Introduction: Rights and Justice toward the Margins

Mäkinen, Virpi; Robinson, Jonathan; Slotte, Pamela

Published in:
Rights at the Margins

DOI:
10.1163/9789004431539_002

Published: 01/01/2020

Document Version
Accepted author manuscript

Document License
Publisher rights policy

Introduction: Rights and Justice towards the Margins

Virpi Mäkinen, Jonathan Robinson and Pamela Slotte

The chapters in this volume explore the idea of rights at the margins from historical, philosophical and legal perspectives. Most of the chapters deal with the subject in the context of the late medieval and early modern period from the perspective of legal and intellectual history. The final chapters in the volume take up some of the ideas elaborated in the earlier chapters and reflect from the perspective of moral philosophy on their relevance in the contemporary context. The content, nature and justification of human rights are subject of intensive debate today, yet we still do not have an adequate account of the origin and early development of human rights.[1] The basic questions: whose

[1] See, e.g., David Boucher, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford: 2009); Rowan Cruft, S. Mattheo Liao, and Massimo Renzo (eds.), *Philosophical Foundations of Human Rights* (Oxford: 2015); Costas Douzinas, *The End of Human Rights* (Oxford: 2009); Costas Douzinas and Conor Gearty, *Meanings of Rights*: *The Philosophy and Social Theory of Human Rights* (Cambridge, M.A.: 2014); Knud Haakonssen (ed.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law in 1791 and 1991* (Cambridge, M.A.:1996); James Griffin, *On Human Rights* (Oxford: 2008); Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, M.A.: 2010); idem, *Christian Human Rights* (Philadelphia: 2015); idem, *Not Enough: Human Rights in an Unequal World* (Cambridge, M.A.: 2018); Pamela Slotte and Miia Halme-Tuomisaari (eds.), *Revisiting the Origins of Human Rights* (Cambridge, UK: 2015); John Witte, Jr. and Frank S. Alexander (eds.), *Christianity and Human Rights: An Introduction* (Cambridge, M.A.: 2010); John Witte, Jr. and M. Christian Green (eds.), *Religion and Human Rights: An Introduction* (Oxford: 2012); John Witte, Jr. and Frank S.

rights, which rights, and in virtue of which property do we have these rights are also the most relevant when looking for the early history of rights at the margins. These are the questions that guide the essays of this volume -- nevertheless, they should not be construed as a complete answer to these questions, pressing though they be.

The term "marginalization" is modern but derives from the Latin *margo*, which means "edge", "brink", or "border". As in earlier times, specific groups of people today often end up pushed to the margins and beyond. In medieval canon and civil law, such people were called *personae miserabiles*; these were the people who were likely to suffer pervasive and long-term poverty, such as orphans, widows, the elderly, and those with physical, cognitive, or psychiatric impairments.2 In this volume, we adopt a broad understanding of people at the margins, covering not only those who are impoverished and needy in a material sense but also those who are relegated to the lower or outer edges of society because of their physical or intellectual disabilities, gender,

---

Alexander (eds.), *Christianity and Human Rights: An Introduction* (Cambridge, M.A.: 2010); Ting Xu and Jean Allain (eds.), *Property and Human Rights in a Global Context* (Oxford: 2015).

2 Brian Tierney, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley and Los Angeles: 1959); Gilles Couvreur, *Les pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité, depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)* (Rome: 1961); Michel Mollat, *Études sur l'histoire de la pauvreté*, 2 vols. (Paris: 1974); Michel Mollat, *Poor in the Middle Ages: An Essay in Social History*, trans. Arthur Goldhammer (New Haven: 1986).

race, religion or infidelity.3 We extend our coverage to include also the case of animals in order to raise questions about who can or cannot be attributed rights.4

Many people are relegated to the margins of society for reasons beyond their control; but some live on the margins of society by choice. In medieval Christianity, voluntary poverty was a religious ideal and was recognized as a spiritual value for those living in monasteries or were members of other religious orders.5 At the beginning of the 13th century, the impact of the mendicant orders on the ideal of poverty was profound, especially with regard to the Franciscan ideal of absolute poverty without individual or corporate property.6 However, the way the

---

3 For marginalization and marginalized groups in medieval society, see Bronislaw Geremek, "The Marginal Man," in *Medieval World*, ed. Jacques LeGoff, trans. Lydia Cochrane (London: 1990), 347-73; Michael Goodich (ed.), *Other Middle Ages: Witnesses at the Margins of Medieval Society* (University Park, PA: 1998).

4 Concerning the roots of our thinking about animals in the history of philosophy, see Richard Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* (Ithaca, NY: 1995). See also William Ewalds, "Comparative Jurisprudence (I): What Was it Like to Try a Rat?," *University of Pennsylvania Law Review* 143 (1995): 1898-2149, where he discusses, for example, the anthropologizing of animals as well as legal proceedings relating to animals in medieval judicial practice.

5 Lester Little, *Religious Poverty and the Profit Economy in Medieval Europe* (London: 1978). See also Emmanuel Bain, *Richesse et pauvreté dans l'Occident médiéval: L'Exégèse des évangiles aux XIIe-XIIIe siècles* (Turnhout: 2014).

6 The meaning and value of religious poverty changed dramatically from the 12th century onwards, due in no small measure to the efforts of the Waldesians, the Humiliati and Catharism. See Malcolm Lambert, *Medieval Heresy: Popular Movements from the Gregorian Reform to the*

Franciscans relegated themselves to the margins, claiming (as time went on) to live only by the factual use of goods without any rights also fostered suspicion and caused long-standing debates among theologians and moral philosophers.7 The Janus-faced nature of religious poverty and its connections to the rights at the margins is a primary concern of many chapters in this study.

Reformation, 3rd ed. (Oxford: 2002), 41-189; Gordon Leff, *Heresy in the Later Middle Ages: The Relation of Heterodoxy to Dissent c. 1250-c. 1450* (1967; Manchester: 1999), 1-139. For studies on the early Franciscan movement, see David Flood and Thaddée Matura, *The Birth of a Movement: A Study of the First Rule of St Francis*, trans. Paul Schwartz and Paul Lachance (Chicago: 1975); David Flood, *Francis of Assisi and the Franciscan Movement* (Quezon City, Philippines: 1989). For a revisionist account of Francis's significance, see Kenneth Wolf, *The Poverty of Riches: St. Francis of Assisi Reconsidered* (Oxford: 2003).

7 The literature is vast, but the following are important book-length studies: David Burr, *Olivi and Franciscan Poverty: The Origins of the Usus Pauper Controversy* (Philadelphia: 1989); ibid., *The Spiritual Franciscans: From Protest to Persecution in the Century After Saint Francis* (Philadelphia: 2001); Marino Damiata, *Guglielmo d'Ockham: Povertà e potere*, vol. 1 (Florence: 1978); Michele-Marie Dufeil, *Guillaume de Saint-Amour et la polémique universitaire parisienne, 1250-1259* (Paris: 1972); Jan G. J. van den Eijnden, *Poverty on the Way to God: Thomas Aquinas on Evangelical Poverty* (Leuven: 1994); Ulrich Horst, *Evangelische Armut und Kirche: Thomas von Aquin und die Armutskontroversen des 13. und beginnenden 14. Jahrunderts* (Berlin: 1992); Ulrich Horst, *Evangelische Armut und päpstliches Lehramt: Minoritentheologen im Konflikt mit Papst Johannes XXII (1316-1334)* (Stuttgart: 1996); Malcolm Lambert, *Franciscan Poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210-1323*, 2nd ed. (St. Bonaventure, N.Y.: 1998); Roberto Lambertini, *Apologia e crescita dell'identità francescana (1255-1279)* (Rome: 1990);

Modern historiography talks about rights in a number of different ways, and not all authors write about rights in the same way. One common topic of concern is whether an author's conception of rights should be characterized as "objective" or "subjective". The distinction between objective and subjective forms of "right" prevalent in recent historiography owes much to the influential work of Michel Villey, who lamented that *droit subjectif* had supplanted *droit objectif* as the dominant way to understand right.[8] These terms have crossed over into Anglo-American scholarship, often with the proviso that the adjectives can clarify whether one is speaking of "subjective" rights or law, reinforcing, if not leading to what Kenneth Pennington has lamented as a "Balkanization (…) of thinking about law and rights in modern English and American

---

idem, *La povertà pensata: Evoluzione storica della definizione dell'identità da Bonaventura ad Ockham* (Modena: 2000); Leff, *Heresy in the Later Middle Ages*, 51-251; Virpi Mäkinen, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: 2001); Patrick Nold, *Pope John XXII and his Franciscan Cardinal: Bertrand de la Tour and the Apostolic Poverty Controversy* (Oxford: 2003); Jonathan Robinson, *William of Ockham's Early Theory of Property Rights in Context* (Leiden: 2012); Andrea Tabarroni, *Paupertas Christi et apostolorum*: *L'ideale francescano in discussione (1322-1324)* (Rome: 1990). For a thorough overview with a comprehensive bibliography, see Jürgen Miethke, "Der 'theoretische Armutsstreit' im 14. Jahrhundert: Papst und Franziskanerorden im Konflikt um die Armut," in *Gelobte Armut: Armutskonzepte der franziskanischen Ordensfamilie vom Mittelalter bis in die Gegenwart*, eds. Heinz-Dieter Heimann, Bernd Schies, Christoph Stiegemann and Angelica Hilsebein (Paderborn: 2012), 243-283.

