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GLAUCOMA" RETHINKING LEGAL HUMANISM IN THE HISTORY
OF THE WESTERN RIGHTS TRADITION

Susan Longfield Karr

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
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Rethinking Legal Humanism in the History of the Western Rights Tradition

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Abstract

This working paper argues for renewed attention by scholars of early modern political and legal thought as to how and why humanist jurists invoked the authority of rights—natural and customary—to legitimize or to critique the expansion of authority underway within Europe in the early sixteenth century. It suggests that attention to legal humanists' discussions of natural law, *ius*, and *ius gentium* can offer new insights into one of the most complex problems addressed within the literature: the transformation of natural rights into human rights within the history of early modern political and legal thought. As such this working paper consists primarily of a review of the historiography, wherein legal humanism is either characterized as an incongruity, is dismissed, or is omitted altogether from the history of modern rights theories. After exploring the dominant literature, this essay then provides a broad comparative overview of why it is worth revisiting legal humanism for historians and human rights scholars alike.

Keywords

Natural law; natural rights; *ius gentium*; legal humanism; Renaissance humanism; early modern political and legal thought

“Often we are deceived, and we suffer glaucoma”

Andrea Alciati, “*Oratio in laudem iuris civilis, principio studii cum Avenione profiteretur,*” in *Omnia Opera* 3 vols. (Basil: Isingrinus, 1546), 506-511; 511.

Introduction

Scholars of late-medieval and early-modern political and legal thought have argued that Renaissance humanists turned away from the traditional scholastic debate, in which natural rights enjoyed primacy, to a discussion of civil law and its utility for the common good.¹ As a result, Renaissance humanists in general and legal humanists² in particular have come to be regarded by historians, legal theorists, philosophers, and human rights scholars as beyond the scope of the scholarship that traces the development of natural law and natural rights theory in the West, or even as representing an interruption in an otherwise continuously developing tradition of thought. Yet, legal humanists frequently engaged with natural law and natural rights in their works, especially when analyzing such Roman legal texts as the *Digest* and the *Institutes*. In light of their discussions, therefore, several questions come to mind: given their focus on the authority and justice of civil law and civil authorities, why did legal humanists concern themselves with natural law and rights (*ius*)³ in the first place? Moreover, if not within the conventions of the scholastic debate, then how did legal humanists interpret the connection between natural law, *ius*, and civil law? In their discussions, did humanist jurists alter traditional Roman and/or scholastic understandings of the relation between natural law, *ius*, and *ius gentium* (i.e., customs and conventions observed by individuals and communities over time)? And if so, to what extent did their treatment of these different categories, as well as their explanations regarding the source, authority, and extent of each, contribute to the transformation of early modern political and legal thought? Finally, given the detailed consideration of fundamental questions about rights by sixteenth-century legal humanists, including the first generation—sometimes referred to as ‘*le grand triumvirat*’⁴—Guillaume Budé (1467-1540), Ulrich Zasius (1461-1536), and Andrea Alciati (1492-1550), why has there been relatively little attention paid to them in the scholarship?

Although each of the above questions cannot be addressed in detail here, nevertheless by focusing on the latter question it is possible to gain insights into the former ones. To that end, this working paper is divided into three parts. The first focuses on the dominant scholarship concerning early-modern natural law and natural rights theories; the second focuses on why attention to legal humanism offers scholars an opportunity to rethink key aspects of the history of political and legal thought, especially the relation between natural law, *ius*, and *ius gentium*; and the third suggest why legal humanism is significant to the development of so-called modern natural rights theories. Together, this essay suggests that rather than exclude discussions of civil law from the field of inquiry,

¹ See specifically Richard Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); and Brian Tierney, *The Idea of Natural Rights: Studies in Natural Rights, Natural Law and Church Law 1150-1625* (Atlanta: Scholars Press, 1997). These texts are discussed in detail below in the section: *The State of the Art*.

² Douglas J. Osler, “Images of Legal Humanism,” *Surfaces*, vol. ix (2001) 101-106, provides a good definition legal humanism: “Within the field of legal history, legal humanism has a very precise technical significance. It applies to the school, active in the 16th century, particularly in France, which applied historical and philological methods to understand the sources of Roman law that had survived from antiquity. It is also often taken to apply to the scholars who continued to practice this branch of legal scholarship, particularly in the Netherlands, in the 17th and 18th centuries” (102).

