad X 3.42.3 § *Item quaeritur*, no. 7. The character of baptism was held to be indelible so that *restitutio in integrum* would not be available, although it would be available in some ordinary transactions.

than is true today. This is the reason that, although one can discern a kind of progenitor of modern religious liberty in the classical canon law, it is very hard to see in it a subjective human right in the modern sense. Unless this difference is taken into account, the classical canonists must seem to have been confused – or worse. They advocated religious freedom on the one hand, but, on the other hand, they also advocated putting men and women to death who sought to take advantage of it.

THE RIGHT TO A FAIR TRIAL

The fifth example is important and fundamental in the progressive recognition of human rights: the right to a fair trial, the right not to be condemned without due process of law, and the right not to have one's property taken without a lawful judgment. The history of this subject has been explored in a well-written book by Kenneth Pennington.[64] The book shows convincingly that under ordinary circumstances, the right to due process was an accepted norm in the *ius commune*. The right was strengthened during the Middle Ages by the virtual exclusion from practice of proof by notoriety, which had been permitted under some circumstances in earlier canonical thought. Affirmative proof in a court of law was thus required before a defendant could lawfully be deprived of liberty or property. Therefore, something very similar to the modern right to due process existed within the *ius commune*, and it is evident from the records of trials in medieval courts that this right was one that individuals involved in litigation could assert. It was not merely an ideal.[65]

What reasons did the medieval commentators give for the existence of this right? Why did a man or woman have a claim to be summoned properly and then allowed to present a defense in response to an accusation that he or she had committed a crime? Did this grow out of a belief in the inherent rights of each individual to personal autonomy? Such a view seems natural to modern commentators, but it was not the justification the canonists gave for the requirement of summons and fair trial. Instead, the canonists cited the story of Adam and Eve from the

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64. *See* PENNINGTON, *supra* note 7, at 149-64. For the presumption of innocence in the *ius commune*, see Kenneth Pennington, *Innocent Until Proved Guilty: The Origins of a Legal Maxim*, 3 *A Ennio Cortese* 59 (Domenico Maffei & Italo Birocchi eds., 2001).

65. *See* LINDA FOWLER-MAGERL, ORDINES IUDICIARII AND LIBELLI DE ORDINE IUDICIORUM (FROM THE MIDDLE OF THE TWELFTH TO THE END OF THE FIFTEENTH CENTURY) 23-24 (1994); Kenneth Pennington, *Due Process, Community, and the Prince in the Evolution of the Ordo Iudiciarius*, 9 RIVISTA INTERNAZIONALE DI DIRITTO COMUNE 9, 20-24 (1998).

Book of Genesis.[66] When Adam ate the fruit of the tree, something God had expressly forbidden him to do, Adam was not punished summarily. Instead, "the Lord God called unto Adam, and said unto him, [w]here art thou?"[67] Then, God asked Adam to say whether he had eaten of the forbidden fruit and even listened to Adam's attempt at self-justification and his effort to shift the blame to someone else.

The canonists saw the origins of the right to a fair trial in this first event of human history. God knew that Adam was guilty of the crime. It could not have been otherwise. He also knew that Adam could offer no adequate justification. Nonetheless, God took the trouble to summon Adam by calling out to him in the Garden of Eden. God listened patiently, if briefly, to what Adam had to say in an attempt to excuse himself. According to the canonists, human judges were bound to do the same in their courts. In other words, the canonists recognized these rights, not because of any merit in defendants or any inherent right they possessed as human beings, but because the biblical example required it.[68] God himself had established an *ordo iuris*, which men must follow. Defendants must be given, therefore, a proper summons before being tried. They must be informed of the crime of which they stand accused, and they must be given an opportunity to be heard in self-defense. Even if their guilt was patent, they must have the chance to offer pleas in mitigation.