[8] See, e.g., Michel Villey, "Abrégé du droit naturel classique," *Archives de philosophie du droit* 6 (1961): 27, where he playfully proposes a return to Aristotle ("Zuruck zum Aristoteles"); for a comment, see Tierney, *Idea of Natural Rights*, 14 and 20.

jurisprudential thought."[9] Unfortunately, this view, though true, can confuse the matter further, which is the precise point of Villey's concern.[10] The distinction is also meant to lay bare the idea that there are two fundamentally different "kinds" of rights: ones that are concerned with the right relation between entities and ones that are unmoored and rooted merely in subjective preferences. Although it is sometimes said that a "subjective right" is no more than a power to act, this account, too, seems unsatisfactory, for any theory of objective right must provide some space for individuals to exercise some discretion in their actions. Thus, a better view of what is at stake is whether the normative valence of "right" ties it to some objective standard of what is morally right or just in the circumstances, or whether we must defer to the right-bearer's subjective (and error-prone) worldview when we say or recognize that he or she has a right.

Taken to extremes, classifying authors as theorists of objective right or subjective rights theories is an enterprise of dubious merit.[11] Few, if any, rights theorists defend the notion that one's

---

[9] Kenneth Pennington, "Rights," in *The Oxford Handbook of the History of Political Thought*, ed. George Klosko (Oxford: 2011), 532.

[10] See John Lamont, "In Defence of Villey on Objective Right," in *Truth and Faith in Ethics*, ed. Hayden Ramsay (Exeter: 2011), 177-98; John Millbank, "Against Human Rights: Liberty in the Western Tradition," in *The Meanings of Rights: The Philosophy and Social Theory of Human* Rights, eds. Costas Douzinas and Conor Gearty (Cambridge, M.A.: 2014), 39-70.

[11] It is sometimes said that "subjective" rights refers to the idea that the individual somehow "has" these rights; but when used in this way the term "subjective rights" is an unhelpful pleonasm. See Thomas Mautner, "How Rights Became 'Subjective,'" *Ratio Juris* 26:1 (2013): 110-32. Cf. Max Kaser, "Zum 'Ius'-Begriff der Römer," *Acta Juridica* 63 (1977): 63; Charles Donahue, Jr., "*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney," in *A Ennio Cortese*, eds. Domenico Maffei et al. (Rome: 2001), 1: 506-35.

rights are not dependent upon a normative framework constructed by morality and law. What is at issue for critics of the "modern" theory of subjective rights is threefold: first, whether there are any sources of law (or morality) beyond human positive law; second, what is the inflection point at which law must bend to the demands of morality; and, third, how is morality determined. How an author answers these questions goes a considerable way to answering whether we are dealing with a theory of "subjective rights" or "objective right", or, put differently, the degree to which that theory says we have in some sense "a right to do wrong".[12] Indeed, when the Franciscan theologian William of Ockham (*c.*1285-1347) is cast in the role of villain in the transition to a world where subjective rights reign supreme, the root complaint is not that he speaks of rights as a "power", so much as that Ockham (it is alleged) conceives of this power as beholden to his broader metaphysical views and/or his supposed voluntarism.[13] Another example can be seen in the debate between Pope John XXII (as the pope 1316-1334) and the Franciscans on whether one needed to have a right to use in order to avoid the charge that one's use was unjust.

A potentially more fruitful way to think about rights is to adopt the modern distinction between positive and negative rights, which captures a distinction made famous by Isaiah Berlin some sixty years ago.[14] The operative idea is that negative rights are rights that are realized through

---

[12] Jeremy Waldron, "A Right to Do Wrong," *Ethics* 92:1 (1981): 21-39; cf. Mautner, "How Rights Became 'Subjective,'" 122 (quoting Michael Zuckert).

[13] In fact, it is not much of a stretch to say that the essence of the complaint is that Ockham's failure to recognize the superior and "true" metaphysical and ethical views of Thomas Aquinas is the chief reason he wrongly championed a subjective rights theory. See, e.g., Lamont, "In Defence of Villey," 193-95.

[14] Isaiah Berlin, "Two Concepts of Liberty," in his *Liberty*, ed. Henry Hardy (Oxford: 2002), 166-217. The essay was originally published in 1958.

non-interference (for example, free speech), while positive rights impose some positive duty on others to help realize a right (for example, a right to housing). The distinction is especially prevalent in human rights discourse. Many critics of the "proliferation"[15] of human rights, for instance, are particularly leery of including any positive right on lists of human rights. One rationale for this hesitation is, in what is in fact an oversimplification for the divide between negative and positive rights is not as clear or as clean as is sometimes supposed,[16] that negative rights are reasonably realizable by governments and institutions in a way that positive rights are not. In the context of the *Universal Declaration of Human Rights*, for example, the rights treated with the greatest skepticism tend to be socio-economic rights and the rights of solidarity.[17]

In a similar vein, Richard Tuck took as paradigmatic a distinction between active and passive rights. As he explained the terms, passive rights are rights to be "given or allowed

---

[15] See, e.g., Eric A. Posner, *The Twilight of Human Rights Law* (Oxford: 2014), 91-95, 151-61. Cf. Michael Ignatieff, *Human Rights as Politics and Idolatry* (Princeton: 2001), 173; Griffin, *On Human Rights*, 51-56; David Miller, "Joseph Raz on Human Rights: A Critical Appraisal," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Matthew Liao, and Massimo Renzo (Oxford: 2015), 237-38.

[16] See, e.g., Elizabeth Ashford, "The Alleged Dichotomy Between Positive and Negative Rights and Duties," in *Global Basic Rights*, eds. Charles R. Beitz and Robert E. Goodin (Oxford: 2009), 92-112; cf. Griffin, *On Human Rights*, 166-69.

[17] For an overview of some of the ways human rights theorists have tried to address this perceived problem regarding socio-economic rights, see Rowan Cruft, S. Matthew Liao, and Massimo Renzo, "The Philosophical Foundations of Human Rights: An Overview," in *Philosophical Foundations of Human Rights*, 23-29.

something by somebody else", while active rights are rights "to do something oneself".[18] One odd feature of Tuck's account is that he imagines an author must subscribe to an active or a passive theory of rights in general, rather than considering that some rights are "active" or "passive" in their very orientation. In fact, the conceptual division Tuck points to maps quite neatly onto the view that some rights are positive (= passive) while others are negative (= active).

Had Tuck considered Berlin's distinction between positive and negative legacy, his historical archaeology of premodern natural rights theories might have been even more successful. The same is true of Wesley Hohfeld's extremely influential attempt to clarify the different ways the term right might be used.[19] Under his schematization, in the example above, negative rights correspond to what Hohfeld calls privileges or liberties; and his point is that if one has a privilege to φ (i.e. a negative right), then others have "no-right" to interfere with that privilege. Conversely, if one is said to have a right to φ (i.e. a positive right), then others are said to be under a duty to realize that right.[20] As he summarized the difference at one point: "A right is one's affirmative claim against another, and a privilege is one's freedom from the right or claim of another."[21]

---

[18] Richard Tuck, *Natural Rights Theories* (Cambridge, M.A.: 1979), 6. See Brian Tierney, "Tuck on Rights: Some Medieval Problems," *History of Political Thought* 4:3 (1983): 429-41.

[19] Wesley N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16-59; *Yale Law Journal* 26 (1917): 710-70. We omit here a discussion of "powers" and "immunities", which are an important part of Hohfeld's much richer analysis.

[20] Hohfeld, "Fundamental Legal Conceptions," 30-44. See also Charles Donahue, Jr., "*Ius* in Roman Law," in *Christianity and Human Rights: An Introduction*, eds. John Witte Jr and Frank S. Alexander (Cambridge, M.A.: 2010), 64-65.

[21] Hohfeld, "Fundamental Legal Conceptions," 55.

Hohfeld's ideas have been picked up among other things by scholars who maintain that contemporary human rights should in fact not be considered simply either "positive" or "negative" rights. In fact, the realization of human rights is by and large understood to require both positive and negative measures at least to some extent: i.e. that states (as primary duty bearers under international law) *do* certain things and that they *abstain* from doing other things, from interfering in the lives of persons in certain respects[22]. For this very reason, some scholars building more or less loosely on Hohfeld also talk about legal rights (including human rights in their legal form) as encompassing what is sometimes called a "bundle of relationships". In order for a right to become an actual reality in a person's life a number of different duties (of both state and non-state actors) of both positive and negative kind have to be taken seriously and addressed within the framework of the right.[23] They further maintain that this at a foundational level is true for the realization all kinds of rights and not just for rights whose realization, for example, seems to require a large-scale

---

[22] For example, Steiner and Alston have named five kinds of state duties: To *respect* rights; to *create the institutional machinery* necessary for the actualization of rights; to *protect* rights/*prevent* violation; to provide goods and services in order to *fulfil* rights; as well as to *promote* right *e.g.* by means of education to increase the general awareness of them. Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: 2000) 182-84.

