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PROPERTY AND POVERTY

Between the eleventh century and the fourteenth the economy of Latin Christendom underwent fundamental and rapid transformations. There is, it is true, scholarly debate as to the direction and pace of economic development; but some points are clear enough. The population increased threefold, urban centres attracted an increasingly mobile populace and there was a massive minting of money. At a time when feudal society still flourished, there was a concomitant development of the basic structures of pre-industrial society, most of which had taken shape by 1300, so that many towns were to retain their essential appearance until the nineteenth century.¹ While feudal tenure was still widespread, especially in France, England and the Empire, it appears that in England, by 1300, such tenures were becoming more like private property, transferred by sale as well as, more traditionally, by inheritance. What was formerly seen by historians as the area of 'classic feudalism' has shrunk somewhat, for regional studies in France and the Low Countries have shown that even by the mid-eleventh century allodial holdings, independent of vassalage, constituted the principal form of property. Allods meant that real estate was more mobile than an extensively feudalised society would permit.² More generally, the commercial revolution of this period produced a market economy centred on towns; and the agriculture which was still the main activity of medieval men and women became organised for that economy.³ The desire for new land and for the more efficient exploitation of the land led to massive reclamation projects, to the assessment of property by reference to rental income instead of service and produce, and to the increasing importance of bankers and credit transactions.⁴ Credit and payment techniques in general improved during the twelfth and thirteenth centuries so that turnover became more rapid and the volume of money was increased. It is with such factors as these – with elements in the economic process which defied or

1. Little 1978. 2. Witt 1971, pp. 965–88; Verriest 1959 and 1946. 3. Lis and Soly 1979.
4. Lopez 1971; Herlihy 1958.

transformed traditional feudal relations, rather than with 'classic feudalism' itself – that the discussion here is concerned.

In eleventh-century Tuscan cities, as elsewhere somewhat later, second-line nobles (*valvassores*) became part of the expanded feudal elite. Commercial families and the old aristocracy blended together so as to obscure the distinction between rural and urban power bases; and, especially in Italy, there is evidence for a widespread intrusion of the nobility into the legal and administrative professions. The increasing use of money and the development of an elaborate structure of financial credit in the new market economy, especially conspicuous in towns, gave rise to impersonal transactions unaffected by considerations of the status of buyer and seller; and this helped to produce a mentality in which the seed of capitalism was sown, thereby generating attitudes to property that were to survive into and beyond the early modern era. The distinctive spiritualities of the period between the eleventh and late fourteenth century were also, in part, responses and adjustments to this social and economic change: the laity became more involved in church reform.⁵ The distinctive political and legal theory and practice of this period, the very survival of the political communities of Europe as they emerged in the twelfth and thirteenth centuries, point to the role of money and financial sophistication in the development of civic-spirited, abstract social ties, replacing the earlier mentality based on kinship and blood relationships.⁶

Any discussion of the evolution of concepts of property in this period must deal with some of the ways in which the abstract ties of credit and a faith in the durability of financial relations gained primacy in the public mind even while feudal rights and obligations persisted. In eleventh-century Tuscany there developed a harsh critique of ecclesiastical institutions that accepted gifts in return for spiritual benefits. This can be seen as an offshoot of the Gregorian Reform movement which inspired monasteries to be freer from the world of power, arms and gifts; priests and monks were inspired to be free of the taint of simony, thereby enforcing spiritual authority as autonomous and abstract. It has recently been argued that the reform movement and a pious laity affected by it, challenged a system of values and social relationships structurally dependent on gift and literal exchange.⁷ A growing belief that interpersonal relationships could be predicated of abstract ties was reflected in the renewed use of Roman law categories on the part of the Holy Roman Emperor and his allies and the

5. Little 1975, pp. 11–26; Le Goff 1970; Bolton 1983; Violante 1974.

6. Becker 1981; Goody 1983; Mollat 1974. 7. Becker 1981.

parallel development of canon law categories by a reformed papacy. A collective Christian set of interests and a collective set of civic, universal interests were enshrined both in the Roman and church law compendia and their commentaries. Ecclesiastical canon law developed to encompass ever widening jurisdiction in men's lives as did civil law. The nuclear family replaced the extended family solidarity.⁸ Marriage achieved sacramental status; dowries became real contracts; wills became true contracts of alienation with the right of *usufruct* at the end of the eleventh century. Notarial formulae came into vogue to guarantee universal legitimacy. The two laws generally classified human behaviour and reified obligation through written formulae in a more mobile, increasingly literate and pious lay society. Roman law projected a vision of legal order that was more stable, autonomous and more universal than the clannish, localised laws of an earlier period. In business as in law, the shift was away from voluntary and amiable transactions ruled by the principle of *convenientia*, that resulted in pacts publicly verified through witnesses and iconic documents enshrining benefactions, towards more impartial legal norms. This was related to a renewed and realised notion of Empire on the part of the Hohenstaufen and an extension of power over local communities through an extension of a more universal tribunal that was fuelled by credit transactions and taxation in money. Ancient imperialism and republicanism were revived in theory, made explicit in revived Roman law, and previously unexplored libraries were examined to reveal ancient texts to justify papal or imperial attempts at consolidation of power. Illegitimacy was censured, ecclesiastical concubinage was condemned, and, in general, a pious laity intervened in the reform of the local churches. Collective contracts between landlords and peasant communities evolved into communal rural statutes in favour of the survival of the community. Communal assemblies were charged with administering parish properties. Twelfth-century Lombard communes corporatively owned and claimed customary rights in pastures, fishing, mills, ovens, banks, food-markets and houses built on public streets. The possibility of living an authentic Christian life whilst remaining of the world (and therefore, not retreating to the monastic cloister) was gaining force, and one observes the shift in legal justifications for private, public and corporate ownership of property. Some of the first juridical texts to define the status of the laity, Gratian's *De matrimonio* and his collection of ecclesiastical law, the *Decretum* (c. 1140), described men as righteously married, tillers of the soil, capable of

8. Goody 1983; Violante 1953.

adjudication amongst themselves, and with the rights to pursue their own affairs as possessors and users of worldly goods.⁹ On the subject of economic policy, city authorities and larger states came to be seen as the appropriate regulators. In effect, Empire and papacy, the two major forces behind the two collected bodies of law, Roman and canon, began to realise more fully in practice their two competing theoretical jurisdictions over Christian lives.

Through the minting of coins and the lending of money at interest, the European commercial revolution came to maturity well in advance of either the concept or reality of the state.¹⁰ It is a commonplace of medieval textbook history that the keystone of feudal government was the personal agreement between a lord and a vassal to exchange, mutually, protection of a gift of land for counsel and military support and incidents in kind. By at least the early twelfth century on the continent, early thirteenth century in England, the personal agreement between two consenting parties to the feudal contract was beginning to be replaced by money payment. The encroachment of a profit economy on government is apparent in the development of a salaried bureaucracy of lawyers, administrators and publicists. Those who moved into the cities from the surrounding countryside adopted a single function as a means to earn their way, raising problems concerning the moral probity of some of the urban professions. Simultaneously bourgeois professions like the lawyer, doctor, administrator were both pursued and also scorned.¹¹ If the major vice had once been pride it was now seen to be joined by avarice,¹² and numerous lay religious movements emerged whose members attempted to live as voluntary paupers, confronting a moneyed economy with a challenge to all coercive power and to the impersonality of financial credit. They rejected the daily materialist world in favour of a return to what was interpreted to be a primitive church community living without ties either to money or material goods and property. An age of finance was producing on the one hand a revived *contemptus mundi*, and on the other the opportunities for pious laymen to be involved in urban society, creating new forms of religious expression for those laymen who needed to be reassured that making money was indeed a Christian activity. The early thirteenth-century debates over the legitimacy of the activities of judges, notaries,

9. Dist. I c. 7. 10. Bisson 1979.

11. Baldwin 1970; Le Goff 1963, pp. 46–7; Baldwin 1959; Little 1978.

12. Damiani, *Laus eremiticae vitae*, PL CXLV, 247–8; *Opusculum* XII, iv, PL CXLV, 255; Ep. I, 15, PL CXLIV, 234; Ep. III, 2, PL CXLIV, 289; *Contra clericos regulares proprietarios*, VI, PL, 490; Little 1971.

merchants, teachers, prepared the way for the justification of these professions by the end of the century. As we shall see, the new mendicant orders of the thirteenth century made a unique contribution to the already elaborate theological and legal justification of property and wealth. The friars became some of the major voices in scholasticism, treating issues close to the heart of their own recent foundations: the role of private property, the just price, the nature of money, the morality of professional fees, commercial profit, business partnerships and usury.¹³ The moral and intellectual problem of the legitimacy of private property had not been raised in this way since the patristic period. Private property was justified for the convenience and utility of men.

The tradition of Roman law was invoked, as was the newly translated corpus of Aristotle's writing, to elaborate on the naturalness of ownership and the necessity of private property as an instrument of the good life and the ordered society. The notion of lordship (*dominium*), the various forms of use of property that one might rent or lease for money, and the notion of private property as a distinguishing characteristic of the individual who was seen to be a rational, rights-bearing *persona* with certain capacities regarding the goods of his world, issued from a situation in which the status of buyer or seller was increasingly coming to be of no consequence in the transaction.

Property and Roman law: the classical position, its revival and modification

In this environment it is not surprising that Roman law had both a theoretical and practical role to play. According to classical Roman private law, which pertains to persons, things and actions, the *ius rerum* is the law of patrimonial rights, all those rights known to the law which are looked on as capable of being estimated in money.¹⁴ Institutionally a *res* is some element of wealth, an asset with a legally guaranteeable value; it is an economic conception. Justinian speaks of *res corporales* as physical, material objects, and the notion of lordship or *dominium* is treated not as an abstract right but as ownership of corporeal things,¹⁵ although there is also a range of inferior modes of ownership like *usucapio*, *mancipatio*, *possessio*, *dos*, *tutela*, *dominium bonitarum*.¹⁶ Informal transfers of land were possible in the time of Gaius so that a *dominus* could lose all practical interest in the land he sold without

13. Above n. 11. McLaughlin 1939, pp. 81–147; McLaughlin 1940, pp. 1–22; Noonan 1957; Gilchrist 1969; Roover 1971; Le Goff 1960, pp. 417–33.

14. Buckland 1975, pp. 181–2. 15. *Ibid.*, p. 185.

16. *Ibid.*, pp. 187–8. Inferior modes of ownership, pp. 194–6; *occupatio*, pp. 205–6; *bona fide possessor*, p. 224; *traditio*, p. 227; *usucapio*, p. 242; *usufruct*, p. 270.

formally transferring *dominium*; only by a lapse of time did *dominium* also pass to the purchaser although in the mean time all practical rights in the land were transferred to the buyer. *Dominium* in classical Roman law was an ultimate right,¹⁷ one was an owner in perpetuity, even if this meant the *dominium* had no practical content. But by Justinian's time the distinction between *dominium* and its inferior modes began to be relaxed, and the classification of modes of acquisition of *dominium* grew more ambiguous and confused. Civil law modes of acquisition included *usus* – acquisition by use; *usufruct* was the inalienable right to enjoy the property of another and take the fruits therefrom, a right separate from ownership.¹⁸ But since the usufructuary was bound to return the thing (land) in good condition there could be no *usufruct* of perishable goods. As we shall see, this would cause thirteenth- and fourteenth-century Franciscans serious problems since they wished to maintain their status as mere users, even of consumables, arguing that consumables were somehow still not owned by them. Furthermore, that *possessio* and *usus* could be seen as distinct from ownership (*dominium*) in classical Roman law set a standard for mendicant attitudes to property in the thirteenth and fourteenth centuries. The papacy became, according to a legal fiction, the *dominus* of what the Franciscans, owning nothing, had the right to use.