³ There is no exact English equivalent for the Roman legal term *ius*. Depending on the meaning and context within Roman law, in some cases *ius* means right (i.e., *ius* in its subjective aspect), while in others it means law, (i.e., *ius* in its objective aspect), but not simply *lex*, insofar as it entails a sense of rightness, or justice, as in the right order of things or the way things ought to be. For three good accounts of the meaning of natural law, *ius*, and *ius gentium* by Roman jurists see Peter Stein, *Roman Law in European History* (Cambridge: Cambridge University Press, 1999); Michael P. Zuckert, “Bringing Philosophy Down from the Heavens’: Natural Right in Roman Law.’ *The Review of Politics* 51, no. 1 (1989): 70-85; and Charles A. Donahue, Jr., ‘*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney,’ in *A Ennio Cortese, Domenico Maffei, Italo Birocchi, Mario Caravale, Emanuele Conte, and Ugo Petronio* (eds.), (Rome: Il Cigno Edizioni, 2001), 506-35. For an in-depth discussion of how medieval jurists, canonists and civilians, interpreted *ius*, in both its subjective and objective aspects, see especially Tierney, *The Idea of Natural Rights*; and Annabel Brett, *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997).

⁴ Domenico Maffei, “Les débuts de l’activité de Budé, Alciati et Zase ainsi que quelques remarques sur Aymar du rivail” in *Pédagogues et juristes: congrès du centre d’études supérieures de la renaissance de tours: été_1960*. 23 (Paris: J. Vrin, 1963).

that attention by scholars as to how, why, and to what purpose jurists invoked the authority of rights, natural and customary, in order to legitimize or criticize civil laws in the sixteenth century can offer new insights and perspectives on one of the most complex problems addressed within the literature, namely, how natural rights were transformed into human rights in the early-modern period. Finally, this essay concludes by suggesting that in light of the legal humanists use of natural law, *ius*, and *ius gentium* to hold civil laws, and those who administered and created them, accountable to a higher criterion of justice, that it is worth expanding the parameters of human rights scholarship to include an investigation of how customary rights (*ius gentium*) first became rearticulated as natural rights (*ius*), then into civil rights, and ultimately into human rights by jurists in the early-modern period.

The State of the Art

The historiography of legal humanism, of the development of legal studies in the Renaissance, and of the development of natural law and natural rights theories is extensive. However, these bodies of scholarship have yet to be integrated; the fields remain for the most part separate and isolated domains of study.⁵ Within natural law and natural rights scholarship proper, scholasticism is the primary focus in the scholarship on the development of natural law and natural rights in the early modern period. This scholarship identifies the role of humanism as either representing an incongruity or interruption in the history of the natural and natural rights or dismisses humanism as irrelevant altogether. While more recent works recognize the general influence of humanism, as a conduit of ancient ideas to the moderns, still an account of legal humanism in this history remains unexplored.

This is the case partly because of the exclusion of Renaissance humanism in general, and legal humanism in particular, by Richard Tuck and Brian Tierney, two of the foremost scholars in the field. This is also partly the case because the scholarship as a whole has as its primary focus an exploration of how and in what ways modern theories arose out of a shift in the scholastic tradition: the advent of second scholasticism in the late sixteenth century.⁶ In the latter case a vague recognition of the