[23] See e.g. Neil MacCormick, "Rights in Legislation," in *Law, Morality and Society: Essays in Honour of H L.A. Hart*, eds. P.M.S. Hacker and Joseph Raz (Oxford: 1977), 189-209; Martin Scheinin, "Women's Economic and Social Rights as Human Rights: Conceptual Problems and Issues of Practical Implementation," in *New Trends in Discrimination Law: International Perspectives,* eds. Lauri Hannikainen and Eeva Nykänen (Turku: 1999); Carl Wellman, *Real Rights* (New York: 1995), 1-28.

redistribution of resources, but also the rights to an adequate standard of living and to freedom from hunger.

By exploring the rights at the margins in historical, philosophical and legal sources, this volume also intends to address an old moral philosophical concept, the "right of necessity", by exploring its application and limitations, mostly in history of philosophy, moral theology and law but also in contemporary moral philosophy. From antiquity onwards, many people have suggested that necessity might be able to suspend the normal operation of the law.24 Canon lawyers from the 12th century onward associated the ancient idea of the right of necessity with the maxim of "necessity has no law", in order to cover the urgent aid of *personae miserabiles*.25 These lawyers generally interpreted the maxim such that, in time of extreme necessity, a person was governed only

---

24 As an old maxim of Publilius Syrus (a moralist writing in the time of Caesar and Cicero) put it, "Necessity gives a law: it does not admit one" (*Necessitas dat legem, non ipsa accipit*). For this and the history of the medieval maxim "necessity does not have a law", see Franck Roumy, "L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIIIe-XIIIs.)," in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington,* eds. Wolfgang P. Müller and Mary E. Sommar (Washington, D.C.: 2006), 301–19 (here 304). See also Johannes W. Pichler, *Necessitas: Ein Element des mittelalterlichen und neuzeitlichen Rechts*, Schriften zur Rechtsgeschichte 27 (Berlin: 1983); Theo Mayer-Maly, *Recht – Gerechtigkeit – Rechtswissenschaft* (Wien: 2019), 203 ff; 491 ff.

25 The principle of extreme necessity was developed by twelfth-century canonists from the statements of the Gratian's *Decretum*: D. 86 c. 21, D. 42 c. 1, and De cons. D. 5 c. 26. For the early history of the principle in canon law sources and its importance in the development of natural rights discourse, see Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150-1625* (Grand Rapids, MI: 1997), 43-77.

by the original natural laws. Such laws conceded that everyone could use the things necessary to their survival. Necessity thus allowed a personal and temporary exemption from the normal laws that governed property rights and instead mandated that things were to be shared (as such sharing was thought to be part of the natural state of human beings before the Fall).26 The canon lawyers concluded that in the case of great need, it was lawful to take another's goods in order to survive without being accused of theft. By necessity, however, they referred to very short-term life-threatening distress, not chronic deficiency. This limited applicability also applied to the theories of theologians of the period and was a common element for all pre-modern natural rights.[27]

The right of necessity was much discussed among medieval authors. Especially during the Franciscan poverty debates, the friars' opponents took the principle of extreme necessity as one of their main arguments against the Franciscan ideal of absolute poverty as a renouncement of all rights over goods. As these opponents argued, no one can renounce temporal goods, since in extreme necessity anyone has a right to use temporal goods as much as is sufficient for his sustenance.28 The discussion of extreme necessity persists well up to the 18th century, especially among early modern natural law theorists such as Hugo Grotius, Samuel Pufendorf and John Locke. Some thought of it as a duty for self-preservation, some (and in a more innovative way) as a natural

---

26 See Tierney, *Medieval Poor Law,* 37–38; Mollat, *Poor in the Middle Ages,* 110-11.

[27] See R.H. Helmholz, *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, M.A.: 2015). Tierney's triumphalist narrative in his *Idea of Natural Rights* could be misunderstood, see e.g. Larry Siedentop, *Inventing the Individual: Origins of Western Liberalism* (Cambridge, M.A.: 2014).

28 Regarding the use of the principle of extreme necessity during the Franciscan poverty disputes, see Mäkinen, *Property Rights*, 124-39.

right to take and use someone else's property even against the latter's will if this was the only means to save one's life.29

We do not know if the principle of extreme necessity was successfully (or at all)[30] employed in legal procedures in the medieval and early modern periods, but it was, nevertheless, included in several European civil laws up to the Reformation period and even after. For example, the Swedish communal law (1327) states: "A person in need can take a maximum of five turnips without a penalty. If someone takes more than five and is immediately captured, he should pay one 'öre'."31 This example from Sweden hints at another feature of the right of necessity, which is its exculpatory force. That is, rather than consider that a person who acts out of necessity has a "right" to stave off imminent death or grave peril, one might think that the person does not have a *right* to act in this way, merely that no blame should attach to that action. Since at least Aristotle, it has been common to pardon involuntary actions where conditions obtain that "overstrain human nature".[32]

---

29 See Scott G. Swanson, "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," *History of Political Thought* 18 (1997): 399-456.

30 See Richard Helmholz, "Natural Human Rights: The Perspective of the *Ius commune*," *Catholic University Law Review* 52 (2002-2003): 305-06.

31 *Svenska landskapslagar* (1327) vol. 3, eds. and trans. Åke Holmbäck and Elias Wessén (Uppsala: 1940), § 2, 115. See also *Landrecht des Königs Magnus Hakonarson* (1263-1280), ed. Rudolf Meissner (Weimar: 1941), IX, 1:2, 381.

32 Aristotle, *Nicomachean ethics,* trans. H. Rackham, Loeb Classical Library, 2nd ed. (London, UK: 1934), 3.1.2-6 (1110a24-26), 117-119, where he discusses a case in which "cargo is jettisoned in a storm; apart from circumstances, no one voluntary throws away his property, but to save his own life and that of his shipmates any sane man would do so".

Roman law, as well, recognized that actions brought about by necessity should not be actionable. For example, the Roman jurist Ulpian (d. 228 AD) gave the example of sailors who were forced to cut themselves free from the anchor lines of another ship after becoming entangled because the wind drove the ships together; in such a case, Ulpian suggested, no action should be made against those sailors.[33] Perhaps more to the point, intentionality -- an *animus lucrandi* or *animus furandi* -- formed a component of theft.[34]

For the authors studied in the chapters collected here, necessity does not merely excuse or pardon forced actions: often an individual straitened by extreme necessity is said to have a right. If so, then it is worth reflecting on what kind of right that might be. If we circle back to discussions about the different ways we might parse and understand the term right, a few points are worth noting. First, if there is any merit to the distinction between so-called subjective and objective theories of right(s), that seems to matter little for the adoption of the right of necessity: it is rare, indeed, to find authors who deny it. Even critics of Ockham, for example, are not prone to criticize him on this point.[35] Second, contrary to the modern complaint that socio-economic rights *qua* positive rights are largely unworkable in theory or in practice, the pre-modern right of necessity does not appear to be a positive right at all. Consider the case where a person commits a "theft" while under imminent danger of starving to death. It is not at first instance a right against a specific individual to take sustenance. It is a liberty to act and take sustenance from wherever it might be found (excepting, perhaps, from someone in even direr straits); others have "no-right" to interfere even if they are under no duty to help the individual in need escape necessity's grasp. To be sure, it

---

[33] Dig. 9.2.29.3 (1:160). See Max Kaser, *Roman Private Law*, 4th ed., trans. Rolf Dannebring (Pretoria: 1984), § 36.2.5 (187).

[34] Dig. 47.2.1.3 (1:764); Dig. 47.2.25.2 (1:767). See Couvreur, *Les pauvres*, 86-87.

[35] See, e.g. Lamont, "In Defence of Villey," 191 and 193.

was sometimes pointed out that those with a surplus of goods are under a duty to share with the needy. This duty un-controversially permeated medieval theological and jurisprudential thought, not least because important maxims from the early Church fathers found their way into the texts of canon law.[36] The right of necessity was not conceived of as correlative to the duty of the rich to provide from their surplus of goods: if anything, the operative duty sprang from an individual's God-given duty to preserve his or her own life or an overriding instinct for self-preservation.

Whether self-preservation was understood as a right or a duty also hints at another issue. Nowadays, necessity is a potential defense in many jurisdictions.[37] As in the Middle Ages, extreme necessity might be exculpatory because of the "moral involuntariness" it imposed or justificatory. Where necessity only excuses the action, the action is still understood to be "wrong" in the salient sense, but that the person committing that wrong should not be held accountable for it. Where necessity justifies the action, then the point is that the action itself was not wrong thought it might technically constitute a crime.[38] Medieval canonists used the term in both senses and may not have distinguished between treating necessity as an excuse or a justification. As Brian Tierney noted some time ago, Johannes Teutonicus (*c*.1170-1245) postulated contrary to those who took a hard line on theft that "very great necessity excuses" theft. Others, such as Bernard Parmensis (d. 1266),

---

[36] Couvreur, *Les pauvres*, 81-84, 259-60.