Today, of course, this kind of reasoning from a biblical text seems quite fanciful, even mildly amusing. One is tempted to dismiss it as nonsense or simply another "proof text" produced to add a religious tone to a rule arrived at for other and better reasons. So it seems. The inescapable fact, however, is that the canonists themselves preferred this explanation to an explanation based upon individual rights. It is not that they *added* this proof text to other reasons. It *was* their reason. And this preference had consequences. Another relevant biblical incident came from the eighteenth 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

66. *See generally* R. H. Helmholz, *The Bible in the Service of the Canon Law*, 70 CHI.-KENT L. REV. 1557, 1573-78 (1995).

67. *Genesis* 3:9.

68. *E.g.*, SEBASTIANUS VANTIUS, TRACTATUS DE NULLITATIBUS PROCESSUUM AC SENTENTIARUM, tit. *Ex defectu citationis*, no. 7 (Venice 1567), f. 186 ("Et hac solemnitate Deus omnipotens uti voluit . . . non quod aliquid sibi foret absconditum, sed ut iudicibus seculi in sententiis proferendis exemplum daret.").

me."[69] From this, the canonists concluded that the *ordo iuris* should encompass proceedings based upon *clamor*, or *fama publica*, the technical term they developed.[70] It was a violation of due process to summon a man before a judge without an accuser or the equivalent of probable cause. The due process requirement could be fulfilled if the *clamor* were sufficient to meet the standard established by God himself in Genesis 18:21. This way of thinking comported with the most notorious example of what now seems like a gross violation of defendants' rights – the denial of legal representation to men accused of crimes. The *ius commune* shared this rule with the English common law.[71] Both systems regarded the intervention of a lawyer in place of the accused as a barrier to discovery of the truth and the prosecution of crime. God's example showed this.

If one accepted the Old Testament as an accurate manifestation of God's will and regarded the discovery of the truth and the punishment of the guilty as the overriding goals of the criminal law, as the medieval jurists did, these conclusions seemed to follow almost as a matter of course. Medieval jurists thought objectively about the subject of defendants' rights to a fair trial. Defendants had a right to due process, and they could invoke it against judges who ignored the *ordo iuris*, but at the same time the jurists insisted that it should not become a means of impeding the orderly prosecution of crime.[72] In the jurists' minds, the right to a fair trial never became an end in itself. The medieval right to due process was not based upon the inherent dignity of the individuals involved, in the Garden of Eden or anywhere else. Still less did it provide a way of escaping punishment for the inhabitants of Sodom and Gomorrah. The right was based upon an assessment of the needs of justice, as those needs were shown in the Bible and deduced from the tenets of natural law.

OTHER FUNDAMENTAL RIGHTS

The pattern revealed by examining the five fundamental human rights just discussed was repeated in other areas of the *ius commune*. The law recognized the existence of human rights, and the jurists sought to ensure that individuals would have the ability to invoke them. The rights were

69. *Genesis* 18:21.

70. *See gl. ord.* ad C.2 q.1 c.20 *s.v. inquirat*; X 5.1.24.

71. C.5 q.3 c.2; *gl. ord.* ad X 5.1.15 *s.v. criminali.*

72. X 5.39.35; *see also* Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages "Rei Publicae Interest, Ne Crimina Remaneant Impunita,"* 1984 ILL. L. REV. 577 (1984); Hyams, *supra* note 7, at 76-86.

not considered simply as ways of giving counsel and guidance to legislators and judges; they were not optional. However, the reasons the jurists gave for the existence of these rights were not based on their regard for the inherent dignity of the human person. They found their reasons in texts taken from Roman law, natural law, and the Bible – texts that suggested that the needs of human society would be promoted by the observance of the rights. Thus, it followed that human rights could not enjoy pride of place in the *ius commune*, as they do so prominently in modern law. This theme is found throughout the medieval law, as illustrated by the following three examples.