⁵ Compare for example Donald R. Kelley, *Foundations of Modern Scholarship: Language, Law, and History in the French Renaissance* (New York: Columbia University Press, 1970), Kelley, "Civil Science in the Renaissance: The Problem of Interpretation," in *The Languages of Political Theory in Early-Modern Europe*. ed. Anthony Pagden, 57-78 (Cambridge: Cambridge University Press, 1987); Guido Kisch, *Erasmus und die Jurisprudenz seiner Zeit: Studien zum humanistischen Rechtsdenken* (Basel: Helbing & Lichtenhahn, 1960); Domenico Maffei, *Gli inizi dell'umanesimo giuridico* (Milan: Giuffr e, 1956); Richard J. Schoeck, "Humanism and Jurisprudence," in *Renaissance Humanism: Foundations, Forms, and Legacy*. Albert Rabil, Jr. ed., 310-26 (Philadelphia: University of Pennsylvania Press, 1988); and Hans Erich Troje, *Humanistische Jurisprudenz: Studien zur europ ischen Rechtswissenschaft unter dem Einfluss des Humanismus* (Goldbach: Keip Verlag, 1993); with Michael Bertram Crowe, *The Changing Profile of the Natural Law* (The Hague: Nijhoff, 1977); A. P. D'Entreves, *Natural Law: An Introduction to Legal Philosophy* (London: Hutchinson University Library, 1972); John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); Otto Friedrich von Gierke, *Natural Law and the Theory of Society, 1500 to 1800*. Translated, with an Introduction by Ernest Barker (Union, NJ: Lawbook Exchange, 2001); Blandine Kriegel, "The Rule of the State and Natural Law," in *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought*. 13-26 (Palgrave MacMillan: 2002); Francis Oakley, *Natural Law, Conciliarism, and Consent in the Late Middle Ages: Studies in Ecclesiastical and Intellectual History*, (London: Variorum Reprints, 1984); Michel Villey, *Le droit et les droits de l'homme* (Paris: Presses universitaires de France, 1983); and Michael P. Zuckert, *Natural Rights and the New Republicanism* (Princeton, NJ: Princeton University Press, 1994).

⁶ The term 'second scholasticism' refers to a period of the revival of scholastic philosophy, at the 'school' of Salamanca, by Spanish theologians and jurists. The founding of the 'school' of Salamanca was marked by the arrival of Francisco de Vitoria (1492-1546) who became the Principle Chair of Theology at the University in 1526. Vitoria is also attributed with renewing the methods of scholasticism—in some respects characterized as rendering the principles of theology in clear, concise, and direct Latin (much as the legal humanists claimed to be doing for law). Vitoria did not publish anything in his lifetime, but his students published his lecture notes. He is deemed the 'father of international law' by present-day historians of European natural law and natural rights tradition and to be the forefather of the 'so-called' modern natural law and natural rights theories that characterize the works of seventeenth century authors such as Grotius and Hobbes because he uses *ius gentium* as a criterion to both criticize and legitimize specific civil laws. This same use of *ius gentium* was also employed by Vitoria's followers, especially Domingo de Soto (1494-1560), Luis de Molina (1535-1600) and Francisco Suarez (1548-1617)—or the second scholastics. See Annabel Brett, *Liberty, Right, and Nature*; Tuck, *Natural*

possible influence of legal humanism is present, but rather than explore this influence, the scholarship remains focused on how second scholasticism directly influenced later humanist jurisprudence, and how this in turn influenced the development of modern natural law and natural rights theories. It is this influence that scholars, such as Annabel Brett, have begun to explore in order to demonstrate continuity between late-medieval and modern rights theories.⁷ To show this it is well-worth providing a brief overview of the texts wherein historians argue that humanists were unconcerned with natural law and natural rights, and thus were altogether insignificant to the development of this aspect of early modern political and legal thought. Next, it is worth exploring how this exclusion continues to characterize the historiography on natural law and natural rights theories, at the very same time that historians are moving beyond the parameters set by Tuck’s and Tierney’s arguments.

In their works, Tuck and Tierney focus primarily upon the influences and continuities between medieval scholasticism and modern rights theory.⁸ To show this both scholars turn to an investigation of the origins of subjective rights, or *ius*. After identifying different origins, Tuck and Tierney then offer detailed accounts of the history and development of natural law and natural rights up to the seventeenth century. Although Tuck and Tierney diverge sharply in addressing the above issues, it is useful to note the common characteristics of their methods and arguments.

First, in terms of their methods, each focuses on the underlying continuity of the language of rights throughout its long history, while simultaneously arguing that each significant moment in this history was accompanied by the shift in meaning according to the contexts in which rights claims were made. They do so through a careful analysis of texts written by theologians, philosophers, and jurists. Second, they both use their analysis of these texts to support their arguments for the central influence of scholastic discussions of natural law and natural rights theories on the development of modern rights theories, natural and human. Finally, in tracing this long history of rights, both argue that Renaissance humanism was not significant in the development of these theories. Thus while they assert the necessity of exploring the history of rights in detail, both exclude the same period in this history, namely, the late fifteenth and early sixteenth centuries. Moreover, after they both argue for the importance of the mid fifteenth-century contribution, especially by the French theologian Jean Gerson (1363-1429), in accounting for the late fifteenth and early sixteenth century, they each provide an argument for the exclusion of Renaissance and legal humanism. Finally, after dismissing the Renaissance, both turn to the mid-sixteenth century to show the influence and inheritance of older traditions of thought (late medieval) on new formulations (modern). The link between the old and the new, for both, is second scholasticism.