[37] See, e.g., the comments of Justice Dickson in *Perka v The Queen*, [1984] 2 S.C.R. 232, 13 D.L.R. (4th) 1 at 241-5 (cited to S.C.R.), where he surveys Canadian, English, and American experience along with an abbreviated discussion of the history of the idea. See also Andrea Lossa's article in which he lists several examples of the state of necessity in existing European criminal law systems, "The Theft as Remedy to Necessity: Human Dignity and Private Property Before the Italian Court of Cassation," *Retfaerd* 3 (2016): 59-74.

[38] See, e.g., *Perka v The Queen* at 246-50 and 259.

went further and suggested that in times of great need, the poor are simply taking what is theirs.[39] This is, it would seem, a far cry from the famous where it was held that homelessness did not allow a defense of necessity or ground any right to occupy an unoccupied building.[40] More recently in Italy, the Court of Cassation ruled the theft of a homeless person as remedy to the state of necessity by appealing to the criminal code (Art. 626.2) that provides for a substantial reduction of the sanction in case of a small entity theft conducted under the conditions of a serious and urgent need.[41] The ruling also shows that "the Italian Constitution allows a restriction on certain individual

[39] Tierney, *Medieval Poor Law*, 37-38 and 147, citing Joannes Teutonicus, *Gl. ord.* to C. 12 q. 2 c. 11 and Bernardus Parmensis, *Gl. ord.* to X. 5.18.3.

[40] *Southwark London Borough Council v. Williams and Another*, [1971] Ch. 734, [1971] 2 All E.R. 175 (C.A.); cf. *Perka v. The Queen* at 275-77. See also Alejandra Mancilla's essay in this volume, and A.J. van der Walt, *Property in the Margins* (Oxford: 2009), 143-44.

[41] The case (in 2016) concerned a homeless Ukrainian migrant who had stolen food from a supermarket (the total amount of which was four euros) and thus sentenced to a six months' imprisonment and one hundred euros in fines. See Lossa,"The Theft as Remedy to Necessity," 59-60. In contemporary Italian doctrine, the requirements of the state of necessity are threefold: it requires the actual (imminent) danger, the serious harm, and an explicit mention of the relation of proportion between the fact and the danger. Ibid., 65-66. Cf. *The Queen v. Latimer*, 2001 SCC 1, [2001] 1 S.C.R. 3 at 19, which outlines the test in Canada: "First, there is the requirement of imminent peril or danger. Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook. Third, there must be proportionality between the harm inflicted and the harm avoided."

liberties, such as private property, in the view of protecting social rights related to human dignity".[42]

It has often been repeated among modern scholars that rights theories are seen as an individualistic reaction against medieval communal ethics. Some in fact argue that the modern emphasis on human rights leads to an uncaring egoism and a loss of commitment to the common good, and thus leads to a society marked by "corrosive selfishness".43 Certainly, it is true to say that at first, natural rights flourished alongside individualistic political theories and pre-capitalist economics. Indeed, one of the first individual rights was the right to property.44 As already stated, the emergence of the right to sustenance in a time of necessity was developed in order to protect (at least theoretically) the *personae miserabiles* in medieval society. As the chapters of this volume will show, however, the earliest natural rights theories did not contrast individual needs and interests with community needs. Alongside with the right of necessity, for example, developed the

---

[42] Ibid., 59.

43 See, e.g., Robert P. Kraynak, *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (Notre Dame: 2001), 167. As Karl Marx famously put it, "das Menschenrecht der Freiheit basiert sich nicht auf der Verbindung des Menschen mit dem Menschen, sondern vielmehr auf der Absonderung des Menschen von dem Menschen"; quoted in B. P. Vermeulen and G. A. van der Wal, "Grotius, Aquinas, and Hobbes: Grotian Natural Law between *lex aeterna* and Natural Rights," *Grotiana* 16 (1995): 67.

44 Peter Garnsey, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge: 2007); Thomas A. Horne, *Property Rights and Poverty: Political Argument in Britain, 1605–1834* (Chapel Hill: 1990); Christopher Pierson, *Just Property: A History of the Latin West*, vol. 1: *Wealth, Virtue and the Law* (Oxford: 2013).

idea of social and distributive justice.45 Although rights express the importance of specific individual needs and interests, they also propose matters of moral concern to others in society. In accordance with the principle of extreme necessity, in cases of urgent need the requirements of the common good might prevail over the rights of the individual, including property rights.46

Firmly rooted in written sources from the 13th to the 18th centuries, the chapters of this volume discuss natural rights and natural law from a perspective that brings new insight into the early evolution of individual rights but also into the early history of socio-economic rights. The volume provides conceptual tools for contemporary human rights claims which address the common needs and aspirations of human beings by offering, for example, a view on the possibility of taking the principle of extreme necessity (in the sense of chronic need) into account in the problem of migration in today's world.47 In this sense, we should question whether the right of necessity coheres with modern attempts to justify human rights on a "needs-based" model.[48]

---

45 Siegfried Van Duffel and Dennis Yap, "Distributive Justice Before the Eighteenth Century: The Right of Necessity," *History of Political Thought* 32:3 (2011), 449-64.

46 See e.g. Cary Nederman, *Lineages of European Political Thought: Explorations along the Medieval/Modern Divide from John of Salisbury to Hegel* (Washington, D.C.: 2009), 214-21, 230-32.

47 For this subject, see Alejandra Mancilla, *The Right of Necessity: Moral Cosmopolitanism and Global Poverty* (London: 2016).

[48] See, e.g. Elizabeth Ashford, "A Moral Inconsistency Argument for a Basic Right to Subsistence," and Massimo Renzo, "Human Needs, Human Rights," both in *Philosophy Foundations of Human Rights*, 515-34 and 570-87. It is worth noting that Ashfor argues that her account is consistent with acceptance of other "uncontroversial negative human rights". See also Joshua Cohen, "Minimalism About Human Rights: The Most We Can Hope For?," *Journal of Political Philosophy* 12:2 (2004):

The chapters of this volume concern rights at the margins from four viewpoints. The first part deals with legal sources concentrating on rights, duties and charity in medieval and early modern poor law and contract law. The second part discusses the nexus between rights, duties, and justice in early modern moral and political thought. The third part considers what might be termed rights beyond the margins, for it considers the status of widows, animals, and infidels in late medieval and early modern moral theology and philosophy. The last part deals with rights and necessity in late medieval cosmopolitan history as well as in modern human rights discussions.

I. Rights and the Poor Law

Part I takes up the task of looking at the different ways in which medieval and early modern jurists conceived of the poor and needy and the means of poor relief.49 In the first chapter, "Poverty and

---

190-230, and Griffin, *On Human Rights.*

49 For studies on the history of poor law, see: Tierney, *Medieval Poor Law*; Donald R. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, M.A.: 1990); Robert Jütte, *Poverty and Deviance in Early Modern Europe* (Cambridge, UK: 1994). There are plenty of studies concerning charity and poor relief. See, e.g., Gert Melville (ed.), *Aspects of Charity: Concern for One's Neighbour in Medieval Vita Religiosa. Vita Regularis*: Ordnungen und Deutungen religiosen Lebens im Mittelalter (Berlin: 2011); Miri Rubin, *Charity and Community in Medieval Cambridge* (Cambridge, UK: 1987); Brian S. Pullan, *Rich and Poor in Renaissance Venice: The Social Institutions of Catholic State to 1620* (Cambridge, UK: 1971); Carter Lindberg, *Beyond Charity: Reformation Initiatives for the Poor* (Minneapolis: 1993); Thomas M. Safley (ed.), *The Reformation of Charity: The Secular and the Religious in Early Modern Poor Relief*, Studies in Central European Histories 30 (Leiden: 2013).

Need in the 14th Century: Johannes Andreae, Bartolus of Saxoferrato, and Baldus de Ubaldis," Jonathan Robinson explores the writings of three of the most prominent jurists of the 14th century: the canonist Joannes Andreae (d. 1348), the civil jurist Bartolus de Saxoferrato (d. 1357), and the doctor *in utroque iure*, Baldus de Ubaldis (d. 1400), who all wrote in the years following the last major phase of the mendicant poverty controversy. This controversy led to robust language regarding the supervening force of natural rights at the time of extreme necessity. It is surprising, therefore, that Bartolus and Baldus in particular appear to have resisted or ignored the nascent language of natural rights when they discussed the plight of *personae miserabiles*. Robinson shows that canonist Andreae located the poor in Christian society and thought in terms of rights and obligations *in abstracto*. Almsgiving remains a matter of duty incumbent on the donor, not a duty that arises from a correlative right on the part of the needy. Civilian jurists Bartolus and Baldus worried about where the poor belonged in (implicitly) urban life. They were more concerned with discerning between the legitimately needy and those who were less deserving of the designation -- that is, the very criteria which came to be standard in early-modern poor law.50 Nevertheless, all of

---

50 The poor laws of early modern societies in Europe began to ban public begging and in accordance with new police regulations concerning several categories of people at the margins (the poor, vagrants, vagabonds, the Roma) were arrested and placed in institutions of preventive detention or even in prisons. See Jeannine Olson, "Continuity or Radical Change? Care of the Poor, Medieval and Early Modern," *Bridging the Medieval-Modern Divide: Medieval Themes in the World of the Reformation,* Catholic Christendom, 1300-1700, ed. James Muldoon (Farnham, UK: 2013), 143-74. Police regulations were already created in the late Middle Ages but they became more general in the early modern age. See Peter Nitschke, "Von der Politeia zur Polizei: Ein Beitrag zur Entwicklungsgeschichte des Polizei-Begriffs und seiner herrschaftspolitischen Dimensionen von der Antike bis ins 19. Jahrhundert," *Zeitschrift für Historische Forschung* 19

them maintained that things should be shared in times of necessity and that an obligation to help the needy was incumbent upon others.