A. A Right to Self-Preservation

The canon law followed the Roman law in recognizing the existence of a basic right of self-defense against attack. This right was said to stem from natural law itself,[73] a position endorsed at the very start of Gratian's *Decretum*.[74] A right to preserve one's life was a right recognized "by every law."[75] Indeed, it antedated the formation of human society and the creation of civil law. The right was one of those natural instincts that men shared with all animals.[76] Human beings had the right to defend themselves and their property from attack. Clerics themselves had the right, despite a general prohibition against their bearing arms. The importance of this right was apparent because even men in holy orders had the right to use force to preserve their own life and goods. If they killed another in self-defense, they were not to be deprived of their orders, although some texts suggested that they could be required to undergo penance for a time.[77] Moreover, some jurists thought that they should be disqualified from ascending further in the church's hierarchy.[78] The right to protect one's person and property gave rise to the concept of a "just war" in scholastic thought and to a considerable body of casuistic literature about the subject.[79]

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73. DIG. 1.1.3.

74. D.1 c.7.

75. DIG. 9.2.45.4.

76. *See* BARTOLUS, COMMENTARIA ad DIG. 1.1.3, no. 5 ("[Q]uod quidem convenit animalibus brutis.").

77. D.50 c.36.

78. *See* Rufinus of Bologna, *Summa Decretorum* ad D.50, c.5 (H. Singer ed., 1963) (1902).

79. *See* FREDERICK H. RUSSELL, THE JUST WAR IN THE MIDDLE AGES 41-44, 95-100 (1975). *See generally* James V. Schall, *On the Justice and Prudence of This War*, 51 CATH. U. L. REV. 1 (2001).

From the beginning, however, this right was limited under the *ius commune*, as it has largely remained to this day. The desire to take vengeance against a man's enemies was strong in medieval society, and the right to self-protection offered a possible means of justifying that desire. The jurists recognized the danger. They saw that the right could conflict with the *ordo iuris* they followed and the overall needs of church and society for order. Accordingly, they restricted the right, finding ample support in the Roman and canon laws.[80] For example, a text in the Codex was read as restricting the use of force to protect one's property; it extended only to using the amount of force commensurate to that used against the person being attacked.[81] The force used in self-defense must also be applied immediately, without an interval, and only used in order to recover property, not for the sake of vengeance.[82] Similarly, the right to defend oneself could be invoked only against a private attacker, not against public authorities acting in the execution of their duties.[83] Thus, the jurists who commented upon these texts placed greater emphasis on preserving order in society than on the vindication of personal rights.

B. A Right to Proportionality in Punishment

Among the most controversial human rights today is that which entitles those who violate the criminal law to fair and equal treatment in being sentenced. The underlying right is given concrete expression at several places in the Eighth Amendment to the U.S. Constitution, which prohibits "excessive bail," "excessive fines," and "cruel and unusual punishment."[84] Some state constitutions recognize this principle of proportionality in so many words.[85] The principle of fair and equal treatment in sentencing even evokes an echo, though perhaps a distorted one, in the Federal Sentencing Guidelines.[86] However, recognition of

80. *See* STEPHAN KUTTNER, KANONISTISCHE SCHULDLEHRE VON GRATIAN BIS AUF DIE DEKRETALEN GREGORS IX 334-79 (1935).

81. *Gl. ord.* ad COD. 8.4.1, *s.v. moderatione.*

82. COD. 8.4.1; *gl. ord.* ad id. *s.v. recti* and *ad defendendam.*

83. BARTOLUS, COMMENTARIA ad DIG. 1.1.3, no. 2 (citing DIG. 9.2.45.4 and COD. 8.4.1 as seemingly contrary texts and resolving the contradiction by construing the second as applying to cases of force used by public authorities).

84. U.S. CONST. amend. VIII.

85. *E.g.*, IND. CONST. § 16 ("All penalties shall be proportioned to the nature of the offense."); MAINE CONST. art. I, § 9 ("Sanguinary laws shall not be passed; all penalties and punishments shall be proportioned to the offence."); N.H. CONST. art. XVIII ("All penalties ought to be proportioned to the nature of the offense.").