West Roman Vulgar law,¹⁹ practised during the period of Diocletian to Justinian saw a number of alterations in classical Roman law that were incorporated into the Roman portions of various barbarian legal codes and thus passed as legacies to the later middle ages. Especially in the field of property and obligations there were numerous changes. The classical notion of *dominium* as a complete and positive mastery over a thing quite distinct from possession, and having its own legal remedy, disappeared in the post-classical period. Limited *dominium*, especially *usufruct*, came to be treated as that form of *dominium* which was to be regarded as the best right to possession, without separate remedies for owners and possessors. The nature of the distinction between *dominium* (defined as property or ownership considered as title) and possession (as practical enjoyment) was central to the development of medieval canon and civil law attitudes applied to contemporary situations of the twelfth through fourteenth centuries.²⁰

Italian Roman jurists habitually translated *dominium* by the word *signoria*, and meant thereby that the feudal lord had the ultimate right to a thing

17. I.e. that which has no right behind it. It may be a *nudum ius* with no practical content. Buckland 1975, p. 188. 18. *Ibid.*, p. 270. 19. Watson 1968; E. Levy 1951; Wieacker 1961.

20. Gaudemet 1979.

which was, in effect, a minimum right left over when the rights of his vassals were removed.²¹ Customary law (in England, the common law, where *seisin* was akin to possession) appears to have drawn upon Roman law categories to classify and justify the slow evolution of customary practices throughout Latin Christendom, practices that were often alien to Roman civil law.²² And where they could, lawyers drew upon the various and often ambiguous Roman categories (which they none the less saw as constituting a universal jurisprudence) to arrange what had become a hierarchy of actions descending from the purely proprietary to the purely possessory, the latter having become a matter of degree. Feudal practices and the expanding use of money valuations combined to produce a situation in which two persons could dispute over who had the best right, the *maius ius* of *seisin* in a property; by the later middle ages the question was not simply which of the two was the owner (*dominus*).²³

English lawyers during the second half of the twelfth century were introduced to Justinian's Roman law by Master Vacarius, and even where the English common law or ecclesiastical canon law was seen as more specifically authoritative in individual cases, Roman civil law principles and structures fundamentally moulded the other two laws.²⁴ By the 1250s royal jurisdiction over freehold land was extensive, and Bracton's arrangement of remedies and procedures in the king's court point to a compromise between Justinian and earlier custom as in Glanvill.²⁵ And Bracton draws on his extensive knowledge of learned, academic Roman law and glosses, incorporating lengthy extracts. From Azo he gets much of his account of the original division of things and the natural modes of acquiring them.

Azo (c. 1200) had distinguished between property that was natural and that which belonged to civil law or the law of nations. Other civilians, however, denied that there was any property that was an institution of natural law; rather it belonged to the *ius gentium* and *ius civile*, to convention. Likewise, in Roman law texts, some ways of alienating property were based on civil law, others on the law of nature. In Gaius' *Institutes* we learn that natural ways of acquiring title to property include tradition, occupation, the capture of an enemy's property, accession, etc. But then in the *Digest*, excerpts from Gaius' works say that acquisition of ownership comes only through the civil law or the law of nations, both of which base themselves

21. Buckland and McNair 1952, pp. 65–6. 22. J. Ph. Lévy 1976.

23. Buckland and McNair 1952, p. 67. 24. Stein 1969; Stein 1975, pp. 119–38.

25. Bracton, *De legibus et consuetudinibus Angliae*, ed. Thorne 1968–77; Barton 1971.

on natural reason. Acquisition by tradition, occupation, etc., is attributed here to the law of nations. Other jurists in the *Digest* vacillate between stating that by the law of nature all things are held in common, or that some things are naturally private; some modes of acquisition belong to the *ius gentium* and are natural, while others belong to the conventional, positive civil law. The *Institutes* of Justinian merely repeat the ambiguities of the *Digest*. Various medieval legal theorists chose one position or another to serve their purposes.

There are essentially two views one finds in civilian texts dealing with *dominium* and *possessio* of the thirteenth century: either a distinction is made between *dominium* as a passive mastery over property and the *ius* or active right to use this property; or there is a failure to make this distinction so that *dominium* is the same thing as *ius*. In practical terms thirteenth-century law appears to have begun to protect users. Early glossators of the Roman law distinguished between *dominium* and *usufruct* as they found it in classical Roman law. But the Bolognese glossator Accursius (1220–30) argued that there was a *dominium utile* which described what a usufructuary possessed, while *dominium directum* described what a superior lord possessed. *Dominium utile* was to be taken as any *ius in re*, any right which could be defended against all other men and it could be transferred or alienated by the possessor to others.²⁶ This is distinct from classical Roman law which said that alienation of the right of *usufructus* was not possible.

Bartolus in the fourteenth century indicated that users *de facto* had extensive rights akin to *dominium* over their property recognised in law. The debate in the thirteenth and fourteenth centuries consequently tried to determine whether these rights of users were conventional creations of social life and the civil government and its laws, or whether a conflation of *dominium* with *possessio* and *usus* was a characteristic of men prior to governments. Do men have rights over things before government gives them such rights by recognising them as possessors in law? Is property natural to man or is property only natural to man after the Fall?

The early church fathers accepted a theory that private property was a result of Adam's Fall and expulsion from the Garden. Arguments from Ambrose and Augustine, where property divisions were to be seen as the fruits of sin, as conventional creations of the state, instituted to keep the peace, were taken over by canonists and civilians who could not resolve the contradiction between those who held that all was common by nature and that there was no private property from nature, and those who argued that

26. Meynial 1908, p. 419.

some modes of property acquisition were indeed natural. Alexander of Hales in the thirteenth century would argue that property was 'natural' only to Fallen Man.²⁷ And that there was a frequent conflation of *dominium* and *possessio*, of lordship and use, further confused the issue. Before we observe how significant thinkers of our period came down on one side or another, resolving the questions of the origins of private property and its use in favour of whatever publicist position they were inclined to adopt, we should observe what in practice was occurring during the thirteenth century. There were extraordinary changes in attitudes to customary feudal obligations and notions of holding land and alienating it, and much legal theory reflected this. Taking the case of England we can tell the following story about property.

Feudal to capitalist dominium and possessio.

Reconstructing the feudal component in the structure of English society around 1200, from Glanvill and plea rolls of Richard I and John, we confront the formulaic, rule-bound expression of a customary, feudal and rule-bound practice of twelfth-century human relationships between diverse ranks. The unspoken relationship behind court cases is seigniorial and the underlying question has to do with entitlement – to hold land, to expect services, in what was a mutual contract between lord and vassal. Side by side with the king's court was the feudal lord's court, the royal justice trying to reinforce the feudal system by making certain that lords were not abusing their side of the feudal bargain. Royal justice was not meant to replace seigniorial jurisdiction but provide a sanction against its abuse. But through the records we see a waning of this dialectical mutuality of lord and vassal so characteristic of feudalism. According to Milsom, by the end of the thirteenth century land tenure is drained of much of this mutuality, and tenements and dues appear as independent properties in most regions, fixed by an external, centralised legal system, that of the king. The seigniorial order was rapidly destroyed as a result of what some have called a juristic accident – the development of central royal government (through the writ of *novel disseisin*). Although some would argue that Milsom's description is too sweeping a generalisation, and that feudal obligations still existed, however difficult to quantify, there is little doubt that at the end of the thirteenth century courts were dealing with rights *in rem*, rights good against the world; in the earlier feudal world rights as individual possessions

27. *Summa fratris Alexandri*, 1948, vol. iv, p. 348.

were a nonsense, and it was tenures rather than property rights that were being protected in earlier courts. Feudal *theory* became increasingly anachronistic as the centuries passed. By 1290 an objective enforcement was to override customary lordship and mutual service, with seigniorial courts having become agents of royal law in practice. The picture is now two-sided rather than mutual: a tenant makes his claim to his right to his tenement (*possessio*); the lord makes his claim to his right of dues (*dominium*). Each is an independent property, each passes from hand to hand without reference to the other. The tenant or possessor *de facto* owns his land and the lord has a residual 'servitude' over the land, a *ius in re aliena*. Although much land still changed hands by inheritance, by the end of the thirteenth century, *dominium* increasingly was seen as independent property and no longer a relative, interdependent thing. By the end of the thirteenth century, Latin Christendom could be characterised as a congeries of communities of equal owners disputing abstract rights over property; and although lords were left with fixed economic rights over property the land belonged to the tenant. What was once a right to hold land of a lord in return for feudal dues had turned into the right of ownership acquired by money. The lord could no longer prevent alienation of his lands by his tenants who became 'owners' of the property; the alienator was, however, forced out of the relationship and the grantee substituted for him and, as the new owner, owed nominal 'services' (income) to the lord. The monetary evaluation of land supplanted customary relationships so that the fee simple became an estate whose ownership was an article of commerce. The legal framework in England had changed from a feudal to a national, common law about land. Freehold land came to be what it is for us, an object of property, capable of alienation with the lord's rights being merely economic, but irrelevant to the conveyance of the land. Possessors or tenants were owners, in England and on the continent, and their individual rights were defensible before the law.²⁸

Property and canon law

When Gratian came to collect the discordant canons of early church councils along with the several theories of property espoused by church fathers, he was faced with selecting those documents that had survived the Dark Ages and were to be revived and regarded as living law. He saw the juridical church as distinct from the evangelical experience so important to

28. Milsom 1976; Milsom 1969.

the radical, reforming laity of the time. His *Decretum* provides us with the prevailing assumptions concerning the proper distribution, control and social obligations of property in the twelfth century.²⁹ The opening pages raise the problem of the natural law in relation to private property and it was his ambiguous presentation of the natural law that provided problems for future canonists whose task it was to unravel the tangle in this textbook of church law. Canonists generally accepted the contemporary structures of property relationships as both necessary and just, a system in which individual property rights were acknowledged and attended by corresponding obligations. Not only individual Christians but also the Church as an institution were substantial property holders. Canonists were faced with framing an acceptable doctrine of property that was consistent with early church legislation. But they also dealt with the criticism of contemporary radicals who favoured a poor church living along what they believed to be apostolic lines. The *Decretum* collected arguments of church fathers who defended the virtuous use of wealth but it also included citations from those who were violently opposed to the abuses of wealth, implying thereby a condemnation of private property often in favour of a primitive communism as described in Acts 4: 32–5. According to some venerated texts, private property seemed contrary to the law of nature. Believing that in the creation God implanted in the nature of things as well as in man's nature, principles of rational conduct that were perpetually binding and immutable, Gratian notes that the human race is ruled by two norms, natural law and custom. The first is that which is contained in the Old Testament (Tobias) and the Gospels, by which everyone is commanded to do to others that which he wishes done to himself, and each is forbidden to do to others what he would not have done to himself.³⁰ This natural law is common to all nations, held everywhere instinctually rather than by positive legal enactment, and it sanctions the coming together of men and women, procreation, the common possession of all things, the liberty of all, the acquisition of whatever may be taken by air, land or sea, the restitution of goods or money loaned, the use of force to repel force.³¹ It is by natural law that all things are common to all men. But the laws of custom and legal enactment enable men to say 'this is mine'. Citing Augustine, who argued that private property was a creation of imperial law and was not a characteristic of natural man before the Fall, the *Decretum* notes that the human laws that permit us to say 'this house is mine' are laws of emperors and kings of the world, laws that are distributed by God by means of earthly

29. Tierney 1959. 30. Dist. I ante c. 1. 31. Dist. I c. 7.

rulers.³² However, if any customary or written law is found to be contrary to natural law, it must be considered null and void. Here was a problem: if all was originally common according to natural law, then it could be the case that positive law establishing private property ran contrary to the natural law and private property rights were null and void. If every man by natural law had the right to help himself to secure his needs then how could private property be justly maintained?