In *Natural Rights Theories: Their Origin and Development*, Tuck argues the origin of natural rights as subjective rights may be found during the fifteenth-century Conciliar movement—specifically in the works of Gerson. For Tuck there is a conceptual link between Gerson, Hugo Grotius (1583-1645), John Selden (1584-1659), Thomas Hobbes (1588-1679), and Samuel Pufendorf (1632-1694). Yet the fundamental innovation of the modern theory, what distinguishes it from the older tradition, can be found in the work of Grotius. It was Grotius, Tuck argues, who incorporated the early fifteenth-century Gersonian rights theory into a new tradition of thought in the seventeenth century.

(Contd.) _____

Rights Theories; Tierney, *The Idea of Natural Rights*; and Stein, “The *Ius Commune* and its Demise,” *The Journal of Legal History*, vol. 25, no. 2 (August 2004): 161-167.

⁷ See Brett, *Liberty, Right, and Nature*, especially pages 165-204.

⁸ Tuck, *Natural Rights Theories* and Tierney, *The Idea of Natural Rights*. Tuck and Tierney have offered the most detailed and comprehensive treatment of Western natural law and natural rights theory to date, concentrating primarily on the origins of natural rights. For additional discussions see John Witte, Jr., *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (Cambridge: Cambridge University Press, 2007); Annabel Brett, *Liberty, Right, and Nature*; Headley, *The Europeanization of the World*; Crowe, *The Changing Profile of Natural Law*; D’Entreves, *Natural Law: An Introduction to Legal Philosophy*; Heinrich A. Rommen, *The Natural Law: A Study in Legal and Social History and Philosophy*, trans. Thomas R. Hanley, fourth ed. (New York: Arno Press, 1947); Paul E. Sigmund, *Natural Law in Political Thought* (Cambridge, MA: Winthrop Publishers, Inc., 1971); Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953); and Lloyd L. Weinreb, *Natural Law and Justice* (Cambridge, MA: Harvard University Press, 1987).

Grotius' specific innovation, Tuck explains, was his introduction of both self-preservation and sociability into natural law and natural rights theory proper.

However, in making this argument linking Gerson directly to Grotius, via second scholasticism, Tuck is faced with the problem of accounting for the late fifteenth- and early sixteenth centuries. In addressing this period, he argues that there was a gap, an incongruity, in the development of modern theories with the advent of Renaissance humanism. He argues that the theory of natural rights failed and interest in natural law declined throughout the Renaissance because the humanists were "engaged in a retreat from a position where natural law and natural rights enjoyed primacy to one where the major concern was human law designed by men for common utility either under their own initiative or under the command of God."⁹ Tuck attempts to demonstrate the lack of interest in natural law and natural rights by Renaissance humanists with reference to the work of Alciati in particular. In regard to legal humanism, Tuck writes:

By virtue of their intellectual origins, humanist lawyers found it virtually impossible to talk about natural rights, and extremely difficult to talk about rights *tout court*. What was important to them was not natural law but humanly constructed law; not natural rights but civil remedies.¹⁰

He argues that it was only in the mid-sixteenth century, during a revival of medieval scholasticism, in the works of Francisco de Vitoria (1492-1546) and Francisco Suarez (1548-1617), that natural law and natural rights theories once again became central. It was the combination of Gersonian rights theory and those of the second scholastics that were decisively joined in Grotius' thought.