86. 18 U.S.C. §§ 3553- 3673 (2001). *See generally* U.S. SENTENCING GUIDELINES MANUAL (2001). For a critical view, see Albert W. Alschuler, *The Failure of Sentencing Guidelines: A Plea for Less Aggregation*, 58 U. CHI. L. REV. 901 (1991).

this particular right is now at war with measures thought to be required by the extent of crime in our society; policies such as "three strikes and you're out" and "zero tolerance" point in the opposite direction.[87] As a result, the issue of equal treatment in punishment has become a contentious area of the law.[88]

This issue also has a history in the *ius commune*. At several points, the texts and related medieval commentaries endorsed the regime of proportional punishment. "Delicts of equal character call for equal punishment," proclaimed the *glossa ordinaria* to a text in the Roman law Codex.[89] Equal delicts are to be subject to equal penalties, stated the *glossa ordinaria* to Gratian's *Decretum*.[90] The jurists found the reason for this rule in the equality of all persons before the law.[91] The Bible itself stated the principle, providing that God was no respecter of persons.[92] He punishes us, but never arbitrarily. He does so in accord with the nature of our acts.[93] Job was a special case. Human judges should follow God's example. The Gregorian Decretals stated it,[94] and the rule was included in the title, *De regulis iuris*, of the *Liber sextus*.[95] In judging, there should be no respecting of persons.

Like the other rights in the *ius commune*, however, this right was subject to many qualifications.[96] The very *glossa ordinaria* to the text of the canon law endorsing the principle ends its treatment with a list of exceptions, including one for persons who hold offices described as "dignitaries." If these "dignitaries" were guilty of an offense, they should

87. Francis A. Allen, *A Matter of Proportion*, 4 GREEN BAG 2D 343, 348 (2001) (focusing on the problems of "zero tolerance").

88. The contentious nature of the issue of equal treatment is explored in Andrew von Hirsch, *Penal Theories*, *in* THE HANDBOOK OF CRIME AND PUNISHMENT 659 (Michael Tonry ed., 1998).

89. *Gl. ord.* ad COD. 1.3(6).30(31) *s.v. par facinus* ("Nota aequale delictum aequalem exigere poenam.").

90. *Gl. ord.* ad C.24 q.1 c.21 *s.v. scelaratius* ("Et in delicto aequali propinquas esse poenas.").

91. COD. 12.19.12.4.

92. *Acts* 10:34; *Romans* 2:11.

93. *Hosea* 12:2; 1 *Peter* 1:17.

94. X 5.1.17.

95. SEXT. 5.[13].12.

96. *See* K. W. Nörr, *Ohne Ansehung der Person: Eine Exegese der 12. Regula iuris im Liber Sextus und der Glossa ordinaria des Johannes Andreae hierzu*, 5 RIVISTA INTERNAZIONALE DI DIRITTO COMMUNE 23 (1994); John Van Engen, *'God Is No Respecter of Persons': Sacred Texts and Social Realities*, *in* INTELLECTUAL LIFE IN THE MIDDLE AGES: ESSAYS PRESENTED TO MARGARET GIBSON 243, 252-64 (Lesley Smith & Benedicta Ward eds., 1992).

be treated more leniently than other men in the assignment of penalties.[97] The canonists thought, for example, that shameful punishment of the clergy might easily redound to the detriment of the clerical order itself. To avoid this consequence, the canonists qualified the principle of proportionality so that it could take account of this overriding need of the church. The *ius commune* thus recognized a right to equal treatment in penal law, but it also accepted exceptions where a greater good seemed to require them.

C. A Right to Privacy

A famous article by Brandeis and Warren asserted that the law contained different remedies designed to protect private personal interests; the various strands simply needed to be drawn together and recognized as a general right of privacy.[98] Had they wished, they could have drawn support for their characterization of prior law from the medieval *ius commune*. Under several headings, it protected rights of privacy, but did not group these rights under a unifying rubric. For example, the *ius commune* prohibited public officials from requiring men and women to reveal their secret faults. As the jurists stated emphatically, no one should be compelled to reveal his own shame.[99] Therefore, it became a maxim of the canon law that "the church does not take notice of what is hidden," at least in its public courts.[100] Similarly, the jurists read the Roman law of *iniuria* to prohibit revelation of the private faults of another person, even if the speaker revealed the truth. Criminal or civil liability against the speaker followed.[101] By such measures, individual privacy was given legal protection in the *ius commune*.