And yet there were many instances in the Bible which showed private property to be acceptable. What then was to be understood by the expression ‘natural law’?³³ Some saw it as describing those original primitive conditions in which men lived when they were as yet untouched by civilisation’s conventions. Others used it to describe psychological and physical characteristics of men no matter what environment in which they found themselves. Gratian included both senses of natural law. In failing to distinguish between conditions of primitive society and conditions proper to human society which satisfied intellectual, psychological and spiritual human needs, he offered a problem for canonists that was never fully resolved in our period.

The *Summa Parisiensis* (c. 1159)³⁴ noted that when a community of property is said to be prescribed by the divine law, it should be interpreted to mean that, in the beginning, the primeval institution was communal property. Rufinus (mid-twelfth century)³⁵ argued that some parts of the natural law (commands and prohibitions) were indeed immutable, but other parts were mere *demonstrationes*, having nothing morally binding about them. The community of property was not morally binding. The natural law of common property was merely a description of the early state of society and was not meant to be taken as a command for all times. The two most influential decretists, Huguccio and Johannes Teutonicus put forward a different solution. Natural law, equated with rational judgement, tells us that all things are common, to be shared in times of necessity with those in need.³⁶ Natural reason teaches us that we should retain for ourselves only necessities and thereafter distribute what is left to neighbours in need. This passed into Johannes Teutonicus’ *Glossa Ordinaria*.³⁷ According to our rational, natural instinct we know that all things are

32. Dist. 8 c. 1. 33. Weigand 1967.

34. *The Summa Parisiensis on the Decretum Gratiani*, ed. McLaughlin 1952, ad Dist. 8. c. 1.

35. *Die Summa Decretorum des Magister Rufinus*, ed. Singer 1902, ad Dist. 1, p. 7.

36. Cited in Lottin 1931, p. 110; Tierney 1959, p. 146 n. 17.

37. Dist. 47 c. 8; Johannes Teutonicus, *Apparatus ad Compilationem Quartam*, MS 17, Gonville and Caius College, Cambridge, Gl. Ord. ad Dist. 1. c. 7.

common in that they are to be shared in time of necessity. Here Johannes drew upon classical Roman law saying that in time of need all things were common. This was, however, an abstract rendering of a law that, as we have already seen, spoke in corporeal rather than abstract terms about property rights.

The *Decretum* also provided patristic texts that dealt with the right to own property as well as with its appropriate use.³⁸ Ambrose discussed the duty of the rich to help the poor, questioning whether the rich had a right to own property at all divorced from this obligation of charity.³⁹ Johannes Teutonicus avoided the implication that communal ownership was a norm, and explained Ambrose's text by saying that private property is not denied; rather what is denied is the right of anyone to appropriate to himself more than suffices for his own needs. Thus, in times of necessity any surplus wealth is to be regarded as common property to be shared by all those in need.⁴⁰ Thereafter the term 'superfluities' was discussed and some of the major debates concerning almsgiving either as a duty or as a voluntary virtuous act developed from here. If canonists accepted that superfluous property belonged to the poor in need, they none the less never developed arguments concerning private property with egalitarian implications.⁴¹ And they took into account that superfluity of wealth was to be measured according to what was considered decent and fitting to one's status in society. In a wider sense they cited Roman law in agreement that 'it is expedient for the commonwealth (*res publica*) that a man should not use his property badly'.⁴²

Confronting contemporary radical pious opinions (Patarini,⁴³ Humiliati,⁴⁴ Poor Men of Lyons, etc.) which doubted that there was any virtue or necessity in the church owning property, canonists defined prelates and bishops as *trustees* rather than owners, acting on behalf of the real owner. Who was the real owner of church property? Gratian had said, under the influence of Roman law, that a cleric could own private property but that if he did so he could not also draw income from the Church.⁴⁵ Later canonists disagreed. Johannes Teutonicus argued that any cleric could own property unless he had taken a vow of poverty. If, however, a wealthy cleric accepted an ecclesiastical income from avaricious motives he was guilty of sin. Although there was a growing belief in the thirteenth century that a

38. Dist. 47. c. 8. 39. St Ambrose, *PL* xvii, 613–14.

40. Gl. Ord. ad Dist. 86 c. 18. possumus &. 41. Tierney 1959, p. 37.

42. Gl. Ord. ad Dist. 47. c. 8 s.v. *Aliena*. 43. Violante 1955. 44. Bolton 1975, pp. 52–9.

45. *Decretum* C. 12 q.1 post c. 24; Tierney 1959, p. 39.

priest did have a right to receive compensation for his services to the Church, he was not considered the owner of the church property he merely administered. Some argued that a corporate group of clerics or a cathedral chapter could be an owner, but ultimate ownership of church goods inhered in God or in the poor.⁴⁶ The position developed that true *dominium* or ownership of church property could only inhere in the whole collective body of clergy. Innocent IV went further and referred to the Church as the mystical body of Christ so that the Church's property belonged to the whole Christian community.⁴⁷ Hostiensis amplified Innocent's arguments and stated that *dominium* in fact rests with the *congregatio fidelium*. The poor and needy were to be supported from the goods of the Church for they had a *right* to this support from the common property of the Church. On this view the use of church property on behalf of the poor was not charity but an established legal use of public property whose purpose was the maintenance of the common welfare and especially the sustenance of the needy poor.⁴⁸ If in the thirteenth century this was enshrined in canon law, expanding the jurisdiction of the Church over all Christians in need, it was a conception that had already proved to be an issue for churchmen in the early twelfth century who were confronted with the ambiguities of the Gregorian Reform regarding wealth. Gerhoh of Reichersberg (1093–1169) increasingly insisted that the idea of the Church renouncing its wealth would weaken it irremediably, preventing it from fulfilling its duties to the poor. He decided that the Church was to persevere and increase its patrimony by whatever means, although revenues should be more equitably distributed with priority to the poor. And he accorded a privileged place to the voluntary poor, the canons regular, the new order to which he himself belonged. The clergy, he said, should be deprived of all personal property but the Church must be rich to support its voluntarily poor members.⁴⁹

Overlapping jurisdictions

What is clear so far is that by the thirteenth century with the immense growth of papal governmental activity promoted by the Gregorian Reform, by papal leadership of the Crusades and by the papal revival of legal studies to suit its needs, canon lawyers were defining a power of

46. Glosses *Ecce Vicit Leo*, MS. o. 5. 17, Trinity College, Cambridge, and *Glossa Palatina* (1210), MS. o. 10.2, Trinity College, Cambridge, *ad c.* 12 q. 1 c. 13; Tierney 1955a, pp. 118–19.

47. *Commentaria ad x.* 2. 12. 4.

48. Tierney 1959, pp. 42–3; Hostiensis, *Summa Aurea super Titulis Decretalium*, 1612.

49. Gerhoh of Reichersberg, cited in Vauchez 1970, p. 1570.

ecclesiastical jurisdiction that was distinct from the domain of the individual's interior intention. They spoke as well of the ecclesiastical power of jurisdiction in the public sphere over material goods and of *dominium*, the *potestas jurisdictionis in foro exteriori*. If *dominium* of the Church's property rested with the whole Christian community where clerics were stewards who administered temporal goods, then this came very close to saying that the Church possessed a coercive power like that pertaining to a public authority, directed to the common good of the faithful.⁵⁰ The question of *dominium* and the role of the Church in administering wealth and property was providing arguments for the Church possessing truly governmental powers, an argument that developed the much earlier Gelasian view concerning the relationship between royal power and priestly authority. The debate between *sacerdotium* and *regnum* and the conflict of jurisdictions was to reach its height in the confrontation between Philip the Fair of France and Boniface VIII at the turn into the fourteenth century. Although Innocent IV had declared that 'the jurisdictions of pope and emperor were distinct',⁵¹ at the turn of the fourteenth century Boniface VIII was to declare that 'the papacy has universal coercive power and that *imperium* depends upon the Church'.⁵² The question of *dominium* was to become one of the exercise of political authority. Pierre de Flotte, emissary of Philip the Fair, was able to reply to Boniface's 'we have universal power' with: 'certainly, my lord, but yours is verbal whilst ours is real'.⁵³

Aquinas on property

Drawing on this mass of civil and canon law as well as on the newly translated *Politics* of Aristotle, Thomas Aquinas developed a magisterial and synthetic theory of property in his *Summa Theologiae*.⁵⁴ His was not merely a theoretical exposition of property rights, presenting the canonical and civilian state of play in the mid-thirteenth century; it was also an eclectic presentation of the century-long battle between the mendicant orders and the seculars within the ecclesiastical community, and Aquinas as a

50. Oakley 1979, pp. 27–8. 51. *De iudiciis, capitulo 'Novit'*, c. 13, X (2.1).

52. *Unam Sanctam*: 'papa utramque gladii habet potestatem et ab ecclesia imperium dependeat': Text no. 5382 in Register; H. Denifle, *Specimina palaeographica ex Vaticani tabularii Romanorum pontificum registris selecta* (Rome, 1888), p. 44 and Table XLVI.

53. 'Utique domine, sed vestra est verbalis, nostra autem realis': *Acta inter Bonifacium VIII, Benedictum XI, Clementem V et Philippum Pulchrum Regem Christianum* (1614), fol. 164v. Cf. pp. 546–7 above.

54. Parel 1979; Aquinas, *Summa Theologiae*, ed. Spiazzi 1951.

Dominican was directly concerned with the outcome of this discussion. The juridical aspect of the question of property was, for him, rooted in the metaphysics of Greek, Roman and patristic thought, in which, more generally, material goods were taken to be means to a higher end for man, to be used rather than enjoyed in their own right.

Through his reason man is a master of what is within himself and also he has mastery, *dominium*, over other things, not by commanding but by using them.⁵⁵ His capacity for reason makes man a person, which is the most perfect thing in all nature.⁵⁶ His goal is twofold: in this life it is felicity, in the next, it is beatitude. Material goods are subordinated to higher ends. Riches, honour, glory, bodily well-being and sensory pleasures are not the ultimate end of human life.⁵⁷ Thus man's desire for material goods has only instrumental value, as a *bonum utile*, a means conducive to an end which transcends any use to which property may be put. Property is a means to this end rather than the end in itself. And it is in the very nature of material things, in their transitoriness, that they are unable to satisfy human desires completely. The place of private property is therefore within the larger consideration of material things, and Aquinas asks whether it is natural for man to possess exterior material things, distinguishing between the nature of material things and the use to which they are put. Man has no *dominium* over the nature of material things for only God has such *dominium*. But man has a natural *dominium* over the use of material things to his benefit.⁵⁸ Initially then, *dominium* is taken to be that indeterminate capacity, that authority which reason has over its own acts, over the acts of the human mind and will. This extends to material things as well. Possession is a specification, a determination of *dominium*, extended to material goods.⁵⁹ Man therefore, was created with *dominium naturale* in this wider sense which did not specify the mode of possession, be it private or in common. Possessions were originally required to be for the use of all mankind. Private property is not wrong but it is a mode of possession that has only conventional justification (*ius gentium*), and the primary recognition of the purpose of property is its use for men in pursuance of higher ends. Man is described as having the capacity to care for and exchange material goods and it is permitted that he possess things as his own. Human affairs are more efficiently organised when each has his own responsibility over his own things for there would be chaos if everyone cared for everything. Men live together more peaceably when each has what suits his own taste; quarrels would erupt were they to

55. Aquinas, *Summa Theologiae* 1 q. 96 a. 2. 56. *Ibid.*, q. 29 a. 3. 57. *Ibid.*, 1 II q. 2 a. 1–8.

58. *Ibid.*, 1 II q. 66 a. 1. 59. *Ibid.*,

hold things in common without distinction.⁶⁰ But natural law does not specify how private property should be arrived at and therefore historical institutions determine distribution; private possessions are not contrary to natural law but are inventions of reason. They are human additions to natural principles.