Yet, the argument for the exclusion of humanism and even Tuck's use of Alciati in particular to do so, makes sense in relation to the broader purpose of Tuck's text as a whole. In his introduction he explains that his book "began as an attempt to solve some of the problems which twentieth-century philosophers have found in writing about rights."¹¹ Namely, that although the language of rights continues to play "an increasingly important role in normal political debate [...]..., academic philosophers find it on the whole an elusive and unnecessary mode of discourse."¹² One of the primary reasons that this discourse is unattractive to contemporary theorists and philosophers is the correlative relationship between rights and duties emphasized first, he argues, by Pufendorf and later by Jeremy Bentham (1748-1832). If the language of rights necessarily corresponds to duties, and the language of duties necessarily corresponds to rights, then, Tuck asserts, human rights discourse might appear to be altogether irrelevant. Tuck's task is to argue against those who hold "to have a right is merely to be the beneficiary of someone else's duty..."¹³ because

If this is true, then the language of rights is irrelevant, to talk of 'human rights' is simply to raise the question of what kinds of duty we are under to other human beings, rather than to provide us with any independent moral insights. The residual Utilitarianism of many Anglo-American political theorists has made this argument particularly attractive, but its force has always been that it appears to embody a logical truth. And yet to dismiss such a key area of political thought in this way seems a foolhardy enterprise—there must be something to the language of rights.¹⁴

Thus the turn to the origin of rights is essentially for Tuck an attempt to solve this problem, to show that there is an important distinction between rights and duties in the history of Western natural law theories. Only by showing this, will it be possible to counter the arguments of those who hold that rights talk, because it is linked to duties, is not a useful or meaningful discourse. And it is this

⁹ *Ibid.*, 44. It is important to note that Tuck likewise contends that the Calvinists and Scholastics during the Renaissance also turned away from natural law and natural rights toward civil law and civil remedies.

¹⁰ Tuck, *Natural Rights Theories*, 33.

¹¹ *Ibid.*, 1.

¹² *Ibid.*

¹³ *Ibid.*

¹⁴ *Ibid.*

emphasis on rights, independent of the language of duties or obligations, in Tuck’s argument that makes accounting for—or including—the Renaissance very difficult: especially as legal humanists often linked the language of duties, civil utility, and the common good directly to the language of rights throughout their works. As this link between rights and duties by the legal humanists might appear, at first sight, to place them squarely within the development of utilitarian traditions and thus support the position of his interlocutors, Tuck’s task is to show in detail that the legal humanists were an exception not the rule; that their focus on the common good, civic utility, and civil law stands outside the development of modern rights theories, not within it.

Two of the main points of criticism against Tuck’s argument in *Natural Rights Theories* have been (1) his emphasis on and presentation of a strict separation between objective and subjective *ius* in the works of late medieval jurists and theologians; and (2) his exclusion of humanism in general, though not his exclusion of legal humanism in particular, from his history.¹⁵ Significantly, these criticisms are not linked; historians primarily criticize Tuck’s text on account of one or the other, not both. That Renaissance scholars criticize the exclusion of humanism on the one hand, and natural law and natural rights scholars criticize the strict dichotomy between objective and subjective *ius* on the other, helps to illuminate how disparate these fields of study are.

This can be further illuminated by how Tuck responds to his critics. In response to criticisms from Renaissance scholars in particular, he revisits the role of Renaissance humanism in the development of modern political and legal thought in his *Philosophy and Government*.¹⁶ However, he responds to the criticisms of natural law and natural rights scholars primarily in his *The Rights of War and Peace*.¹⁷ Yet in neither text does he offer a reconsideration of his previous arguments concerning his analysis of why the early sixteenth century represents an incongruity in the development of natural law and natural rights theories. Instead, in both texts he focuses on what he calls ‘new humanism’ which he argues introduced the concept of *raison d’état* into natural law and natural rights theories in the mid-to-late sixteenth century.¹⁸ In doing so, Tuck’s argument points to a convergence of humanism and natural rights theories, but in each case the early sixteenth century is not his focal point, nor are the legal humanists. To date, both remain outside the parameters of Tuck’s work. Moreover, it is perhaps Tuck’s own insistence that the current problem of rights could be solved historically, especially with attention to the shifts in meaning and significance of *ius*, from objective to subjective, which generated such extensive criticisms from scholars such as Brian Tierney.¹⁹

Throughout his *The Idea of Natural Rights: Studies on Natural Rights, Natural Law, and Church Law, 1150-1625*, Tierney argues against Tuck that the fundamental problem of the history of human rights is not making the language of rights usable for contemporary philosophers and political theorists, but rather in exploring the contributions of medieval theorists, and in doing so, investigating why and how dignity, linked to *ius*, became the fundamental and foundational category of modern rights—natural and human,

