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The abstractions of law and property

Witchcraft proliferates when fundamental premises are challenged and society itself appears unstable; it is thus no accident that the later Renaissance witnessed a profusion of witches. By definition, witches are supernatural creatures who exist beyond and in defiance of the laws of nature. They have the capacity to alter regular and expected patterns, to affect the cycles of fertility and regeneration, and to assume unnatural forms and powers. So long as witches are present, the homogeneity of experience is moot; the value of previous empirical observation is dubious; and the possibility of creating rational, scientific hypotheses on the basis of an orderly and immutable set of natural laws is questionable. Witchcraft, then, perhaps unfortunately, is antithetical to the more mundane craft of the modern economist. The latter conceives of the world as regular, bound by his version of natural laws – as, for example, those of supply and demand – and subject to innumerable constraints that enable him to predict, or at least rationally believe that he can predict, the reaction that will be caused by a given action.

Anomalous as it may appear to contrast modern economic thought with witchcraft, the contrast is illuminating. Those who concerned themselves with economic problems in the sixteenth century, particularly those cast as political figures or advisers, often seem to the modern critic to be naive or simply wrongheaded. One wonders, for example, how a thinker of Jean Bodin's genius could invent the quantity theory of money in 1568[1] and shortly thereafter, in 1576,[2] advocate the most sterile policies of bullionist mercantilism. The one position holds that the import of large quantities of bullion will cause domestic prices to rise; the other holds that domestic prices should be kept low so that large quantities of bullion may be imported. Clearly, the former insight

should provide a limit to the effectiveness or success of the latter policy, but Bodin does not draw the obvious conclusion, and, indeed, it remained unexpressed for nearly a century and a half after his death. What prevented Bodin from making what appears to us so direct and simple a connection? Perhaps it is overly facile to point out that in 1580 Bodin published his *Démonomanie des Sorciers*,[3] a book that defends the existence of sorcerers and witchcraft against the attacks of skeptics, but it is suggestive of a cast of mind. If witches and sorcerers did exist, if there were supernatural forces, what were the constraints to action in the economic and political spheres? Could political power be substituted for, or alter, natural laws?

In his *Six Livres de la République*, Bodin carefully outlined his theory of the relationship between climate and the quality of government. Briefly, the cold of the north produces such torpor that the people of those regions are unfit to govern; in the south, the climate renders people so mercurial that they too are unfit. In regions such as his native France, however, Bodin found the climate ideally balanced to produce sound governors. Disregarding the historical or empirical credibility of the theory, the concepts do seem, at least to the author, to have something of the quality of a law of nature; the forces involved in molding political capacities appear too massive to be altered by the will of man. Bodin, on the contrary, draws the conclusion that one simply needs more forceful government in the extreme northern and southern regions to compensate for the natural defects of the residents. Through political intervention, it was possible to avert the normal consequences of natural forces.

Such an attitude, although it certainly does not resolve the internal contradictions in Bodin's writings, does perhaps make them more explicable. To the degree that political power and positive law (i.e., that of the state) wax, the constraints and limits imposed by divine or natural laws wane. At the extreme, political power becomes analogous to witchcraft, since both are viewed as capable of bringing about the unnatural and subverting the chain that leads from action to reaction. Perhaps one could indeed import vast sums of bullion without raising prices if enough political pressure were exerted within the domestic economy to control the cost of goods.

Bodin was, of course, but one figure, and it would be dangerous in the extreme to use him as symbol or even touchstone for the intellec-

tual developments of the northern Renaissance, with its multitude of crosscurrents. Yet belief in demons, in witchcraft, and, even more generally, in the possibility of challenging the immutable character of law, political or natural, was a strong, and perhaps even dominant, aspect of the period. Louis XI of France (1461–83) was not above bargaining with the saints of those towns he sought to capture and in effect offering bribes to the patron saints in return for victory.[4] Even in the German mining industry, the center of the most advanced engineering and mechanical skills known to the sixteenth century, technologists included methods for propitiating bad demons and winning the favor of beneficent spirits when they were encountered beneath the surface of the earth.[5] In the political sphere, Machiavelli tolerated no external legal or moral constraints to the power of the prince save his own weakness.[6] Examples could be multiplied, but it will perhaps suffice to call attention to the prevalence of the idea that the limitations on political and economic action were far from certain in the sixteenth century, and that, in many instances, the abstraction, which law in one dimension is, seemed to have lost much of its force. What was true in the confrontation between witches and natural laws was also, depending on the region and to various degrees, true in regard to custom, written law, Roman law, divine law, and indeed the entire concept of law other than the will of the prince.