Dominium naturale provides for a primary right of use which takes precedence over the power to acquire and exchange private property, the latter being only a secondary right. And when there is a superfluity of private goods, there can be no justification for its being maintained as private; natural law teaches that this surplus is due to the poor. Man's needs have to be met by such material goods that suffice to living and a surplus can only be justified in terms of its social use.⁶¹ Thus, wherever necessity exists, it is permitted to expropriate a surplus held privately by another without being considered a thief, whether one expropriates this secretly or openly. In extreme necessity a starving man may take what is necessary to free himself from certain death. Furthermore, private owners do indeed have freedom to acquire and exchange as they wish, but when the common welfare is at stake, the civil law is obliged to activate the natural law principle of the primacy of use over ownership, and civil law must regulate property in the interest of the society as a whole.

Turning to the vexed issue of the different kinds of use of things, especially of consumables, Aquinas argues that when things are used through consumption, what has been exchanged is the ownership of the consumables as well as their use. Franciscan apologists argued, in contrast, for the separation of use and *dominium* in consumables. But where the use of a thing can be distinguished from its ownership (house, land), then a rent may be offered for use without the concomitant transfer of *dominium* or ownership. Money is a consumable, but it is not, according to Aquinas, saleable. When there is a lending of money, what is transferred is both its use and *dominium*. Usury violates the justice of selling what is not saleable because in charging interest on a loan you are charging for something you no longer own and whose increase in value comes through the use made of the money by others. This does not mean that men ought not to seek shares of profit in some investment in a trading or manufacturing company, and, of course, renting land is legitimate. Profit in trade and commerce is to be had privately but it too must be governed by his principle of the primacy of social use for superfluities. There is a kind of natural business which has a social purpose other than the pure self-assertion through the accumulation

60. *Ibid.*, a. 2. 61. *Ibid.*, a. 7.

of private property and wealth. Such natural business is moderate, and its purpose is the maintenance of life rather than the accumulation of profit for its own sake.⁶²

Aquinas is therefore not against profit that is socially beneficial and he goes well beyond Aristotle in his positive attitude to business activities whose proper purpose is the making of a moderate profit to support a family, the poor, or to contribute to the public good. But nothing is exercised here without due reason and limits. Property is not an end in itself nor is the right to it unlimited. Men live in a world created by and for their fallen natures and they are prey to the vice of avarice and immoderate accumulation. Avarice can become so dominant in a man's character that money can replace his true end, felicity. Avarice is the immoderate appetite for temporal things which have a measurable valuation.⁶³ A society in which money transactions have increased the possibility of monetary misuse increases the range of avarice. There are fools, he notes, who believe in only those goods which can be acquired by money.⁶⁴ Avarice dehumanises man, reversing the right order of things so that men enjoy rather than merely use their possessions. It is of utmost importance, then, that men develop an inner freedom from avarice, an internal control that is more significant than external legal regulations of property. Men must obey their desire for natural wealth which is terminated when natural needs are satisfied. Without this internal freedom social disorder becomes the norm and men take things that rightfully belong to others.⁶⁵ The inordinate desire for money and property is the root of all evil. When the accumulation of property becomes the end of human existence, then avarice subverts the moral and social order creating a situation in which men are incurably dehumanised. The use of money and property must be guided by the virtue of liberality, whereby the quantity given is of little consequence in comparison to the attitude of the giver. Liberality creates in man that attitude of indifference towards one's own possessions, creating an inner freedom which alone allows them use rather than the enjoyment of material goods. This liberality is the founding virtue of a good society.⁶⁶ It inspires justice in the social forum where there is respect for the property of others and the obligation of fairness in property exchange. Only with justice can the rule of equality prevail over every public consideration of ownership. And only a good government can maintain just property relations, directing its authority towards the common good. The good law-

62. *Ibid.*, q. 77 a. 4. 63. *Ibid.*, I q. 63 a. 2 *ad* 2; II II q. 78 a. 2. 64. *Ibid.*, I II q. 2 *ad* 1 and 3.

65. *Ibid.*, II II q. 118 a. 1 *ad* 2 and a. 8. 66. *Ibid.*, q. 117 a. 6.

giver, then, following Aristotle, has the responsibility for justly regulating private property for the common good. We are no longer in a society of lords and vassals but in one of kings and subjects where there is an acceptance as a proper concern of royal government and its courts of the whole field of torts.

*Definitions of 'the poor'*⁶⁷

The poor may be defined, in a period when agriculture is the dominant means of subsistence, as those who do not possess a minimum of arable land sufficient to support a family; a family of four, say, in the thirteenth century required 4 hectares. It appears that in our period the spread of a money economy and commutation of labour services into rents in money helped only a minority of wealthy peasants. Fixed land rents, facilities for borrowing, the sale of franchises contributed instead to a differentiation and polarisation amongst an already differentiated peasantry, enmeshing the less well-off who did not move to towns in a web of debts, binding them in effective slavery to the economy of urban centres or to their better-off neighbours.⁶⁸ Although the population between 1000 and 1300 grew faster in towns than in the countryside, the vast bulk of the European population lived in the country. But it was the towns which determined the course of economic development through the rise of commercial capitalism based on a rural economy whose agrarian production increased substantially. Whilst feudal landlords became increasingly involved in the expanded market and urbanisation, the increasing production for this market disrupted the peasantry and accelerated the social differentiation between rich and poor. This process has been described as 'the proletarianization of a steadily increasing number of people alienated from the land'.⁶⁹

Furthermore, until the fourteenth century, merchants and entrepreneurs remained two distinct groups, and a growing tension between artisans and a merchant patriciate became evident by the end of the thirteenth century. At the same time the bulk of the rural population lived in penury: around 1300, between 40% and 60% of the European peasantry had insufficient land to maintain a family; they survived by wage labour and contributed to the increasing numbers of shifting, landless paupers in search of work – a quest which often led them into towns. The fourteenth century saw a growth in pauperisation amongst the urban masses who were not integrated into

67. Mollat 1974 and 1978; Bosl 1974; Bosl, Graus and Devisse 1974; Goglin 1976.

68. Duby 1966, pp. 25–33. 69. Lis and Soly 1982, pp. 1–25.

confréries and *corps de métiers*, which led to frequent eruptions of urban violence.⁷⁰

The vocabulary of the social categories used by canonists and moralists in the thirteenth century reveals perhaps the most fundamental of contemporary oppositions in the pair *dominus/servus*.⁷¹ The *servus* is a part of society, he submits to a certain number of obligations and possesses rights limited by those who act as master or *dominus*. The *dominus* is the proprietor, the possessor of land and of *servi* attached to the property, and he draws revenues from the exploitation of both. This *dominus* possesses *dominium* which is essentially an economic capacity. The Dominican Raymond of Penyafort in his *Summa de casibus poenitentiae* suggested that if by chance a landholder was unable to draw profit from his lands it was advisable that he at least collect symbolic rents from his dependents as a sign of their subjection and to avoid the situation in which his proprietorial rights might seem purely theoretical (*inanis*).⁷² The *dominus* was also he who possessed jurisdiction, authority to govern, to establish justice, to levy taxes in return for maintaining the security of his *subditi*, and to wage war within established limits.

Poverty is a relative notion, determined by what is taken to be privation and the needs of men in different contexts. In Carolingian times the *dominus* was a *potens* in contrast to the *pauper*, the man with authority in relation to the dependent impotent.⁷³ The latter had originally no rights, no weapons, was often unfree and laboured for survival. His *pauper* status was only in part ascribed to economic circumstances. *Paupertas* could be a normal way of life and church alms the normal means of subsistence within a gift economy. Gradually, poverty came to be a synonym for drifting and uprootedness. Then the reform movements of the twelfth and thirteenth centuries brought another change. When the poverty of Christ and the Apostles was emphasised by reforming lay groups and spiritual ascetics like the Patarini, the Poor Men of Lyons, the Humiliati and others, the pauper was no longer taken to be the embodiment of original and personal sin but the living example of the spiritually powerful, unattached to material goods, the object of charity and mercy, the *imitatio christi*. By the thirteenth century men voluntarily chose to be poor.⁷⁴ When money could buy freedom from servile work, many of the pious fled from money. A dilemma emerged between what appeared to be the evangelical requirement of poverty and

70. Chevalier 1982, pp. 18–44. 71. Michaud-Quantin 1973, pp. 73–86.

72. Raymond of Penyafort, *Summa de casibus poenitentiae*, 1601 vol. II, pp. 5, 15.

73. Bosl 1963, pp. 68–87. 74. Manteuffel 1970 (1963); Vauchez 1970, pp. 1566–73.

the social necessity to combat an increasingly evident indigence and misery. The reform movements and city life redefined the status of the pauper.

The term *miserabiles personae* was used, in the *Decretum* and thereafter, to designate precisely a category of persons recommended to judicial benevolence, whom the clergy would represent in cases where this was normally forbidden. Included here were widows, orphans and the poor who had not the means to pay for the maintenance of their rights in an age when lawyers' costs were beyond them. *Miserabiles personae* were those deprived of protection of the family, whose freedom and material poverty left them solitary and on the edge of survival. Paupers, according to canon law, were those who passively received alms as a right. In a society which recognised authority in degrees, the weight in social relations of different functional groups placed the poor man at the very bottom as he who has no authority. Hostiensis affirmed that one cannot accept the testimony of the poor man because, according to Roman law, he is not the equal of those more powerful. Contrasting with this social category were the rich, *divites*, those who were obliged to give alms. By the twelfth century *nobiles/ignobiles*, *divites/pauperes*, *civis/pauper* expressed a relative superiority which came to be measured primarily in terms of material possession and money or the lack thereof. The social meaning included rights-bearing, civic capacity and its opposite.⁷⁵ One gave material aid in proportion to the social status of the person who found himself in poverty, so that alms itself was an obligation that admitted of degrees. These social categories and the advocacy in the twelfth and thirteenth centuries of voluntary poverty and mendicancy depended on the fiscal resources of an expanding urban economy and on the perception of a growing social disparity consequent on this economic development. There is, of course, a close connection between the economic changes we have been discussing and the development of charitable institutions established by municipal authorities as civic measures of social control.