Hard times could also affect aristocrats, noblemen, and noblewomen, as well as merchants, dealers, and debtors. In the next chapter, "Poor and Insolvent: Debtor Relief in Alvarez de Velasco's *De privilegiis pauperum* (1630)," Wim Decock surveys what the lawyers of early modernity had to say about the possibility of debt relief. The main question Decock discusses is: If an impoverished debtor was currently unable to repay what he owed, did the debtor have a right to an extension of time (*dilatio*) or even to debt relief (*remissio*), or, alternatively, did the creditor owe the debtor an extension? The chapter is based on an analysis of *De privilegiis pauperum et miserabilium personarum* written by the civilian jurist Gabriel Alvarez de Velasco (1595/1597-1658), a figure who has largely fallen into oblivion. The chapter shows that the treatment of debt and necessity often re-entrenched power, privilege, and wealth. One must, in the end, (re)pay one's debts,51 and this was especially true when the debtor shared in the blame for the inability to repay. Against the background of the stratified social structure of the ancient régime, Decock shows that it

---

(1992): 1-27; Michael Stolleis (ed.), *Policey im Europa der Frühen Neuzeit* (Munich: 1996); Karl Härter, "Entwicklung und Funktion der Policygesetzebung des Heiligen Reiches Deutscher Nation im 16. Jahrhundert," *Ius Commune* 20 (1993): 61-141; H.C.M. Michielse and Robert van Krieken, "Policing the Poor, J.L. Vives and the Sixteenth-Century Origins of Modern Social Administration," *The Social Service Review* 64 (1990): 1-21.

51 See David Graeber for an exhilarating, though uneven, romp through the global history of debt in his *Debt: The First 5,000 Years (*Brooklyn: 2012). In this context, Wim Decock's review of Graeber is worth reading. See Wim Decock, "Review of David Graeber, *Debt: The First 5,000 Years* (Melville: 2011)," *Comparative Legal History* 2 (2014): 349-53.

might be fruitful to reconsider the "rights" that were granted to poor and miserable persons in terms of privileges, rather than human rights in the contemporary sense of the word.

II. Rights, Duties and Justice

The chapters in Part II show that the principle of necessity and the natural inclination to self-preservation remained a vital subject, undergoing various modifications in the natural rights and law traditions up to the time of 18th-century political thought. The maxim that necessity has no law, which was enshrined in the texts of the *ius commune*, and often repeated by theologians and jurists, unsurprisingly found a prominent place in the writings of Thomas Hobbes (1588-1679), Samuel Pufendorf (1632-1694), and John Locke (1632-1704). Although their interpretations of the maxim differ, all of them recognized its importance for humankind's fundamental right and/or duty to sustain life.52 The chapter "Inclination of Self-Preservation and Rights to Body and Life in Samuel Pufendorf's Natural Law Theory," written by Heikki Haara illustrates, how Pufendorf conceptualizes natural rights to life and body from the perspective of historically situated psychological notions and assumptions. As Haara shows, Pufendorf does not ground natural rights in the intrinsic features of human nature, but in the duties that human beings must necessarily observe in order to promote peaceable sociability, the ultimate goal of natural law. Despite this assertion, Pufendorf takes into account the natural

52 For the studies on the continuity in relation to natural rights between the medieval and the early modern periods to the time of Locke, see, e.g. Tierney, *The Idea of Natural Rights*; Annabel S. Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholasticism* (Cambridge, UK: 1997); Virpi Mäkinen and Petter Korkman (eds.), *Transformations in Late Medieval and Early-Modern Rights Discourse* (Dordrecht: 2006).

inclination to self-preservation when explicating the scope of the natural rights to life and body, a moral power to act that natural law grants or leaves unaffected. Haara argues that, though Pufendorf drives a wedge between nature and morality, his rights theory is not detached from the natural necessities of human nature.

The chapter "The Right of Necessity: From Hugo Grotius to Adam Smith" written by John Salter explores how Adam Smith (1723-1790), as well as his friend David Hume (1711-1776) learned and yet differed from seventeenth-century theories of necessity. Grotius and Pufendorf based their account of the right of necessity on principles of legal reasoning that are relevant in the application of human law. They argued that people cannot be blamed and should not be punished for actions for which they are not morally accountable, including those that are compelled by circumstances such as extreme poverty. Their treatment of the doctrine of necessity thus cleared away the medieval integument of the language of natural, God-given rights and established it as a topic that was to become a serious challenge to the moral sense theories of the eighteenth century. David Hume was the first to see the full implications of this for moral sense theory. The case of necessity was just one of a number of circumstances under which theft seemed to lack a blameworthy motive, and this led him to his famous conclusion that the rules of property are no more than social conventions. Smith's attempt to counter this and establish justice as a natural virtue ultimately failed.

III. Rights Beyond the Margins

When originally translated into policy, the first documents asserting human rights, like the Magna Carta (1215), the English Bill of Rights (1689) or the French Declaration on the Rights of Man and Citizen (1789), excluded women, people of color, and members of certain social, religious, economic, and political groups. Impoverished persons were thus not the only group whose

vulnerable situation and status historically elicited a scholarly response and reflection on rights, the causes for marginalization, or the reasons for including previously marginalized or excluded categories of beings. In the first chapter of this part, "Widows as a Needy and Protected Group in Christine de Pizan's Thought," Ilse Paakkinen discusses the changing social status of widows through an analysis of the Italian-French Christine de Pizan's (1364/65-1430/41) legal and moral advice to widowed women in her *Le livre de trois vertus*. De Pizan herself was widowed at the age of twenty-five, which is why she identified so strongly with the obstacles widowed women regularly faced. Paakkinen sheds light on both the conception of gender and the status of widowed women in late medieval society by focusing on their right to inheritance and to defend themselves against oppression.53 The chapter shows that for de Pizan, the purpose of the law was to protect and defend the defenseless and fragile in society, including widowed commoners, who merited the right to be treated as human beings. This right, as the author says, is based on natural, moral law, even though there are no written, man-made laws that secure these rights.

The next chapter, "Can Animals Have Rights? Conrad Summenhart and Francisco de Vitoria at the Margins of Rights Language," written by Jussi Varkemaa, focuses on another disagreement in order to test the naturalness of rights. By analyzing the answers given by the German theologian Conrad Summenhart (1455-1502) and the Spanish Dominican theologian Francisco de Vitoria (1483-1546), Varkemaa's main focus is not to discuss animal rights as such but to clarify Summenhart's and Vitoria's understanding of the term right (*ius*) by asking how they associated rights with individual agency, and with animal agency. One of the most frequently cited

53 There are a lot of studies concerning widowhood in medieval and early modern era, see e.g., Sandra Cavallo and Lyndan Warner (eds.), *Widowhood in Medieval and Early Modern Europe* (Harlow: 1999); Robert R. Edwards and Vickie Ziegler (eds.), *Matrons and Marginal Women in Medieval Society* (Woodbridge: 1995).

ways that Roman law (and canon law after it) understood *ius naturale* was that it was "what nature taught all animals" (*quod natura omnes animalia docuit*).54 Both civilians and canonists tended to follow the civilian glossator Accursius (1182-1263) and stressed that this meaning of *ius naturale* referred to the "instinct of nature" all animals possessed.55 Thus, certain forms of natural law seemed to apply to animals as well. As the semantic ambiguity of *ius* grew to include our more modern meaning of "rights", the question of whether animals also have such natural rights came to play a role in determining where the limits of these rights lay. Summenhart's definition shows that animals might have a kind of dominion with associated rights; the right to take sustenance in the manner accorded them by God. Francisco de Vitoria denies natural rights to animals on the basis of two arguments: first, humankind's holding a unique status as rational beings within God's creation and second, animals cannot suffer injury (*iniuria*) since they not only lack rights but are passive objects in "the realm of justice".

Religion has been and still is a major cause of marginalization: throughout history, people have been persecuted and excommunicated on the basis of their religious beliefs.[56] The next

54 Dig. 1.1.1.3; Inst. 1.2 pr.

55 See *Glossa ordinaria* to Dig. 1.1.1.3, v. *natura*; *Glossa ordinaria* to Inst. 1.2 pr., v. *natura*; and *Glossa ordinaria* to D. 1 c. 7, v. *ius naturale*. All three passages are quoted in Rudolf Weigand, *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus*, Münchener theologische Studien 3, kanonistische Abteilung 26 (Munich: 1967), 57 and 255. See also ibid., 48–49, 60, 163, 179-80, 182, 205, and 208.