To sum together ethical, civil, and physical laws under one rubric may appear somewhat bizarre in our time; yet it is precisely this sum, this combined legal abstraction, against which sixteenth-century witchcraft mounted its assault. A single act of sorcery, after all, entailed transgression against all three dimensions of law. If the set of legal abstractions – ethical, civil, and physical – had been firm and sound in the sixteenth century, witchcraft would not have been possible or even conceivable and thus would presumably not have been attempted. The immutable homogeneity and constancy of church, state, and nature would have precluded the irregular and unnatural aberrations that sorcery sought to achieve. The very fact that witchcraft was deemed increasingly possible suggests that something had gone wrong with the system of legal abstractions. But before inquiring into the nature of the system's malaise, let us recall our main purpose and observe that those abstractions have real force in the sphere of economic behavior and organization as well as in the more arcane reaches of the supernatural.

In the first place and most obviously, the abstractions of law are basically conservative; they tend to preserve the status quo, to protect property and those who hold it, and to resist innovations of organization or method whether these originate from the private or governmental sector. The abstractions of law at once provide the constraints that limit the excessive assumption of power by any single agent within society and the framework within which to conceptualize and articulate the defense against any such endeavor to excess. It is through them that the disparate elements in the body politic find strength to counterbalance each other's power instead of degenerating into separate, anarchical, and warring entities.

Despite their importance for the preservation of social stability, the set of legal abstractions that had proved viable during the high middle ages was in pronounced disrepair by the beginning of the sixteenth century. As early as the beginning of the fourteenth century, William of Ockham (d. 1349) and Marsilius of Padua (d. 1342) had launched what amounted to an assault on the Thomist synthesis of faith, reason, philosophy, and law. Marsilius, in his *Defensor Pacis* (1324),[7] renounced the delicate Thomist balance between church and state, *regnum* and *sacerdotium*, and replaced it with the assertion of a single, indivisible sovereign power, the state, and a state for all earthly purposes superior to the church. More significantly for our present purposes, Marsilius separated and made independent the various levels of law that had formed a unity in Aquinas. Where Aquinas had postulated a congruent set of laws – eternal, divine, natural, and human – Marsilius limited law largely to that which could be enforced on this earth, that is, to that rendered by the state.[8] The Thomist conceptions of eternal and divine law are not so much abandoned as elevated to a sphere where they no longer impinge on matters of secular authority. To transgress against human or positive law is to transgress against divine law, since Christ commanded obedience to secular authority, but transgressions against divine law are not necessarily within the jurisdiction of secular law. Such sins neither concern nor violate human law, although "what is lawful and what unlawful in an absolute sense must be viewed according to divine law rather than human law . . ."[9] Marsilius also deviated from the Thomist view of natural law; he maintains that "natural right . . . is that statute of the legislator with respect to which all men agree that it is honorable and should be observed" and gives as examples

"that God must be worshiped, parents must be honored, children must be reared by their parents, etc."[10] He further explicitly states that "although these depend on human enactment, they are metaphorically called natural rights."[11] Despite his claim to be following Aristotle, Marsilius's insistence on human enactment is a marked break from the ancient conception of natural law. Aristotle conceived of natural law as that law which was everywhere valid without regard to human action – a view that, not surprisingly, is far closer to that of Aquinas than that of Marsilius. For Thomas, natural law was at once above man, immutable with regard to his actions, and always in accord with the yet higher orders of divine and eternal law in the same fashion that valid human law must always be in accord with the natural law. In the Thomist system, man, through the use of right reason, could determine the prescripts of natural law, and thus it acted as a constraint and guide both for human actions and for human and positive law. It is this view of natural law that Marsilius specifically rejects "since there are many things in accordance with the dictates of right reason, but which are not agreed upon as honorable by all nations, namely, those things which are not self-evident to all, and consequently not acknowledged by all."[12]

Marsilius's rejection of the Thomist view of natural law as the model for human or positive law did not lead him to view political authority as independent of any constraints. The prince was expected to rule by law. Unfortunately, however, law was for him the creation of the *legislator humanus*, the whole body of the people or the weightier part thereof[13] and its interpretation depended largely on the ruler himself. Although the *legislator humanus* could, under certain rather ill-defined circumstances, correct or punish the ruler, the composition of this body is vague and the methods by which it might proceed so little considered by Marsilius that for all intents and purposes its restraining power is virtually nil.[14] In general, Marsilius appears to have hoped for a beneficent, but powerful, ruler and to have devoted only the barest attention to the potential necessity of constraining a malevolent one. Modern interpretations of the nature of Marsilius's state are in sharp disagreement. Some writers stress the strictures that the monarch must be elected, that he was to rule by law, and that he was subject to correction by the whole body of the people in order to find in Marsilius a prototype of later doctrines of popular sovereignty.[15]

Others concentrate on the primordial character of the election that introduces an hereditary monarchy, on the fact that the electorate was not the whole body of the people but only the weightier part in terms of rank and significance rather than number, and on Marsilius's definition of law as requiring an enforcing agent, inevitably the ruler, in order to find in him the precursor of Machiavelli or Hobbes.[16] Both views are perhaps correct; the apparent contradiction arises primarily from juxtaposing Marsilius's intent against the likely consequences of his doctrine. By removing the abstract constraints upon a weak empire in order to strengthen it against an overblown papacy, he sought to restore a benign balance; but in aiding the lamb, he released a lion.