Shifting attitudes to poverty

Augustine had spoken of the poor without resources who could scarcely procure what they needed to live on and who needed charitable aid to such a degree as no longer to possess any shame in begging. Thus by the fifth century we already have a sketch for a reprobatory judgement on the poor

75. Couvreur 1961; Michaud-Quantin 1973. *Miserabiles personae* in commentaries on *Decretum*, Dist. 87, 88; Gl. Ord. c. 15. q. 2 c. 1.

man who has been reduced to begging and who feels no shame. It remained important throughout our period that the worthy poor be those who were ashamed of their poverty. St Ambrose spoke of how important it was to recognise the shame of those in need and that perfect liberality was therefore secretly given.⁷⁶ Although no one should be ashamed of having once been rich and now being poor, the shame (*verecundia*) of the poor does comprise a part of the circumstance which should guide the giver's perfect liberality. Alms was explicitly linked with the embarrassment of downward social mobility.⁷⁷ 'Look for the man who is ashamed of being found and remain silent when you give. All the needy have a right to mercy but compassion is the stronger towards those who were rich and noble and who misfortune has thrown into extreme misery.' Drawing on Matthew vi, 3 and Psalm xl, 2 the tradition of giving alms was based on preferring those who were ashamed to receive it. In the eleventh century the reformer Peter Damian presented a picture of the worthy poor man who was often of knightly status, who did not know how to beg to survive, who suffered embarrassment as well as hunger, preferred to die than beg publicly and who thereby merited most to receive secret alms.⁷⁸

Throughout the twelfth century one observes two strands of thought developing regarding the worthy poor, and Gratian includes both: the notion of selective charity pertaining to the original status of the poor, and an unselective principle which defines the poor as those simply in extreme need.⁷⁹ There is no discussion of the aptitude or the physical incapacity for work, but it is significant that work was considered a humbling experience and that monastic rules (Augustine's *De opere monachorum* and the *Benedictine Rule*) exhorted monks to work with their hands, 'for the monk is a pauper, possessing nothing and working to live'. Augustine observed however, that those who, prior to their monastic vocation, had received a 'soft' education and could not bear heavy physical work would receive exemptions. This could never be the case, he noted, for those monks who previously were slaves and then freed, or peasants and artisans.⁸⁰ During and after the Gregorian Reform when numerous groups chose to live communally and work, many members originally coming from those social groups for whom labouring had been out of the question, it became part of the voluntarily poor ethos to beg, work and live by merely using rather than owning material goods, in imitation of what was believed to

76. St Ambrose, *De officiis ministrorum*, I, PL xvi, 71–4, 130–1. 77. Ricci 1983, pp. 158–77.

78. Damiani, *De elemosyna*, PL cXLV, 214. 79. Tierney 1958–9, pp. 362–3; Tierney 1959.

80. St Augustine, *De opere monachorum, liber unus*, PL xl, 547–82.

have been the evangelical life of Christ and the Apostles. Stephen of Muret, founder of what eventually became the Order of Grandmont in the time of Gregory VII, established a rule whereby rents were refused as was control over churches, no land was held outside their enclosure; they did all their own work, possessed neither flocks nor books nor buildings and were not in competition with the local clergy:⁸¹ St Francis would later speak in his rule of living by labouring, according to merit and work rather than rank and status.⁸² Attitudes to time and work had begun to change so that by the thirteenth century work for all men was a rehabilitated concept in the sense that labouring was not only a tragic result of Adam's sin, but a means to salvation for all. A distinction was drawn between manual labour and intellectual work, the former remaining despised but for some all the more appropriate as a means to imitating the apostolic life.

When worldly social values were systematically stood on their head by St Francis⁸³ in the early thirteenth century, the question of the valid poor, the valid mendicant, the voluntary assumption of powerlessness in all senses came under intense scrutiny. The Franciscans typified the real change in attitudes to poverty that had developed rapidly from the mid-twelfth century when a growing population, increasingly conscious of social stratification, experienced the transformation of agrarian structures, the development of a money economy and urbanisation. Only then was the pauper a major social phenomenon, materially deprived. Until the twelfth century the disinherited, the ill, the old, the indigent were not a marginal group and they survived through the charity of the parish and the monastery. Before the twelfth century the shameful poor, real though they once were, were used primarily as moral and religious examples drawn from scriptural and patristic sources. But a new economic poverty emerged in our period. Only by the thirteenth century could theft in the case of extreme necessity be morally condoned. And new social opportunities stimulated the widespread poor relief that had come to be seen as an obligation placed on the property-holding and money-making groups.⁸⁴ The ideals of St Francis and the attempts to put them into widespread practice throughout the thirteenth and fourteenth centuries caused major social disruptions and reevaluations of practical attitudes to property and poverty. The consequences of the debate within the Franciscan order and

81. Witters 1974, p. 183. 82. Le Goff 1973. 83. Esser 1975, pp. 60–70.

84. Some of the contemporary and practical considerations concerning the question of poverty were discussed by Aquinas, *Summa Theologiae* II II q. 144 a. 2 and q. 32 a. 10, and in his *Quaestio de eleemosyna*.

between the order and its opponents throughout the thirteenth and fourteenth centuries were to be felt into the early modern period when notions of *dominium* and its opposite would penetrate debates on the nature of sovereignty in Church and state.

Reform movements and poverty

The rise of diverse religious orders and movements in the twelfth century is best described as a reformation. There is a noticeable coherent line of church reform from the Italian hermits of the eleventh century to the early generations of the friars.⁸⁵ A new emphasis was placed on the interpretation of the Gospels and the Acts of the Apostles as codes of behaviour to be imitated through literal observance. Scripture was to be the Rule for the laity as monastic *Regulae* were to be observed by the cloistered. The new lay piety stressed the observance of material poverty, disdaining those values of the increasingly sophisticated market economy that required the impersonality of money transactions. The very handling of money was rejected. Withdrawal and contemplation, fundamental to the ideals of the older monastic orders, were replaced by an engaged ministry to the faithful, an active apostolate that recognised the need for preaching.⁸⁶ It must be said that many of the older monastic orders were actively involved in the market economy. There was a large audience for preaching in those who were no longer satisfied with a religious life practised vicariously on their behalf by monks. The process of adjusting the religious life to social and economic change was consciously undertaken with the papal establishment of the friars. The Fourth Lateran Council of 1215 prohibited the establishment of any further orders. This was the culmination of lay reform movements of the twelfth century like the Patarini whose initial impetus derived from the desire to dignify and purify the already existing clergy and to restore the *forma* of the *Ecclesia primitiva*. This developed into a desire for personal poverty amongst lay groups. The Humiliati of Lombardy are a case in point: their Tertiaries may be regarded as having set the tone for the mendicant orders a few years later.⁸⁷

85. Manselli 1969; Bolton 1983.

86. Peter Damian, *Contra intemperantes clericos*, PL CXLV, and *Contra clericos regulares proprietarios*, PL CXLV.

87. Bolton 1975, pp. 52–9.

*St Francis and the Franciscans*⁸⁸

Francis grew up as the son of a cloth merchant in the flourishing town of Assisi, where new money joined with this religious lay ferment. Although his own writings avoid reference to social hierarchies, never using terms like *vassallus* or *vavassor*, his biographers speak in terms of his youthful nobility; prior to his conversion he is described not as a greedy merchant but as generous like the nobility. In his own writings we can observe an attempt to efface feudal and capitalist hierarchies of status, an attempt to level social degrees by means of a vocabulary that raised to spiritual prominence all the social inferiors of the day. Francis called himself *servus, rusticus, mercenarius, inutilis, subditus, idiota, minor*, calling upon his followers to associate with and be considered poor, feeble, vagabonds, beggars, labourers, unlettered, the powerless and the dispossessed. The touchstone of his understanding of poverty was begging, and he rejected the shame that was conventionally associated with this demeaning posture. His social ideal was the reconstituted family in which fraternal love imitated the artificial family of the Apostles and Christ, without hierarchy except when he saw himself as Father, to be obeyed in love rather than fear. They were to possess nothing of their own, not even the knowledge of the educated which was itself treated as a commodity evaluated in money. The social vocabulary of Francis and his early followers reflects the transitional phase between feudal and capitalist relations, but rejects the castes, orders, classes of both in favour of a concept of a universally poor and levelled society of the materially impotent.

A first revision of Francis' Rule of 1209, the *Regula Prima* of 1221, has no legal standing, but it does survive and allows us to examine his attitudes to property and poverty before these views would be reformulated with the help of juristically minded brethren and a cardinal protector who would become pope. It must be said that Francis' intentions were not always clear, either to his order or to those outside, and a decisive standard of measurement for his mind is wanting.⁸⁹ There is no contemporary document we can select as a completely reliable guide. The Rule of 1221 is perhaps best seen as a series of Admonitions to his followers:⁹⁰

88. Lambert 1961; Brooke 1959; Moorman 1940 and 1968. 89. Esser 1949.

90. *Regula Prima* (1221), in Francis of Assisi, ed. Esser 1978; also in Francis of Assisi, ed. Habig 1973, with English transl.

The friars are to have no property; Franciscan candidates should sell all possessions and give the money to the poor; friars may not meddle in the candidates' property affairs; no one is to be called 'prior' for there is no distinction amongst friars minor; they may not accept positions of authority in houses of their employers; friars who have a trade should remain at it; their payment is never in money; otherwise they seek alms; they may not claim ownership of any place. In general, they should have neither use nor regard for money, considering it as dust.

The Rule of 1221 gives the impression that Francis wished the friars to sever all ties with the commercial system of the world. When he uses legal and commercial terms, *hereditas*, *commercium*, *mutuum*, they lose their customary meaning and take on a significance drawn from the spiritual values he wished to stress. Both *denarius* and *pecunia*, money tokens and all forms of wealth, are to be eschewed. Here is a total withdrawal from the world of buying and selling replaced by a contact with the economic world of the most tenuous kind. But the Rule of 1223, the *Regula Bullata*,⁹¹ modified the relations between friars and the economic world. It permitted intermediaries, allowing for the accumulation of a surplus of material goods at least as a possibility which became an inevitability. Although Francis' strict attitudes to the renunciation of all property survived into the *Regula Bullata*, it remained unclear whether he intended the renunciation of all common as well as all individual property. If contact with money was still restricted, there was added a clause that for the necessities of the sick and clothing of the other friars, ministers were to have recourse to spiritual friends. But there is no reference to words like *dominium* or *usus*, words that would be put in his mouth by his biographers like Celano and which would loom so large in the history of the order.

In his Admonitions, what is clearly condemned is the action of brethren arrogating to themselves as an individual corporation any goods which should remain the common property of all men. He was against the principle of exclusion implied in private property rights. The money prohibition was absolute, money being considered as something unnatural and associated inextricably with worldly avarice. If he died without clarifying the legal aspects of the friars' relation to property, he none the less clearly condemned the property-owning mentality. This would become a sticking point when the order did achieve some measure of economic security. It is still debated whether he intended the order to be totally divested of all property rights, if only because in his own lifetime the issue of

91. *Regula Bullata*, in *Regula Fratrum Minorum*, in *Seraphicae Legislationis, textus originales* (Quaracchi, 1897), pp. 36–47, including Honorius III's Bull *Solet annuere* (1223), also in Francis of Assisi, ed. Esser 1978.

common *dominium* was of slight importance. 'No reserves of property' was not the same thing as 'not having rights to property'. Whatever his intentions, and these would be elucidated by radical and conservative followers throughout the next centuries, it is clear that from the practical point of view his ideal was so extreme that it was nearly impossible for the developing order to follow it strictly.

One of the major dilemmas was the order's interpretation of Christ's and the Apostles' poverty: the friars refused property in temporal goods because they believed themselves to be imitating Christ. But the question was in fact an exegetical one. Did Christ and the Apostles possess goods and was one imitating them in refusing *dominium* and *possessio*? Was extreme voluntary poverty the highest state of perfection? What was the nature of property ownership and was it possible to divorce use from ownership? And is the divorce of use and ownership what Francis intended? Extreme poverty was clearly an encumbrance to successive popes, and along with members of the order itself, the Franciscan Rule's interpretation evolved to establish a life for Franciscans far from the primitive life apparently envisaged by Francis. Even in Francis' own lifetime Honorius III began the process of exempting the order from the control of local ecclesiastics, opening the way to their role in pastoral care previously exercised only by the secular clergy. In *Quo Elongati* (1230),⁹² Gregory IX extended the functions of the spiritual friend by allowing him to have recourse to goods considered imminent necessities, and a further official was introduced who could receive money, the *nuntius*, who was defined as an agent of the *almsgiver* rather than of the friars. As the friars became more dependent on alms it became inconvenient for these to be given in kind alone.