As with the other rights explored in this Article, the reasons given by the commentators for recognizing these rights were quite different from

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97. *Gl. ord.* ad SEXT. 5.[13].12 *s.v. in iudiciis* (citing SEXT. 1.14.2) ("Item est habenda acceptio personarum in impositione pene, quia quantum ad impositionem pene mitius agitur cum persona constituta in dignitate quam cum alia persona.").

98. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 213-14 (1890); *see also* DAVID FLAHERTY, PRIVACY IN COLONIAL NEW ENGLAND (1972) (examining the right to privacy in an historical context).

99. *E.g.*, JULIUS CLARUS, PRACTICA CRIMINALIS, Quaest. 45, no. 9 ("Nemo tenetur prodere seipsum, quia nemo tenetur detegere turpitudinem suam.").

100. For a fuller discussion, see Stephan Kuttner, *Ecclesia de Occultis Non Iudicat: Problemata ex Doctrina Poenali Decretistarum et Decretalistarum*, *in* ACTA CONGRESSUS IURIDICI INTERNATIONALIS 225 (1936).

101. *See* R. H. Helmholz, *The Roman Law of Blackmail*, 30 J. LEGAL STUDIES 33 (2001) (discussing more fully the possible civil and criminal liability against the speaker).

those that would accord with a more individualistic conception of privacy. The commentators grounded the rights in biblical and formal sources. Jesus himself had chosen not to reveal the treacherous intentions of Judas Iscariot, although he certainly knew of them.[102] Public courts must do the same. In the world, the man who is guilty of a secret crime must be tolerated; his punishment must be left to God. Similarly, the reason most often given for the existence of a privilege not to answer incriminating questions was that without the privilege, the *ordo iuris* would be perverted. If a judge required a man to answer for his secret faults, the judge would become an accuser, whereas under the *ordo*, he was required to be an impartial adjudicator of fact and law.[103] The privilege existed, but the *ius commune* also allowed compelled questioning of a person where the judge was not acting in the place of an accuser. If a man were publicly defamed of a crime, he could be required to answer incriminating questions because, in those circumstances, the judge would not himself be acting as the accuser. The *ordo* would be preserved.

In the same fashion, the law of *iniuria* admitted an exception for the revelation of crimes in which the public had a legitimate interest. To say truthfully that a man was a thief might not be wrongful, if the purpose of the utterance was to promote the public need to detect and punish criminals.[104] Although the *ius commune* recognized a right of privacy, the right became so hedged with exceptions that, in practice, it meant a good deal less than it appeared to mean at first sight.

CONCLUSION

What conclusion emerges from this evidence? The evidence is far from destroying the revisionist argument that the *ius commune* recognized a number of basic human rights. Nor does it undercut the assertion that many of the rights recognized by the *ius commune* were quite similar to modern rights. The medieval rights found in the Roman and canon laws by the medieval jurists were not just statements of ideals. Individuals were given the power to exercise them; indeed, the rights were exercised in fact. The evidence from the medieval *ius commune* does, however, raise questions about the connection between medieval and modern notions of natural human rights. The differences are as

102. C.2 q.1 c.6.

103. X 3.11.1; *see also* BARTOLUS, COMMENTARIA ad DIG. 1.18.13, no. 3 ("Et ista regulariter est prohibita, quia nemo sine accusatore punitur."); *gl. ord.* ad X 5.1.1 *s.v. non fatigetur*.

104. DIG. 47.10.33.

significant as the similarities. In the medieval law, these rights were based upon a purportedly objective assessment of the teachings of natural law and the Christian religion. That is obviously much less true of the natural human rights found in modern law. Modern rights are grounded in conceptions of individual autonomy and human worth, and this makes a significant difference in fact.