[56] Historically, religious liberty has been discussed under the (in)tolerance of different theological systems of belief. See e.g. Rainer Frost, *Toleration in Conflict: Past and Present* (Cambridge: 2013). Contemporary recognition theory has exposed the concept of toleration as being too narrow and negatively. Concerning the recognition of religion in history and today, see Risto Saarinen,

chapter, “Whether Heretics and Infidels Can Possess Dominion Rights? Late Medieval and Early Modern Debates,” written by Virpi Mäkinen and Mikko Posti, focuses on the long-lasting debates on the meaning and legitimation of the concept of dominion (*dominium*) and dominion rights among heretics and infidels by asking, how did theological theory in effect lead to the marginalization of people who are not part of the true faith or righteous elect, also in terms of politics, and second how might political theory be able to recognize the rights of individuals at the margins, including infidels? The chapter deals with these questions by analyzing two different kinds of interpretation of the notion of dominion: first, among the 14th-century Augustinian theologians who followed the Hostiensian line of interpretation of grace-based dominion, and second, the 16th-century Spanish Dominican theologians, whose arguments offered an opposed view by maintaining that all rational human beings can possess dominion rights. All the authors whose views are covered here (e.g. Hostiensis, Giles of Rome, Richard FitzRalph, John Wyclif, and Francisco Vitoria) aligned themselves with the long interpretative tradition of the notion of dominion starting already from early 13th-century juridical and theological thinking.

IV. Geopolitical, Global, and Contemporary Perspectives at the Margins

Following up on the theme of how the colonial encounter provoked and influenced reflections on rights, many postcolonial studies have subscribed to a Wallersteinian core-periphery structure, identifying marginality with subjugated extra-European colonies. This geopolitical imaginary has shaped global politics, especially the program of “developmental aid”. As conceptualized by

---

Recognition and Religion: A Historical and Systematic Study (Oxford: 2016); Kahlos, Maijastina, Koskinen Heikki J., and Palmén, Ritva (eds.), *Recognition and Religion: Contemporary and Historical Perspectives* (New York: 2019).

American sociologist Immanuel Wallerstein (1930-2019), the wealthy West gives aid to the impoverished, developing world which is identified as being at the margin of the world system.57 However, as the history of poverty reminds us, the experience of marginality, of power asymmetries and of being at the edge of the socio-economic and political currencies is at the core of European history. Julia McClure's chapter, "The Darker Side of Rights in Global Intellectual History: An Ambivalent Case of Franciscan Poverty," reflects on the geopolitical landscape of margins. The chapter uses the history of the Franciscan Order, a socio-political-religious movement with global dimensions, to go beyond the established paradigm of the darker side of rights, showing the way in which rights have contributed to the structuring of power asymmetries. McClure claims that Franciscan history offers an interesting perspective not only because the friars played an important role in the early history of extra-European colonialism, but also because they voluntarily aligned themselves with or even co-opted the poor and hence gave a face to the phenomenon of marginality. McClure suggests that Franciscans were early critics of the darker side of rights: they provide a window into historic ambivalences within the history of rights. The chapter touches on a central theme of postcolonial critiques, namely how law and "rights" are and historically have been complicit in processes of marginalization and have facilitated and legitimated these processes.

The question regarding our moral duties to alleviate poverty at the global level has been repeatedly addressed by moral and political philosophers.58 A point that has been mostly overlooked

---

57 See Immanuel Wallerstein, *The Modern World System,* vols 1-3 (Berkeley and Los Angeles: 1979-1989).

58 See Peter Singer, "Famine, Affluence and Morality," *Philosophy and Public Affairs* 1 (1972), 229–43 (revised ed.); Thomas Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Malden, M.A.: 2008). See also Mancilla, *Right of Necessity*.

in the discussion is that taking basic human rights seriously -- and the basic right to subsistence in particular -- implies acknowledging that people in need have a right of necessity to take, use and/or occupy the property of others in order to get out of their plight. In other words, it implies acknowledging that people in need, given certain conditions, are morally permitted to do things that go against standard property laws in order to fulfill their basic rights. Alejandra Mancilla's chapter, "Necessity Knows No Border: The Right of Necessity and Illegalized Migration," considers how the maxim of "necessity has no law" might be deployed today by exploring the implications of it for the phenomenon of illegal immigration that results from persistent need and deprivation. Thus, Mancilla's starting point is a broader understanding of the right of necessity, which differs from the narrower interpretations considered in the historical chapters of the volume. She argues that receiving countries ought not to deny entry to these immigrants. On the contrary, those seeking to enter are morally permitted to do so, and those already in should not be deported. Just as basic rights should serve as limits to any minimally reasonable system of property rights, so should they serve as limits to any minimally reasonable system of territorial rights.

The final chapter, "'Rights, Not Charity!' On Vocabularies for Conceptualizing the Case of Persons with Disabilities," written by Pamela Slotte, explores the supposed usefulness of human "rights" vocabulary, as opposed to "charity", for addressing matters of concern to persons who are marginalized in various ways. Slotte puts a contemporary twist on the themes of this volume: rights, needs, charity and the politics of rights, as well as the darker sides of rights. She does so by presenting and juxtaposing the writings of two American philosophers in political thought, James W. Nickel and Martha Nussbaum. In certain respects, Nickel and Nussbaum represent two ways in which contemporary scholarship deals with human rights from a more philosophical point of view in their attempt to grasp the character of human rights, their "usefulness" and their supra-positive basis. They emphasize in different ways the importance of "rights" language. The chapter considers the utility of Nussbaum's and Nickel's approaches for making a case for those on the margins. To

some extent, Slotte does this by focusing on the case of people who live with disabilities. She also explores the juxtaposition of the vocabularies of charity and rights to expose how, in an age that struggles with the idea of an "objective morality", rights have come to represent a "basis" for unconditional demands.59 Thus, the chapter shows how the context for discussions of rights, and the terms for rights differ from earlier eras. Slotte concludes that, given the limits of contemporary rights language, there may still be reason to underline the importance of other vocabularies that are normatively able to address a range of actors and relations of dependency. In effect, efforts to change structures and socially constructed barriers and address the multitude of contemporary patterns of exclusion need more than the language of individual (moral and/or legal) rights.

Bibliography

Early Printed Texts

Bartolus of Saxoferrato, *Lectura super prima et secunda parte Digesti veteris* (Milan: 1490).

Edited Texts and Translations

Aristotle, *Nicomachean ethics,* trans. H. Rackham, Loeb Classical Library, 2nd ed. (London, UK: 1934)

Grotius, Hugo, *De jure praedae commentarius*, ed. H.G. Hamaker (The Hague: 1868).

Locke, John, *Two Treatises of Government*, ed. Peter Laslett (Cambridge, M.A.: 1960).

59 Cf. John Rawls, *The Law of Peoples* with "The Idea of Public Reason Revisited." (Cambridge, M.A.: 1999), 79-81, who argues that consistent violations of human rights are grounds for intervention in the affairs of otherwise sovereign states.

Modern sources

Ashford, Elizabeth, "The Alleged Dichotomy Between Positive and Negative Rights and Duties", in *Global Basic Rights*, eds. Charles R. Beitz and Robert E. Goodin (Oxford: 2009), 92-112.

———, "A Moral Inconsistency Argument for a Basic Right to Subsistence," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Mattheo Liao, and Massimo Renzo (Oxford: 2015), 515-34

Bain, Emmanuel, *Richesse et pauvreté dans l'Occident médiéval: L'Exégèse des évangiles aux XIIe-XIIIe siècles* (Turnhout: 2014).

Berlin, Isaiah, "Two Concepts of Liberty," in *Liberty*, ed. Henry Hardy (Oxford: 2002), 166-217.

Boucher, David, *The Limits of Ethics in International Relations: Natural Law, Natural Rights, and Human Rights in Transition* (Oxford: 2009).

Brett, Annabel S., *Liberty, Right, and Nature: Individual Rights in Later Scholasticism* (Cambridge: 1997).

——— , "Human Rights and the Thomist Tradition", in *Revisiting the Origins of Human Rights*, eds. Pamela Slotte and Miia Halme-Tuomisaari (Cambridge, UK: 2015), 82-101

Brown, Peter, *Through the Eye of a Needle: Wealth, the Fall of Rome, and the Making of Christianity in the West, 350-550 AD (*Princeton: 2012).

Burr, David, *Olivi and Franciscan Poverty: The Origins of the Usus pauper Controversy* (Philadelphia: 1989).

——— , *The Spiritual Franciscans: From Protest to Persecution in the Century After Saint Francis* (Philadelphia: 2001).

Cavallar, Georg, *The Rights of Strangers: Theories of International Hospitality, the Global Community, and Political Justice since Vitoria* (Aldershot: 2002).

Cavallo, Sandra and Warner, Lyndan (eds.), *Widowhood in Medieval and Early Modern Europe* (Harlow: 1999).

Cohen, Joshua, "Minimalism About Human Rights: The Most We Can Hope For?," *Journal of Political Philosophy* 12:2 (2004): 190-230.