But when movable goods were given to the order who was it that held *dominium* over such property if it was true that Franciscans could have no corporate ownership? The legal language of *Quo Elongati* answered vaguely that the friars, in not being able to alienate goods and having to ask permission of the cardinal protector, were therefore, not owners. Gregory said that the friars were not to have either individual or common *proprietas*, but that they might have *usus* of utensils, books, moveables permitted them, leaving all property rights to the donor. An administrative system had replaced the strict, literal observance of the Rule. Building programmes proceeded throughout the 1240s and the faithful were encouraged to contribute to Franciscan convents. Friars were then permitted to supple-

92. Text in Gregory IX, ed. Grundmann 1961. See also Eubel 1898–1904, vol. 1; Brooke 1959, pp. 130–3.

ment their alms by taking restitution money: fines paid by usurers or sums illicitly gained where the owners remained unknown. The Franciscan *studium* at Bologna was thus financed. So many problems of interpretation of the *Regula Bullata* arose that learned commentaries were requested on difficult points from Franciscan scholars of the various provinces. The province of France sent back the *Expositio Quatuor Magistrorum* (Alexander of Hales, John of Rupella, Robert of Bascia and Odo Rigaldus are believed to have been the authors (1241)).⁹³ Chapter four discussed the provision of material needs according to the *forma paupertatis*. In chapter six they used the vocabulary of law and business to discuss friars and money. Their attitudes and terminology became authoritative. They sought appropriate solutions to property problems of the Rule in Roman law, citing the *Digest* and the Glossators with which they were familiar, although their references to the meaning of wealth, *pecunia 'secundum iura'* are never indicated. Here we see the language of *emere, vendere, locare, mutuare, commutare* defined.

It was clear that different styles of life were arising within the order and discourse on the Rule and on papal 'clarification' were ways to judge the admissibility of differing interpretations of Francis' intentions. Innocent IV (1245) further relaxed strict adherence to the Rule as interpreted in *Quo elongati* with a statement in *Ordinem vestrum*. Intermediaries now could not only buy necessities but superiors could use these agents to take money alms and any commodities offered. Now the *nuntius* was not only an agent of the almsgiver, as before, but could also act on behalf of the friars: the office of *amicus spiritualis* and *nuntius* merged into one official who handled both expenditure and alms. Although benefactors retained *dominium* over major items of property, it was unclear who owned moveables. Innocent agreed to receive all *dominium* of those goods that were used by the Franciscans into the domain of St Peter. The legal fiction of the pope as *dominus, in ius et proprietatem beati Petri*, separated from the Franciscans as simple users, was born. Innocent IV (*Quanto studiosius*, 1247) further relaxed the mechanism whereby application to alienate goods had to be made to the cardinal protector of the order; the friars could now appoint procurators acting nominally on behalf of the *dominus*, the pope, but who were in effect at the disposal of the order. *Ordinem vestrum* and *Quanto studiosius* created a bitter split in the order. And it is here that the strand of apocalyptic biblical exegesis, whose origins were in the biblical commentaries of the late twelfth century renegade Cistercian Joachim of Flora, rose to the surface.

For some time there had been an undercurrent, more or less explicit,

93. *Expositio quatuor magistrorum super regulam fratrum minorum* (1241–2), ed. Oligier 1950.

amongst Franciscans, that theirs was an elect body of spiritual men who, Joachim had predicted, were to usher in the last age of world history.⁹⁴ This order of monks was called to descend from contemplation to action in the sixth age of history which was fast rushing to its close at the end of the twelfth century. In his *Expositio in Apocalypsim*, Joachim described two new orders, one to preach in the world, the other in operation in the seventh and last age; the latter was in perfect imitation of the life of the Son of Man.⁹⁵ Characteristic of Joachim's many more radical followers amongst the Franciscans (who instead of awaiting the new order in the last age of history claimed to be that order) was their belief that the degree and nature of their humility and poverty was a sign of their perfection and election. Gerard of Borgo San Donnino tried to answer the question of Francis' historical significance by taking over Joachim's elaborate progressive trinitarian notion of the world's history, and saw Francis as initiating the last age. The secular masters at the University of Paris jumped at this opportunity to discredit the mendicants who had so successfully moved into university positions, and mounted an attack not only on Joachim but on the Franciscans' understanding of their Rule and its injunction to live according to evangelical poverty. William of St Amour and Gerard of Abbeville wrote vitriolic tracts which created havoc in the order, causing the mendicants temporarily to lose their privileges.⁹⁶ A commission was set up to examine the works of Gerard of Borgo San Donnino and Joachim. Franciscan intellectuals were thus forced to develop a defence and a coherent theory of absolute poverty, and Bonaventure's *Apologia Pauperum* (1269)⁹⁷ became their classic exposition.

Bonaventure defined poverty as living by what was not one's own. This meant that Franciscans renounced voluntarily all title to possession and they abdicated all ownership, possession, usufruct, leaving only the obligation to use what was necessary to stay alive, which was termed *simplex usus facti*. Simple use was a natural duty imposed on all creatures to maintain their lives; but this did not imply that they also had rights of any kind in things. Hugh of Digne, more radical than Bonaventure, was in effect the forerunner of these ideas. The original renunciation of material goods had become, by the 1260s, a renunciation of ownership, *dominium* and *possessio*, but not *usus*. It is, said Bonaventure, the

94. Coleman 1982, pp. 1–23; Reeves 1969.

95. Joachim of Fiore, *Expositio in Apocalypsim*, 1527, fols. 83r, fol. 175v–176r; Reeves 1969.

96. Dufeil 1975, pp. 241–2; Faral 1950–1.

97. St Bonaventure, *Apologia Pauperum* in *Opera Omnia*, vol. viii (Quaracchi, 1898), pp. 233–330.

nature of evangelical poverty to renounce earthly possession in respect of *dominium* and *proprietas*, and not to reject *usus* utterly but to restrain it.⁹⁸ He clarified the situation further by describing a fourfold gradation of *dominium*, *possessio*, *usus* and *simplex usus facti*, which would be taken over as official doctrine in Nicholas III's bull of 1279: *Exiit qui seminat*.⁹⁹ The notion of restraining the use of material goods was to lead to the even more radical doctrine maintained by Peter John Olivi and those extremists later called the Spirituals as the doctrine of *usus pauper*. Bonaventure argued that *dominium* was capable of renunciation in two ways because *dominium* is possessed both individually and in common. The renunciation of both individual and common *dominium*, based on the life of Christ and the Apostles, was the pattern of Franciscan poverty, a poverty imposed on the Apostles by Christ but not forced upon the Church. Penurious poverty, lack of possessions, rejection of money and other movable goods, served as a certain sign of perfection. It would be absurd to claim that the present possessionate way of living was to be preferred to the life of Christ and the Apostles. And the Franciscans were closer to imitating Christ's perfection than were others, because they renounced, as Christ did, the capacity to possess temporal goods.¹⁰⁰

With this classic statement, Bonaventure was able to balance the two wings of the Franciscans in a kind of equilibrium for twenty years. Apart from the distinctive interpretation of scriptural references to the economic aspects of the life of Christ and the Apostles, Bonaventure was also drawing upon a distinctive and questionable use of civil law. In brief, *dominium* (as we saw earlier) could, in fact, be separated from possession, but could possession be separated from use where consumables were concerned? Roman law noted that the *usufructus* shall not be separated in perpetuity from *proprietas* lest the holder be deprived of temporal benefit which it is the nature of *proprietas* to convey.¹⁰¹ What possible value to the papacy as *dominus* could Franciscan property and goods given for Franciscan use be? The Franciscan claim to a total renunciation of *dominium* and *possessio* was a nonsense.

Radical Franciscans like Peter John Olivi¹⁰² countered by arguing that the indispensable condition of the Franciscan poverty vow was the

98. *Ibid.*, c. vii para 3, pp. 272–3.

99. *Exiit qui seminat* (1279) in *Seraphicae Legislationis, textus originalis* (Quaracchi, 1897), pp. 181–227; *Registres de Nicolas III* (1277–80), ed. Gay 1916, pp. 232–41.

100. St Bonaventure, *Apologia Pauperum*, c. ix, p. 289.

101. *Corpus Iuris Civilis*, I, *Institutiones*, ed. Krueger 1928, p. 13.

102. Gieben 1968; Hödl 1958; Alverny 1928.

irrevocable bond to a life of penury where use was strictly limited to the most basic of human needs: ragged habits, no shoes, no horse-riding, and the practice of begging. The intention to live according to a minimum of needs was insufficient: it was the practice of abject poverty that counted. Anything less was seen as a betrayal of Francis' original intentions. He set this argument within the Joachite cosmic struggle between the forces of Christ and Antichrist.

Olivi's views¹⁰³ were incorporated into Nicholas III's attempt to clear up once and for all the practical interpretation of the Rule in his *Exiit qui seminat* (1279), especially with regard to outside critics. Nicholas dogmatically affirmed that a renunciation of *proprietas* of all things (*abdicatio proprietatis huiusmodi omnium rerum tam in speciali quam etiam in communi*), individually and in common, for God, is evangelical and worthy of merit. It was taught by Christ as a *via perfectionis* through his example. Thus in distinguishing *dominium*, *proprietas*, from *possessio*, *usufructus*, *ius utendi* and *simplex usus facti*, Nicholas insisted that it was appropriate for the order, whose founder was inspired by the testimonial of the trinity, to have only *simplex usus facti* of certain necessary temporal goods, and their use was revocable at the will of the donor. Drawing on the language of Bonaventure, on Olivi and on the *Expositio Quatuor Magistri*, Nicholas seemed to go much further than the more conservative element in the order, which accepted that the vow of poverty was really only a renunciation of *dominium* alone. Nicholas did not, however, adopt the radical scheme of history of the Joachites, nor did he designate the Franciscans as the perfect men of the final age with a clear historical mission. As a consequence, the more conservative Franciscan Conventuals closed ranks as did the rigorists who came to be known as the Spirituals in the fourteenth century.

The university response to poverty–property disputes

The debate between the seculars and mendicants over poverty intensified discussions concerning proper attitudes to property and *dominium* in its extended sense of sovereignty. This spilled over into university quodlibetal sessions. University masters in theology participated in *quodlibets*, the *determinatio* of which was reserved to the master to present his views on issues that his wide-ranging public audience raised from the floor of the debating chamber. The *quodlibets* of Giles of Rome, an Augustinian, and Godfrey of Fontaines,¹⁰⁴ a secular, in the 1280s and 90s treat of

103. Ed. Flood 1972; Burr 1975, pp. 71–8. 104. Lejeune 1958–62, pp. 1215–61.

contemporary political issues and current ethical or doctrinal problems, one of which was the notion of *dominium*. And it is not surprising that one finds *quodlibets* that ask whether the church would best be ruled by a good lawyer rather than by a theologian.¹⁰⁵ Here the meaning of legal terms such as *dominium* (lordship), property, possession and use of material goods and the respective realms of jurisdiction over such goods of lay and clerical powers were disputed. The *quodlibets* of Godfrey of Fontaines are specially illuminating for their frequent attention to problems of property rights of different social groups: can a religious who has taken a vow to own nothing arrogate to himself a steady income of alms?¹⁰⁶ What is the nature of the mendicant ‘use’ as opposed to personal or communal ownership? Is the pope to be seen as head of the church but, regarding material possession, only steward of communal church property? Godfrey also treated problems of illegal financial gain and debt.¹⁰⁷ His *quodlibet* 13, q. 5 *responsio*, setting out the nature of ecclesiastical and papal relationships to material goods, incorporating canon and civil law developments, would be adopted by the Dominican John of Paris early in the fourteenth century.