Like Marsilius's, William of Ockham's work has generated a substantial and highly controversial secondary literature. Like Marsilius, he too was a polemicist on behalf of the emperor and against the abuses of papal power, and, perhaps for this reason, his thought resists simplification, and his influence is at once difficult to trace and probably greater than his intentions. More prolific and subtle than Marsilius, Ockham too attacked the Thomist hierarchy and balance, but he did so more effectively as a philosopher and theologian. In a formal assault on the then current philosophical systems, he denied the real existence of universals.[17] For him, concepts of a universal character were the result of "abstractive cognition" – "something abstracted from many singulars" – and hence had no reality of their own.[18] Such a doctrine would appear to cast considerable doubt on the viability of the Thomist structure of legal abstractions, depending as they do on the existence of natural law in a real and immutable sense and on the capacity of every human to recognize that law through the exercise of right reason. Ockham pursues the argument further and asserts that no universal could exist outside the mind, because that would mean that something of the individual would preexist his creation; as this would limit the power of God to create or destroy, it is rejected as impossible.[19]

Ockham does not draw the seemingly logical conclusion from the preceding; he does not renounce natural law nor the innate capacity of all men to recognize it. Instead, he maneuvers around the difficulties by doubling the number of systems of natural law. In his political writings, there are two distinct systems of natural law: the first is absolute, immutable, and largely irrelevant to the secular state; the second is subject to conditions and modifications.[20] The latter is that

which is "licit, just, and expedient"; it is this version of natural law that governs secular political power.[21] The insertion of the word *expedient* in the traditional doctrine of natural law was fraught with overtones for the future of Western political thought, since almost any action can be legitimized under that broad rubric. To cite but one example, two centuries after Ockham's death, Jean Bodin, contrary to his property-conserving bias as a civil lawyer, uses a similar phrase to justify unlimited extraordinary taxation, observing that such "impositions are most just, for nothing is more just than that which is necessary."[22] Once natural law is seen as a variable, whose meaning is determined by what a secular ruler judges to be expedient, its value in constraining the unbridled will of the prince is very seriously diminished.

The influence of late medieval scholasticism on the subsequent development of political theory is acknowledge in general but disputed in particular. With rare exceptions, its influence on the development of economic analysis is left to a few specialists who are usually historians rather than economists.[23] The erosion of natural law, however, deeply affected the subsequent course of both political and economic theory. Theories of natural law, dependent as they are on the general prevalence of "right reason" among the populace, have a basically egalitarian bias. All men stand in the same relationship to a law that no man has the capacity to alter. This, of course, is not to deny the existence of distinctions of rank, status, wealth, and position. Medieval society was indeed hierarchical – dukes did not associate with peasants – but even within that rigidly structured world, each soul had value and the combined impact of Christianity and natural law acted to preserve and assert the importance of the individual. He had a soul, he could distinguish between right and wrong – a capacity that affirmed his significance and individual responsibility – and he was an integral part of the "public," benefiting from the sanctions of natural law which specified that political actions be for the public good.

When natural law came to require an enforcing agent and human enactment as in Marsilius, or an interpreter of that which was expedient as well as just as in Ockham, it was no longer true that each individual stood in an identical relationship to an immutable law. Marsilius's definition of the *legislator humanus* as the "weightier part" of the whole body of the people, by rank rather than number, is thus but an extension of a doctrine that denied the egalitarian component of the

theory of natural law. The case of Ockham is, as always, somewhat more complex because, in his aversion to universals, he strongly emphasizes the particular and the individual by separating them from any universal.[24] The impact of such separation, however, is deceptive. On the one hand, the individual seems no longer embedded in the layers of medieval hierarchies, be they social or political realities or conceptual abstractions; in this sense, it is true that he seems more significant in himself. On the other hand, from a political point of view, the individual, by becoming separate, becomes more vulnerable, and, in this sense, less valuable. One effect of the disruption of the Thomist system of natural law was to set the individual adrift while at the same time removing the protective abstraction that had guaranteed his position in the hierarchy. It is not accidental, as LaGarde observes, that "neither the principle of submission to the common good, nor that of the autonomy of the human individual, nor that of collective sovereignty are effectively developed" in Ockham.[25]

Mutations in political values also affect their economic counterparts: Concepts of property are not independent from concepts of either law or the individual. Under the Thomist view of natural law, property was provided by God for the common benefit of mankind. In order to limit friction and disputes and to provide for better and more careful stewardship, however, the private division of property had been instituted through human law, but this division supplemented rather than displaced natural law. Property and its use were still designated for the common good, and, thus, its ownership implied obligation as well as rights; in cases of extreme necessity, all worldly goods reverted to common property.[26]