Couvreur, Gilles, *Les pauvres ont-ils des droits? Recherches sur le vol en cas d'extrême nécessité, depuis la Concordia de Gratien (1140) jusqu'à Guillaume d'Auxerre (1231)* (Rome: 1961).

Cruft, Rowan; Liao, S. Matthew and Renzo, Massimo (eds.), *Philosophical Foundations of Human Rights* (Oxford: 2015).

Damiata, Marino, *Guglielmo d'Ockham: Povertà e potere*, vol. 1 (Florence: 1978).

Decock, Wim, "Review of David Graeber, *Debt: The First 5,000 Years* (Melville, 2011)," *Comparative Legal History* 2 (2014), 349-53.

Donahue, Jr., "*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney," in *A Ennio Cortese*, eds. Domenico Maffei et al. (Rome: 2001), 506-35.

——— , "*Ius* in Roman Law," in *Christianity and Human Rights: An Introduction*, eds. John Witte Jr and Frank S. Alexander (Cambridge: 2010), 64-65

Douzinas, Costas, *The End of Human Rights* (Oxford: 2009).

Douzinas, Costas and Conor, Gearty (eds.), *The Meanings of Rights: The Philosophy and Social Theory of Human Rights* (Cambridge: 2014).

Dufeil, Michele-Marie*, Guillaume de Saint-Amour et la polémique universitaire parisienne, 1250–1259* (Paris: 1972).

Edwards, Robert R. and Ziegler, Vickie (eds.), *Matrons and Marginal Women in Medieval Society* (Woodbridge: 1995).

Ewalds, William, "Comparative Jurisprudence, vol. I: What Was it Like to Try a Rat?," *University of Pennsylvania Law Review* 143 (1995): 1889-2149.

Flood, David, and Matura, Thaddée, *The Birth of Movement: A Study of the First Rule of St Francis* (Chicago: 1975).

Flood, David, *Francis of Assisi and the Franciscan Movement* (Quezon City, Philippines: 1989).

Frost, Rainer, *Toleration in Conflict: Past and Present* (Cambridge: 2013).

Garnsey, Peter, *Thinking about Property: From Antiquity to the Age of Revolution* (Cambridge, UK: 2007).

Gaudemet, Jean, "Ambiguité du privilege," reprinted in *Droit de l'Église et vie sociale au Moyen Âge* (Northampton, UK: 1989).

Geremek, Bronislaw, "The Marginal Man," *Medieval World*, ed. Jacques LeGoff, trans. Lydia Cochrane (London, UK: 1990).

Goodich, Michael (ed.), *Other Middle Ages: Witnesses at the Margins of Medieval Society* (University Park, PA: 1998).

Graeber, David, *Debt: The First 5,000 Years (*Brooklyn: 2012).

Griffin, James, *On Human Rights* (Oxford: 2008).

Haakonssen, Knud (ed.), *A Culture of Rights: The Bill of Rights in Philosophy, Politics and Law in 1791 and 1991* (Cambridge:1996).

Härter, K., "Entwicklung und Funktion der Policygesetzebung des Heiligen Reiches Deutscher Nation im 16. Jahrhundert," *Ius Commune* 20 (1993): 61-141.

Helmholz, Richard H. *Natural Law in Court: A History of Legal Theory in Practice* (Cambridge, MA: 2015).

——— , "Natural Human Rights: The Perspective of the *Ius commune*," *Catholic University Law Review* 52 (2002–03): 305-06.

Herdt, Jennifer A., *Putting on Virtue: The Legacy of Splendid Vices* (Chicago: 2008).

Hohfeld, Wesley N. "Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23 (1913): 16-59; *Yale Law Journal* 26 (1917): 710-70.

Horne, Thomas A., *Property Rights and Poverty: Political Argument in Britain, 1605-1834* (Chapel Hill: 1990).

Horst, Ulrich, *Evangelische Armut und Kirche: Thomas von Aquin und die Armutskontroversen des*

13. und beginnenden 14. Jahrhunderts (Berlin: 1992).

——— , *Evangelische Armut und päpstliches Lehramt: Minoritentheologen im Konflikt mit Papst Johannes XXII (1316–34)* (Stuttgart: 1996).

Ignatieff, Michael, *Human Rights as Politics and Idolatry* (Princeton: 2001).

Jütte, Robert, *Poverty and Deviance in Early Modern Europe* (Cambridge, UK: 1994).

Landrecht des Königs Magnus Hakonarson (1263-1280), ed. Rudolf Meissner (Weimar: 1941).

Kahlos, Maijastina, Koskinen, Heikki J. and Palmén, Ritva (eds.), *Recognition and Religion: Contemporary and Historical Perspectives* (New York, NY: 2019).

Kaser, Max, "Zum 'Ius'-Begriff der Römer," *Acta Juridica* 63 (1977): 63-81.

——— , *Roman Private Law*, 4th ed., trans. Rolf Dannebring (Pretoria: 1984).

Kelley, Donald R., *The Human Measure: Social Thought in the Western Legal Tradition* (Cambridge, M.A.: 1990).

Keohane, Nannerl O., *Philosophy and State in France: The Renaissance to the Enlightenment* (Princeton: 1980).

~~Korsgaard, Christine M., *Fellow Creatures: Our Obligations to the Other Animals* (Oxford: 2018).~~

Kraynak, Robert P., *Christian Faith and Modern Democracy: God and Politics in the Fallen World* (Notre Dame: 2001).

Lambert, Malcolm, *Franciscan Poverty: The Doctrine of the Absolute Poverty of Christ and the Apostles in the Franciscan Order, 1210-1323*, 2nd ed. (St. Bonaventure, NY: 1998).

——— , *Medieval Heresy: Popular Movements from the Gregorian Reform to the Reformation*, 3rd ed. (Oxford and Cambridge: 2002).

Lambertini, Roberto, *Apologia e crescita dell'identità francescana (1255-1279)* (Rome: 1990).

——— , *La povertà pensata: Evoluzione storica della definizione dell'identità da Bonaventura ad Ockham* (Modena: 2000).

Lamont, John, "In Defence of Villey on Objective Right," in *Truth and Faith in Ethics*, ed. Hayden

Ramsay (Exeter: 2011), 177-98.

Landrecht des Königs Magnus Hakonarson (1263-1280), ed. Rudolf Meissner (Weimar: 1941).

Leff, Gordon, *Heresy in the Later Middle Ages: The Relation of Heterodoxy to Dissent c. 1250-c.1450* (Manchester: 1999).

Levi, Anthony, *French Moralists: The Theory of Passions, 1585 to 1649* (Oxford: 1964).

Lindberg, Carter, *Beyond Charity: Reformation Initiatives for the Poor* (Minneapolis: 1993).

Lio, Ermenegildo, *Determinatio 'superflui' in doctrina Alexandri Halensis eiusque scholae* (Spicilegium Pontificii Athenaei Antoniani 6) (Rome: 1953).

——— , *S. Bonaventura e la questione autografa 'De superfluo' contenuta nel MS. di Assisi, Bibl. Comun. 186 citata al concilio Vat. 11. Testo con studio critico-letterario e dottrinale* (Rome: 1966).

Little, Lester, *Religious Poverty and the Profit Economy in Medieval Europe* (London: 1978).

Lossa, Andrea, "The Theft as Remedy to Necessity: Human Dignity and Private Property before the Italian Court of Cassation," in *Retfaerd* 3 (2016): 59-74.

MacCormick, Neil, "Rights in Legislation," in *Law, Morality and Society: Essays in Honour of H.L.A. Hart*, eds. P. M. S. Hacker and Joseph Raz (Oxford: 1977), 189-209.

Mäkinen, Virpi, *Property Rights in the Late Medieval Discussion on Franciscan Poverty* (Leuven: 2001).

——— , "Dominion Rights, Their Development and Meaning in the History of Human Rights", in *A Companion to Early Modern Iberian Imperial Political and Social Thought*, ed. Jöerg Tellkamp (forthcoming, Leiden: 2020).

Mäkinen, Virpi and Korkman, Petter (eds.), *Transformations in Late Medieval and Early-Modern Rights Discourse* (Dordrecht: 2006).

Mancilla, Alejandra, *The Right of Necessity: Moral Cosmopolitanism and Global Poverty* (London: 2016).

Mautner, Thomas, "How Rights Became 'Subjective,'" *Ratio Juris* 26:1 (2013): 110-32.

Mayer-Maly, Theo, *Recht – Gerechtigkeit – Rechtswissenschaft* (Wien: 2019).

McClure, Julia, *The Franciscan Invention of the New World* (New York: 2017).

Melville, Gert (ed.), *Aspects of Charity: Concern for One's Neighbour in Medieval Vita religiosa. Vita regularis* (Ordnungen und Deutungen religiosen Lebens im Mittelalter) (Berlin: 2011).

Michielse, H.C.M. and van Krieken, Robert, "Policing the Poor, J.L. Vives and the Sixteenth-Century Origins of Modern Social Administration," *The Social Service Review* 64 (1990): 1-21.