When John wrote his justly famous *De potestate regia et papali*¹⁰⁸ in 1302, he was contributing to a wider controversy between Philip IV, the Fair, of France and Pope Boniface VIII.¹⁰⁹ Ostensibly the issue was the debate between *sacerdotium* and *regnum* which sought to determine the spheres of sovereignty on the parts of secular and ecclesiastical powers. John has often been seen as a moderate, establishing a *via media* that recognised two powers but separated ecclesiastical from secular jurisdiction: with regards to the respective internal structures of each hierarchy, with regard to their respective powers over property, and with regard to the separate moral influence of each power. But he is far more radical than his *via media* implies when he elaborated his notions of *dominium in rebus* and *jurisdictio*.¹¹⁰ John incorporates the opinion of Godfrey of Fontaines on *dominium* in his chapters six and seven, to produce a clear distinction between church and lay rights to *dominium*. He defines *dominium* as only referring to things, *dominium in rebus*. The pope is not a true *dominus* but merely an

105. Godfrey of Fontaines, *Quodlibet* x (1293) q. 18 (ed. Hoffmans, *P.B.*, 4). *Utrum per unum bonum iuristam melius possit regi ecclesia quam per theologum*: Glorieux 1925b, p. 162.

106. *Quodlibet* x q. 16 (ed. Hoffmans, *P.B.*, 4). Ms Paris BN Lat. 14311 fols 123–5.

107. *Quodlibet* viii q. 11 (ed. Hoffmans, *P.B.*, 4, p. 116) and *Quodlibet* xi q. 8 (ed. Hoffmans, *P.B.*, 5, p. 42); *Quodlibet* xii q. 1 (ed. Hoffmans, *P.B.*, 5, p. 169); *Quodlibet* xiv q. 1 (ed. Hoffmans, *P.B.*, 5, p. 304); *Quaestiones ordinariae*, iii (ed. Hoffmans, *P.B.*, 14, p. 134).

108. *De potestate regia et papali*, ed. Bleistenstein 1969; *On Royal and Papal Power*, transl. Watt 1971; Leclercq 1942.

109. Tierney 1955a, p. 161; Ullmann 1976, pp. 58–87. 110. Coleman 1983b.

administrator of collective church goods.¹¹¹ These goods were given to ecclesiastical communities rather than to individuals, so that no one person has proprietary right or lordship over them. The intention of those who gave property to the church was not to transfer proprietary right and lordship to Christ: these things are his already. The transfer was to Christ's ministers. The pope may not, therefore, treat collective church property as his own, and only where the welfare of the whole church requires it may he deprive anyone. If the pope does not act in good faith and should he betray the trust of his stewardship, he must make restitution from his own patrimony. Furthermore, regarding lay property the pope does not even have stewardship. Lay property is not granted to the community as a whole, but is, rather, acquired by individual people through their own skill, labour and diligence.¹¹² Only individuals have *ius* and *dominium* over their own property. The individual alone administers, disposes, holds or alienates his property so long as he injures no one else.¹¹³ There is *no* common head to administer this individually acquired and owned property: not even the prince has lordship or administration of it. It is only when civil peace is disturbed through disagreements over possession, that a ruler is thereafter established to act only as arbiter and judge in property disputes.¹¹⁴

John argues further that Christ's royal power is not of the temporal order. His kingdom is not of this world and therefore his royalty is spiritual. As incarnate Man/God, Christ acts as mediator, exercising in the world a spiritual royalty. Considered with respect to his humanity alone Christ is not a temporal king over goods possessed by men, be they Christian or not. He voluntarily took on human nature, accepting poverty and other human deficiencies without contracting sin. In his terrestrial life Christ did not exercise *dominium* or temporal jurisdiction over lay goods; he reigns in and over the hearts of the faithful but not over their possessions. Whatever

111. Cap. vi: 'quod [summus pontifex] non sit verus dominus exteriorum bonorum sed dispensator simpliciter vel in casu' (Bleienstein 1969, p. 91).

112. Cap. vii: 'Ad quod declarandum considerandum est quod exteriora bona laicorum non sunt collata communitati sicut bona ecclesiastica, sed sunt acquisita a singulis personis arte, labore vel industria propria, et personae singulares ut singulares sunt, habent in ipsis ius et potestatem et verum dominium' (Bleienstein 1969, p. 94).

113. *Ibid.*: 'et potest quilibet de suo ordinare, disponere, dispensare, retinere, alienare pro libito sine alterius iniuria, cum sit dominus' (Bleienstein 1969, p. 94).

114. *Ibid.*: 'Verum quia ob talis bona exteriora contingit interdum pacem communem turbari dum aliquis quod est alterius usurpat, qui etiam interdum homines quae sunt nimis amantes ea non communicant prout necessitati vel utilitati patriae expedit, ideo positus est princeps a populo qui in talibus praestit ut iudex decernens iustum et iniustum, et ut vindex iniuriarum, et ut mensura in accipiendo bona a singulis secundum proportionem pro necessitate vel utilitate communi' (Bleienstein 1969, p. 97).

imperfections Christ had, as described in Scripture, he adopted in order to ransom us back. Having assumed human nature he also took on voluntarily hunger, thirst, death and poverty.¹¹⁵

Both John of Paris and Godfrey of Fontaines were responding in the legal language of property rights, drawing on contemporary events as well as on civil and canon law theory to counter the views expressed by the Augustinian Giles of Rome, who argued from a more theological base concerning the plenitude of papal power in matters of *dominium* and rights over material goods. The contrast between Giles' *De ecclesiastica potestate*¹¹⁶ and John of Paris' *De potestate regia et papali* epitomised the two major tracks along which the debate would run throughout the fourteenth century between the respective sovereignties of church and state regarding *dominium*.

John of Paris, the anonymous authors of the *Quaestio in utramque partem* and the *Rex pacificus*,¹¹⁷ Marsilius of Padua, Augustinus Triumphus, Alvarus Pelagius, James of Viterbo, William of Ockham, Richard FitzRalph, John Wyclif and various conciliarists would contribute to the genre *de potestate regia et papali*, specifying *dominium* as property rights, *ius in rem*. At one end of the spectrum, legitimate property rights were seen as created by governments or through recognition by the church of men's pacts with men (Giles of Rome). At the other end, legitimate rights in things were acquired by men prior to the establishment of governments and issued from men's natural capacities to labour for their requirements in a world created for their common use. Civil law was taken to be either a formalisation of property rights and *dominium* acquired through one's labour, or an institution that gave men such rights, which did not exist before. In many of these tracts the secular ruler and his subjects, defined as property-owning individuals, were established as autonomous in relation to the Church. For John of Paris, the most radical of all these early fourteenth-century theorists, men already had individual property rights prior to the establishment of government; and government then transformed these into positive legal rights as its main service to the individual.

John XXII versus the radical Franciscans: Ockham

Amongst the Franciscan Spirituals like Ubertino da Casale at the beginning of the fourteenth century, the poverty position of *usus pauper*, non-

115. Leclercq 1942, pp. 102–3.

116. Giles of Rome, *De ecclesiastica potestate*, ed. Scholz 1929, Cap. II.

117. Ed. Vinay 1939; Kuiters 1958; Watt 1967. On *Rex pacificus*, Sacnger 1981.

possession and sparseness in use became hardened into something more than a mere legal theory. They wished to exemplify an attitude and practice of disdain for the material world beyond the direst of necessities, and they said that no pope had the power to dispense from gospel vows. Consequently, the Spirituals were persecuted and Olivi's writings met with a concerted effort to get them out of the life of the order, culminating in their condemnation by John XXII in 1326.

A series of documents issued from the papacy between 1321 and 1323 ended with a dogmatic definition in *Cum inter nonnullos*.¹¹⁸ John argued that a pope had the right to alter edicts of his predecessors at will; and he began with *Exiit qui seminat*, which accepted that Franciscans could renounce all the rights of civil law and maintain only *simplex usus facti* in their goods. John also rejected *Ordinem vestrum* and its establishment of the legal fiction that the papacy was *dominus* of Franciscan property. He refused to accept this *dominium* over goods which might come to the order in the future and refused to appoint procurators. He argued that the notion of papal *dominium* was nonsensical if, as was the case, the Franciscans under certain circumstances had the right to give, sell and exchange goods normally held by the pope. And as to consumables: 'what sane man could believe that it was the intention of so great a father to preserve to the Roman Church the dominion over one egg, one bean, or one crust of bread, which are often given to the brothers?' Furthermore, the claim that Christ and the Apostles had totally renounced *dominium* was untrue because such renunciation was impossible. John studied the civil law definitions of *usufruct*, *ius utendi*, *simplex usus facti* regarding consumables, affirming that the use of a consumable object implied the right of its use. He says nothing about the natural-law precept that allowed men to have use without positive rights in a thing in extreme necessity; he appears to have accepted this. Thomas Aquinas' views, far more moderate, as we have seen, than those of the Franciscans, were preferred, and Aquinas was canonised. John deemed it heretical to say and believe that Christ and the Apostles had nothing either privately or in common, for this contradicted holy scripture, which asserts that they did have some things. It was also deemed heretical to say that Christ and the Apostles had no right of use in those things, no right of selling, giving or exchanging them, for scripture testified that they could have done so. In effect, the Franciscans had misunderstood the civil law. But had they? We have seen that classical Roman law did separate *possessio*, *usus* and *usufruct* (except in consumables) as distinct from *dominium*. But Roman

118. *Cum inter nonnullos*, Extra. Joann. xxii, 14.4, Freidberg, *Corpus Iuris Civilis*, II, pp. 1229–30; Eubel 1898–1904, vol. V, pp. 256–9.

law had also evolved, as we have seen, where *dominium* was collapsed into *possessio*. None the less, John made his final pronouncement in *Quia vir reprobus* (1328)¹¹⁹ that perfection was now commensurate with possessory rights because without rights there could be no justice.

As a result of these dogmatic definitions from 1323 onwards, a group of Franciscans led by the Minister General of the order, Michael of Cesena, revolted and joined the papally unconsecrated Holy Roman Emperor Louis of Bavaria. From his court at Munich the Franciscan William of Ockham attacked John's theses in the *Opus nonaginta dierum* (1332),¹²⁰ a work of overwhelming erudition dealing with the legal terms *dominium*, *usufruct* and *simplex ususfacti* amidst scriptural exegesis. He followed up these themes in his *Epistola ad fratres minores*, his *Breviloquium*, the *Octo questiones* and the *Dialogus* (1338?).¹²¹ Elaborating on the wider concern for the location of political and juristic power (*potentia*), Ockham wished to define what sort of entity could have power and what was its relation to *dominium*. He demonstrated that distinct individuals have powers of various kinds prior to any political structure or arrangement giving them such powers. Men had two kinds of *dominium*, corresponding to the situations before and after the Fall. Each *dominium* was possessed in common by the species and naturally. Prelapsarian *dominium* was a miraculous power to command all creatures but was not property-ownership. The world was given by God to mankind in common. Man's nature was improved after the Fall by God giving fallen men a second kind of natural *dominium* in the form of natural common powers to appropriate temporal goods as individual appropriators and he gave them the power to set up governments to secure these rights. In the *Opus nonaginta dierum* he distinguished pre- and post-lapsarian conditions, defining *ius poli* (as used in *Exiit qui seminat*) as a natural equity conforming to right reason and independent of positive laws. He also defined *ius fori*, or positive law, which need not conform to right reason or divine law. Under the category of the *ius poli* he included man's right to sufficient goods for his survival. He then argued that the Franciscans were in fact fulfilling the initial natural obligation to maintain their existence and were exercising the *ius poli*. But since *dominium* and *possessio* resulted from the Fall and governments were established as a result of Adam's sin, the power of exercising dominion over men and their property was exclusively that of

119. *Quia vir reprobus*, in Eubel 1898–1904, vol. v, pp. 408–49.

120. William of Ockham, *Opus nonaginta dierum*, in *Opera Politica*, I, ed. Sikes and Bennett 1940.

121. *Epistola ad fratres minores*, in *Ibid.*, III, 6; *Dialogus*, in *Monarchia Sancti Romani Imperii*, II, ed. Goldast 1614; Kölmel 1962; Damiani 1978–9; McGrade 1980, pp. 149–65.

temporal rulers. The Franciscan ideal was therefore broadened into an attack on the very foundations of the church's claim to a plenitude of power in the spiritual and temporal affairs of Christendom.