In a passage immediately following the one in which he defines natural laws as human enactments, Marsilius sets forth his theory of property. For him, one has the "right" to usufruct, acquisition, holding, saving, or exchanging "whenever these are in a conformity with right taken in its first sense," that is, humanly enacted natural law. "Right, then, taken in this sense, is none other than what is willed by the active command, prohibition, or permission of the legislator . . ."[27] Now although this doctrine appears at first sight to be but a small deviation from Thomist theory, the implications are considerable. Property remains, as it is in Aquinas, the creature of human law, but for Marsilius, whatever obligations might be entailed in the holding of

property are equally the creation of human enactment. Property is essentially divorced from any higher moral sanction and title to it is entirely at the discretion of the will of the *legislator humanus*. Marsilius is quite explicit on this point and states that the legislator can "entrust to whomever it wants, and at any time, authority to distribute these goods."[28] Since the *legislator humanus* does not normally convene, this assertion would appear to mean that the secular ruler, acting in the name of the legislator, holds total and absolute power over property and its distribution among the citizens and institutions of the state.[29]

For his part, Ockham denies that property was ever held in common by all mankind. Instead, he maintains that at the moment of the fall, God gave each man the absolute power of dividing and appropriating the goods of this earth; this power, further, was not dependent on the consent of either the community or the state, but was in fact a true right, resident in each man.[30] Despite Ockham's retention of the almost universal proscription that in cases of extreme necessity the property of others may be appropriated, his doctrine would appear to be a considerable forward step toward unlimited private property. No perceptible moral or political obligations were normally attached to the rights of ownership. Unfortunately, however, in maintaining the individual property right, Ockham opens the way to its demise. In defending the property right, he asserts that no one may be deprived of his property "without cause or without blame."[31] But who decides the cause and by what criteria? Ockham would place this question under the civil law, but civil law is, as we shall subsequently observe, mutable. The Thomist correspondence between human law and the immutable natural law had disappeared in Ockham, and a natural law that was "licit, just, and expedient" was a pale substitute for maintaining the integrity of civil law. By becoming more individual and more private, property, as the person, had become more vulnerable.

There is a considerable difference between thought and action, and it is well to recall that the difficult and abstruse concerns of ecclesiastics do not always coincide with the temper of the times nor reflect historical reality. The works of Ockham and Marsilius, however, took their origin from and were formed by the historical context in which they were written. The fourteenth century had begun with the dramatic confrontation between Boniface VIII and the kings of France and

England over the issue of secular taxation of the church. In his final effort to defend the position of the church, Boniface issued the bull *Unam Sanctam* (1302), in which he claimed that "every human being to be saved must be subject to the Roman pontiff."[32] This seemingly excessive assertion of papal authority exacerbated the controversy over the relationship between secular and ecclesiastical jurisdiction and generated a substantial literature that included both Marsilius and Ockham. The clash was directly political, not simply an exchange of scholarly treatises. Edward I of England denied the protection of royal law to churchmen who refused to pay taxes, and Philip IV of France first prohibited the transfer of papal funds out of his country, and then, through his minister Nogaret, actually captured, and for a short time imprisoned, the hapless pope at his summer retreat at Anagni. The subsequent election of a French pope in 1305 and the transfer of the papacy to Avignon at once stimulated discussion of the political role of the pope and converted obscure scholastic arguments into political weapons. After his work had been condemned by the pope, Marsilius fled Paris, where he had written the *Defensor Pacis,* and sought the protection of the emperor, Ludwig of Bavaria, whose imperial election he defended against papal interference. In 1328, Ockham followed.[33] It was from this position that Ockham "defended the emperor with his pen" and even sought to justify Ludwig's matrimonial policy.[34]

Sometimes directly and sometimes indirectly, the events of the later middle ages continued to increase the relevance of the troubled writings of the later scholastics. The Franciscans, whose most brilliant intellectual leader was Ockham, had asserted as doctrine the absolute poverty of Christ and the apostles and preached that the ideal religious life was one that imitated Christ in this respect. Carried to its extreme, such a doctrine could not but prove embarrassing to a church that had grown rich over the centuries; Pope John XXII declared the Franciscan doctrine heretical in 1323.[35] Little could have pleased the revenue-hungry princes of the fourteenth century more than the opportunity to forward doctrines of ecclesiastical poverty, and, as a result, a natural alliance developed between the Franciscans and those princes who were out of favor with the pope. Indeed, during the period 1337–40, when Edward III, under threat of papal sanction, was briefly allied with the already excommunicated Ludwig, Ockham wrote his *An princeps,* defending the right of Edward to tax the wealth of the church in En-