Miethke, Jürgen, "Der 'theoretische Armutsstreit' im 14. Jahrhundert: Papst und Franziskanerorden im Konflikt um die Armut," in *Gelobte Armut: Armutskonzepte der franziskanischen Ordensfamilie vom Mittelalter bis in die Gegenwart*, eds. Heinz-Dieter Heimann, Bernd Schies, Christoph Stiegemann and Angelica Hilsebein (Paderborn: 2019), 243-83.

Millbank, John, "Against Human Rights: Liberty in the Western Tradition," in *The Meanings of Rights: The Philosophy and Social Theory of Human* Rights, eds. Costas Douzinas and Conor Gearty (Cambridge: 2014), 39-70.

Miller, David, "Joseph Raz on Human Rights: A Critical Appraisal," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Matthew Liao and Massimo Renzo (Oxford: 2015).

Mollat, Michel, *Ètudes sur l'histoire de la pauvreté*, 2 vols (Paris: 1974).

———, *Poor in the Middle Ages: An Essay in Social History*, trans. Arthur Goldhammer (New Haven: 1986).

Moriarty, Michael, *Fallen Nature, Fallen Selves: Early Modern French Thought,* vol. 2 (Oxford: 2006).

Moyn, Samuel, *The Last Utopia: Human Rights in History* (Cambridge, M.A.: 2010).

——— , *Christian Human Rights* (Philadelphia: 2015).

——— , *Not Enough: Human Rights in an Unequal World* (Cambridge, M.A.: 2018).

Nederman, Cary, *Lineages of European Political Thought: Explorations along the*

Medieval/Modern Divide from John of Salisbury to Hegel (Washington, D.C.: 2009).

Nickel, James W., *Making Sense of Human Rights* (Malden, M.A. and Oxford: 2007).

Nitschke, Peter, "Von der Politeia sur Polizei: Ein Beitrag zur Entwicklungsgeschichte des Polizei-Begriffs und seiner herrschaftspolitischen Dimensionen von der Antik bis ins 19. Jahrhundert," *Zeitschrift für Historische Forschung* 19 (1992): 1-27.

Nold, Patrick, *Pope John XXII and His Franciscan Cardinal: Bertrand de la Tour and the Apostolic Poverty Controversy* (Oxford: 2003).

Nussbaum, Martha, "Poverty and Human Functioning: Capabilities as Fundamental Entitlements," *Poverty and Inequality*, eds. David B. Grusky and Ravi Kanbur (Stanford, CA: 2006).

——— , *Creating Capabilities: The Human Development Approach* (Cambridge, M.A.: 2011).

Olson, Jeannine, "Continuity or Radical Change? Care of the Poor, Medieval and Early Modern," *Bridging the Medieval-Modern Divide: Medieval Themes in the World of the Reformation, Catholic Christendom, 1300–1700*, ed. James Muldoon (Farnham, UK: 2013), 143-74.

Pagden, Anthony, "Human Rights, Natural Rights, and Europe's Imperial Legacy," *Political Theory* 31 (2003): 171-99.

Pennington, Kenneth, "Rights," in *The Oxford Handbook of the History of Political Thought*, ed. George Klosko (Oxford: 2011).

Pichler, Johannes W., *Necessitas: Ein Element des mittelalterlichen und neuzeitlichen Rechts* (Schriften zur Rechtsgeschichte 27) (Berlin: 1983).

Pierson, Christopher, *Just Property: A History of the Latin West*, vol. 1: Wealth, Virtue and the Law (Oxford: 2013).

Pogge, Thomas, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, 2nd ed. (Malden, M.A.: 2008).

Posner, Eric A., *The Twilight of Human Rights Law* (Oxford: 2014).

Pullan, Brian S., *Rich and Poor in Renaissance Venice: The Social Institutions of Catholic State to*

1620 (Cambridge: 1971).

Rawls, John, *The Law of Peoples* with "The Idea of Public Reason Revisited" (Cambridge, M.A.: 1999).

Renzo, Massimo, "Human Needs, Human Rights," in *Philosophical Foundations of Human Rights*, eds. Rowan Cruft, S. Mattheo Liao, and Massimo Renzo (Oxford: 2015), 570-87.

Robinson, Jonathan, *William of Ockham's Early Theory of Property Rights in Context* (Leiden: 2012).

Roumy, Franck, "L'origine et la diffusion de l'adage canonique *Necessitas non habet legem* (VIIIe–XIIIs.)," in *Medieval Church Law and the Origins of the Western Legal Tradition: A Tribute to Kenneth Pennington,* eds. Wolfgang P. Müller and Mary E. Sommar (Washington, D.C.: 2006), 301-19.

Roux, S., *Christine de Pizan: Femme de tête, dame de cœur* (Paris: 2006).

Rubin, Miri, *Charity and Community in Medieval Cambridge* (Cambridge: 1987).

Xu, Ting and Allain, Jean (eds.), *Property and Human Rights in a Global Context* (Oxford: 2015).

Saarinen, Risto, *Recognition and Religion: A Historical and Systematic Study* (Oxford: 2016).

Safley, Thomas M. (ed.), *The Reformation of Charity: The Secular and the Religious in Early Modern Poor Relief* (Studies in Central European Histories) 30 (Leiden: 2013).

Scheinin, Martin, "Women's Economic and Social Rights as Human Rights: Conceptual Problems and Issues of Practical Implementation," in *New Trends in Discrimination Law: International Perspectives,* eds. Lauri Hannikainen and Eeva Nykänen (Turku: 1999), 1-28.

Siedentop, Larry, *Inventing the Individual: Origins of Western Liberalism* (Cambridge, M.A.: 2014).

Singer, Peter, "Famine, Affluence and Morality," *Philosophy and Public Affairs* 1:1 ([revised ed]. 1972): 229-43.

Slotte, Pamela and Halme-Tuomisaari, Miia (eds.), *Revisiting the Origins of Human Rights*

(Cambridge, UK: 2016).

Stamatov, Peter, *The Origins of Global Humanitarianism, Religion, Empires, and Advocacy* (Cambridge: 2013).

Steiner, Henry J. and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed. (Oxford: 2000).

Stolleis, Michael (ed.), *Policy im Europa der Frühen Neuzeit* (Munich: 1996).

Svenska landskapslagar (1327), vol. 3, eds. and trans. Åke Holmbäck and Elias Wessén (Uppsala: 1940).

Swanson, Scott. G., "The Medieval Foundations of John Locke's Theory of Natural Rights: Rights of Subsistence and the Principle of Extreme Necessity," *History of Political Thought* 18 (1997): 399-456.

Tabarroni, Andrea, *Paupertas Christi et apostolorum*: *L'ideale francescano in discussione (1322–1324)* (Rome: 1990).

Taliadoros, Jason, "Law, Theology, and Morality: Conceptions of the Rights to Relief of the Poor in the Twelfth and Thirteenth Centuries," *Journal of Religious History* 37 (2013): 474-93.

Tierney, Brian, *Medieval Poor Law: A Sketch of Canonical Theory and Its Application in England* (Berkeley, LA: 1959).

———, "Tuck on Rights: Some Medieval Problems," *History of Political Thought* 4:3 (1983): 429-41.

———, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law 1150–1625* (Grand Rapids, MI: 1997).

Tuck, Richard, *Natural Rights Theories: Their Origin and Development* (Cambridge, MA: 1979).

———, "The 'Modern' Theory of Natural Law," *The Language of Political Theory in Early-Modern Europe*, ed. Anthony Pagden (Cambridge, M.A.: 1987), 99-119.

Van den Eijnden, Jan G.J., *Poverty on the Way to God: Thomas Aquinas on Evangelical Poverty*

(Leuven: 1994).

Van Kley, Dale, "Pierre Nicole, Jansenism, and the Morality of Enlightened Self-interest," *Anticipations of the Enlightenment*, ed. Alan C. Kors and Paul Korshin (Philadelphia: 1987), 69-85.

Vermeulen, B.P. and Van der Wal, G.A., "Grotius, Aquinas, and Hobbes: Grotian Law between *lex aeterna* and Natural Rights," *Grotiana* 16 (1995): 55-86.

Villey, Michel, "Abrégé du droit naturel classique," *Archives de philosophie du droit* 6 (1961).

Waldron, Jeremy, "A Right to Do Wrong," *Ethics* 92:1 (1981): 21-39.

Wallerstein, Immanuel, *The Modern World System,* vols 1–3 (Cambridge: 1979–1989).

Walt, A.J. van der, *Property in the Margins* (Oxford: 2009)

Weigand, R., *Die Naturrechtslehre der Legisten und Dekretisten von Irnerius bis Accursius und von Gratian bis Johannes Teutonicus* (Münchener theologische Studien 3, Kanonistische Abteilung 26) (Munich: 1967).

Wellman, Carl, *Real Rights* (New York: 1995).

Witte, John, Jr. and Alexander, Frank S. (eds.), *Christianity and Human Rights: An Introduction* (Cambridge, M.A.: 2010).

Witte, John Jr. and Green, M. Christian (eds.), *Religion and Human Rights: An Introduction* (Oxford: 2012).

Wolf, Kenneth, *The Poverty of Riches: St. Francis of Assisi Reconsidered* (Oxford: 2003).