The legally-minded pope John had said something more than that *dominium* was the same as *ius*. In arguing for *dominium*/*possessio* as an active right in something he implied, (like John of Paris), that rights in things entailed specific duties of others that determined how men ought to behave towards possessors of rights. *Dominium* had become *de facto* private rights of individuals defensible in law against all others. And like John of Paris, the pope argued that natural men, prior to governments, had *dominium* over *temporalia* so that property was natural to men, sustained by divine law and unavoidable. God's *dominium* over the earth was conceptually the same as man's *dominium* over his earthly goods. But in the tradition of Boniface VIII and Giles of Rome, he also argued that such active rights needed church sanction to be realised, whereas John of Paris invoked the secular monarch as the defender and transformer rather than creator of these rights.

Marsilius on dominium

Theoretical tracts were only one of many ways to counter the papal claims of plenitude of power, and Marsilius of Padua wrote one of the most radical, not only in defence of *imperium* but also in defence of the Franciscan notion of poverty which he applied to the situation of the whole church.¹²² Although Marsilius was chiefly concerned with his native *Italicum regnum*, in the *Defensor pacis* he developed a political doctrine to which he attributed universal validity against the claims of John XXII. He maintained a distinction between *dominium* and *usus* against what he says is often common practice, admitting that it is more common to use the term *dominium* to mean both the principal power to lay claim to something rightfully acquired (in accordance with 'right' taken to mean a coercive command or prohibition of the human legislator), and the use or *usufruct* of the thing.¹²³ He also notes that possession does more commonly mean both abstract incorporeal ownership and the actual corporeal handling of the thing or its use.¹²⁴ But he wishes to put his clearly defined terms, *dominium*, *ius*, *possessio*, *proprium*, to a narrower, more polemical use which argues for the temporal disendowment of the whole church through defining it as

122. Marsilius of Padua, *Defensor pacis*, ed. Previté-Orton 1928; *Defensor minor: De translatione imperii*, ed. Jeudy and Quillet 1979. 123. *Defensor pacis*, II, xii (13) and (14). 124. *Ibid.*, II, xii (19).

incapable of *dominium* in its own right.¹²⁵ Marsilius had taken the Franciscan example and universalised it regarding the whole church and its relation to temporal goods.

Church and state powers over property: FitzRalph and Wyclif

Throughout the fourteenth century assemblies of clergy and laity met to debate the relations between the two powers without resolution. By mid-century the concept of the public good which was in the care of the monarch inspired new reflections on the notion of the state and its relation to *dominium* and jurisdiction over *temporalia*. Dialogues proliferated between knights and clerics to define the rights and powers of the two jurisdictions and to coordinate these, continuing into the conciliar epoch.¹²⁶ By mid-century the place of mendicancy and poverty in the church flared up once again at the papal court at Avignon and the campaign of Richard FitzRalph¹²⁷ against the mendicant orders gave rise to a radical doctrine of *dominium* and its relationship to grace. This would be the inspiration of Wyclif's doctrine, not unlike that of Marsilius, to disendow the church entirely, which issued from his belief that all property was held from God and thus from the king who was, by grace, God's vicar. Objecting to the clergy assuming lay offices, Wyclif argued that ecclesiastical possessions were derived from the king as patron and could be reduced when necessary. His thesis would influence Jan Hus and Jerome of Prague in the fifteenth century.

FitzRalph's *De pauperie salvatoris* (1356)¹²⁸ subjected the Franciscan poverty doctrine to minute analysis; his earlier sermons focused on the issue of secular and mendicant pastoral jurisdiction.¹²⁹ Once again he raised the tangled questions concerning the nature of property and discussed whether its use could be divorced from ownership. He argued that the friar who engaged in pastoral activity, especially in preaching, thereby ensuring a regular means of subsistence, was violating his vow of poverty. Denying that voluntary poverty was meritorious, FitzRalph went on to argue for a new theory of *dominium* whereby all lordship, ownership and jurisdiction was founded in God's grace to the individual soul. Those who commit grave sin are deprived of just *dominium*, ecclesiastical or temporal. But he

125. *Ibid.*, II, xiv (18) and (22). 126. Black 1979.

127. Walsh 1981; Dawson 1983; Walsh 1975.

128. Richard FitzRalph, *De pauperie salvatoris*, ed. Lane Poole, 1890, books I–IV, as appendix to Wyclif's *De dominio divino*; ed. Brock 1954, books V–VII. 129. Gwynn 1937; Coleman 1984.

never suggested that either the church or the secular powers should deprive such sinners of actual proprietorship as Wyclif was to do.

Just civil lordship requires divine sanction. Thus, before the Fall all temporal possessions were held in common; private property was introduced as a result of sin. But the just are in a state of grace whereby at least theoretically they continue to share equal dominion over all things. FitzRalph does recognise a limitation placed on original lordship by legally sanctioned private property so that he appears to be arguing for a double legitimisation: sanction by God and sanction by men's laws. When he comes to discuss Franciscan absolute poverty he distinguishes five degrees, the strictest of which is the abdication of all secondary rights of use, of all civil lordship, where only original lordship which was common to all in a state of grace was to be preserved. This original or natural lordship whereby possessions were held only by the common natural right of use was epitomised by the teaching and practice of Christ and the Apostles. Christ had restored the original situation in which distinctions of property after the Fall were reversed and he recreated with his Apostles the community of all things. But it is impossible to take this as a model for contemporary society. The mendicant poverty of the Franciscans cannot be equated with the lifestyle of Christ and the Apostles.

FitzRalph summarised the conclusions of his *De pauperie salvatoris* in a series of sermons preached publicly in London,¹³⁰ and as a consequence, the friars led a party to Avignon to accuse him of heresy.¹³¹ The confrontation dragged on without conclusion until his death in 1360. Thereafter it continued to trouble the university of Paris during the 1360s and Oxford in the 1370s as a result of Wyclif taking FitzRalph's doctrine of *dominium* and grace further.

Wyclif came to Oxford and by 1354 had distinguished himself in logic and in theological dispute. Quite early on he became involved in the political issues that were to cause him to formulate a radical position regarding the unjustified possessions of property by ecclesiastical authorities.¹³² In 1371 Parliament heard arguments in favour of the removal of clerical administration and its replacement by laymen more in touch with the nation's needs in time of war: the wealth of the church should contribute

130. Four such sermons are printed at the end of FitzRalph's *Summa in Quaestionibus Armenorum* (Paris, 1511), including assertions that voluntary poverty was neither of Christ's example nor of present obligation; that mendicancy had no warrant in scripture or primitive tradition.

131. *Appellatio* of the London Greyfriars. MS 64. 4. 2, fol. 4. Sidney Sussex College, Cambridge.

132. McFarlane 1952; Wilks 1965, pp. 220–36; Daly 1973, pp. 177–87.

to a larger extent to the war against France. Wyclif was present to hear two Austin friars argue that it was justifiable to seize ecclesiastical property for the common good. Churchmen were rebuked for being unpatriotic possessioners. It was argued that what pious laymen had given the church could, *in extremis*, be lawfully taken back by their heirs in the interests of self-preservation. The clergy was reminded of its obligations to the state, to national taxation, and advised of the right of the king to appoint to vacant benefices. Wyclif appears to have been employed by John of Gaunt and the widow of the Black Prince to make it clear to the papacy that in time of war the English clergy could not afford papal taxation. He composed tracts of a highly political if theoretical nature making the case for the secular government's right to despoil the wealthy clergy. He refuted the clerical argument of long standing that the church's spiritual authority, being higher than that of the state, granted her immunity from secular interference in her property. Wyclif adopted FitzRalph's arguments, citing long passages of the *De pauperie salvatoris* in his own writings, that true *dominium* came from God's grace to possessioners and that the man who failed in his service to God as *dominus* by falling into mortal sin forfeited his rights. Seeing secular government as the instrument of all reform, Wyclif argued further that the state could deprive the undeserving possessioners of their secular power and wealth. God is the *dominus capitalis* who has delegated his powers to the king or prince, and in so far as the king derives his just power from the grace of God, only secular lordship is justified in the world. Wyclif's full thesis on *dominium* appeared in 1378 (*De officio regis*, *De potestate papae*, *De dominio divino*, *De civili dominio*), and the papacy lost little time in condemning it, unsuccessfully. Only when he wrote down his unorthodox views on the eucharist was he effectively silenced and edicts passed against his writings and his followers.

It is clear that Wyclif's was, above all, a political movement concerned with a great renewal and reform of Christian life which could only come about through a restructuring of society. Doctrinal reform would follow, and Wyclif conceived of a new age, in which tyrant priests would be dispossessed and forcibly returned to an apostolic church, a vision that had informed the apocalyptic writings of radical Franciscans. Property ownership was not itself evil but a possessionate clergy was a misinterpretation of its spiritual function, a perversion of the very nature of true dominion. He saw an end to the separation of church and state jurisdictions over temporal goods, and argued that only the king should head the commonwealth of the righteous, the *communitas iustorum*. The king's law was the final arbiter, and

this would be made clear if Scripture were placed in the hands of the laity, especially lay lords. Holy writ should be defended by lay lords for the church comprised not only the prelates but included members of the whole congregation of the faithful who were imbued with grace, and predestined to salvation. However unjust, the king was vicar of God and above all human laws. If necessary he was obliged to reform the church, correcting the worldly pursuit of the clergy for honours and offices, punish their simony and remove them from temporal dominion. The clergy were to live in an apostolic manner surviving on tithes and alms offered by the faithful.¹³³ It is not surprising that pope Gregory XI saw Wyclif as an heir to Marsilius of Padua.

Wyclif combined theological, political and popular radicalism in a unified programme of reform that appealed beyond university circles, and his followers, the Lollards, merely expanded in the vernacular on the more scholarly presentation of his complaints against the contemporary *ordo* of church and state. They publicised his views in a more manageable form to an increasingly literate laity. Although some Lollards went considerably beyond Wyclif's teachings he helped to inspire such offshoots of his theories by supporting if not actually initiating wandering 'poor priests' to educate the laity in the nature of the proposed new reform of society. His ideas were not bounded by the school room and he was consequently perceived as a danger. Although the Lollards and Wyclif were not responsible for the 'peasants' revolt' of 1381–2, their opponents suggested their culpability. This is only one of many instances where the scholarly debates over property and poverty reached beyond the literate and educated groups, inspiring lay movements to reassess their social conditions and their piety. The debate would pass into the fifteenth century and beyond amongst groups of high and low degree.

If there is an outstanding theme related to property and poverty in this period, it is the gradual development of arguments which clarify the twofold nature of the individual: his power over his own and his responsibility for his fellows in so far as they partake of the common good. By the fourteenth century the concern for the individual was expressed in theological and political works by means of arguments demonstrating that individuals have powers or capacities of various kinds before anyone or any political or ecclesiastical arrangement gives these to them. This reflected a *de facto* situation throughout Europe. By the end of the century *dominium* in its

133. Wilks 1965.

narrower sense, as *dominium in rebus*, had become a *ius in re*, any right to some material thing like land defensible against all others, transferable and capable of alienation by the possessor – a situation that depended on a profit economy. Men were described in political theory, in legal treatises, in political poetry and prose, in polemic and ephemera, as individuals controlling their lives by being in some way responsible for the material as well as the spiritual aspects of their existence.¹³⁴ The debate over *dominium* and property would not end here; it would continue to echo, even more emphatically but in a new key, in seventeenth-century England.¹³⁵

134. Coleman 1981. 135. Tierney 1980, pp. 167–82.