It is worthy of note how easily the rights that existed and, at first sight, looked very like modern rights, were qualified substantially in the medieval *ius commune*. Enforcement of the right of the poor to support was reduced to the most extreme situation, and even then, it was controversial. The right to marry freely was limited in its scope and its consequences by the claims of church and family. The right to vote was surrendered in large measure to the needs of the institutional church. The right to religious liberty was largely overcome by a concern for the objective validity of baptism. The right to be free from criminal prosecution fell prey in many instances to the need to quiet *fama publica* and to keep society free from crime. These human rights were effective only so long as they comported with natural law and God's will. When they threatened to become a barrier to justice or the needs of the church, they gave way.

No rights are absolute; not today and not then. That a right may exist without being absolute is evident in our understanding of the right to self-defense. The legal right must co-exist with society's interest in settling disputes peacefully. There is more, however, to the argument than this obvious and elementary point. We have not entirely lost touch with medieval ways of thinking about some of the rights we prize most highly. For example, we treasure freedom of speech partly because we believe that the government of our country will be improved if we encourage the interchange of ideas and the fullest discussion of the merits of those who govern us.[105] The objective is good government; free speech promotes it. The Second Amendment to the Constitution, the now controversial declaration of the people's right to bear arms, is also couched in terms of an objective right: the need of a functioning militia. Moreover, something clearly akin to this way of thinking about rights has been used by many of the advocates of granting greater legal protection to the weak and the oppressed. Recognizing that the exercise of rights by the powerful can subvert the true interests of society, advocates have argued in favor of a more limited view of human rights, one that curtails

105. *See* Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 20-35 (1971) (discussing, albeit in extreme form, this view of the freedom of speech).

the rights of some in the interests of the well-being of the many. Their attitude would have been quite familiar to the jurists of the *ius commune*.[106]

However, adjusting human rights to fit the objective needs of society is not the usual contemporary way of thinking about such rights. Today, rights are often treated as part of a system based upon a respect for personal autonomy.[107] Human rights are natural and inhere in individuals.[108] They require a broad freedom from external interference, and except in extreme circumstances, they are not lost even when the interests of society or a desire for justice seem to conflict with them. More often than not, freedom of speech, the right to due process, and the right of religious freedom are ends in themselves. They are prized because they express the autonomy of the individual and are tolerated in many situations where they appear to threaten the social fabric. It is a measure of how dissimilar the human rights articulated in the *ius commune* were from modern rights that medieval rights so often and easily were sacrificed to meet the other needs of church and state.

Of course, many of the reasons given for the exceptions that were carved out now seem like simple rationalizations – conclusions reached, probably out of self interest, and justified by artificial invocations of natural law and fanciful interpretations of Scripture. However, that view does not represent the way the rights were perceived at the time. If medieval law is to be understood, it must be viewed as it was by the medieval jurists. Virtually all the conclusions drawn by those commentators were entirely consistent with a designedly objective view of rights. That approach was characteristic of medieval thought, and it continued to be the dominant way of looking at rights well into the early modern period. For that reason, although the revisionist scholarship has undoubtedly made valuable contributions to understanding the historical concept of human rights by unearthing its roots in the medieval *ius commune*, it remains true to say that the creation of natural rights in the modern sense of the term belongs as much to a later age as it does to the Middle Ages.

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106. *E.g.*, Morton J. Horwitz, *Rights*, 23 HARV. C.R.-C.L. L. REV. 393 (1988). *See generally* JOHN C. CALHOUN, THE RESTRAINT OF THE EXERCISE OF ONE'S RIGHTS (1965).

107. Bork, *supra* note 105, at 8 (noting that rights are dependent upon "a general principle of individual autonomy").

108. Horwitz, *supra* note 106, at 399-400 (suggesting that rights are "conceived in radical individualism and continue to express an individualistic perspective").