¹⁵ Compare, for example, Maryanne C. Horowitz’s review of *Natural Rights Theories: Their Origin and Development* in *The American Historical Review*, vol. 86, No. 2 (Apr., 1981): 370-371; Martin P. Golding’s review of the same title in *Political Theory*, vol. 10, no. 1 (Feb., 1982), 152-157; Tierney, “Tuck on Rights: Some Medieval Problems,” *History of Political Thought* 6 (1983): 429-41; and Tierney, *The Idea of Natural Rights*.

¹⁶ Tuck, *Philosophy and Government, 1572-1651* (Cambridge: Cambridge University Press, 1993).

¹⁷ Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (Oxford: Oxford University Press, 1999).

¹⁸ According to Tuck this conception of *raison d’état* introduced by ‘new humanism’ rested on the belief that “a population had to be disciplined and manipulated in the interests of security.” Tuck, *Philosophy and Government*, xvi. He identifies the model for the ‘new humanists’ as Tacitus whereas the model for the ‘old humanists’ he argues was Cicero. In *Philosophy and Government*, Tuck focuses on the importance of virtue, civic utility, and the common good in the light of ‘new humanism’. In his *The Rights of War and Peace*, he focuses on the ‘new humanism’ of Alberti Gentili; wherein Tuck focuses on categories such as *ius gentium* more so than *ius*, objective or subjective.

¹⁹ See Tierney, “Tuck on Rights: Some Medieval Problems,” and Tierney, *The Idea of Natural Rights*.

Many scholars have argued that a doctrine of natural rights was always implicit in the Judeo-Christian teaching on the dignity and moral autonomy of each individual human person. Such a concept of human personality could indeed provide a fitting basis for a theory of natural rights; and, of course does not nowadays have to be expressed in terms of Jewish or Christian theology (though religious cultures that regard individuation as illusory are not likely to develop rights theories spontaneously). But, if a doctrine of rights has always been implicit in Judeo-Christian thought, it has certainly not always been explicit. Merely calling attention to Judeo-Christian values does not solve the problem of origins. The historian's task remains—to understand the particular situation in which the old ideal of human dignity could first find expression in a new theory of human rights. There are two basic questions to be answered. When did the phrase *ius naturale*, which traditionally meant cosmic harmony or objective justice or natural moral law, begin to acquire also the sense of a subjective natural right? And what cultural context, what set of conceptual historical circumstances, made the shift in meaning possible and acceptable?²⁰

To address these two fundamental questions Tierney argues against Tuck's assertion that the modern conception of subjective right was an innovation of Gerson. He also argues against Tuck's position that the idea of self-preservation, as a natural subjective right that could never be surrendered, was a unique contribution to the tradition by way of Grotius and Hobbes. To do so, Tierney shows that the idea of natural rights was already present in twelfth-century Roman and Canon law and that self-preservation can already be observed as an important aspect of natural law in Gratian's *Decretum* (ca. 1140) as well as among the Stoics. Furthermore, Tierney demonstrates that both Roman law and Canon law jurists were well aware of the concept of natural rights as early as the twelfth century, and indeed, that they were purposefully using this concept to make arguments for and against the expansion of specific kinds of religious, legal, and political authority.

Like Tuck, Tierney emphasizes the fundamental contributions of the Conciliar movement and Gerson to the development of natural law and natural rights theory. He places far greater emphasis on the rediscovery of Roman law, on the Franciscan poverty debates, and on the expansion of Europe through Atlantic colonization. Crucial to the development of Western natural law and natural rights theory in Tierney's account are Gratian, the Decretists, William of Ockham (1288-1348), Suarez, and Grotius. Although Grotius is central in Tierney's narrative, he is not important for his emphasis on self-preservation. Rather, Grotius is significant because he made it possible for the old theory to live into the new world. According to Tierney, Grotius made this possible because he held that "human sociability was the original source of law"²¹:

Grotius also noted that humans were capable of judging what was beneficial for humankind in the long run and argued that to go against such a judgment would be to violate the law of nature, namely of human nature. (For Grotius human nature was the 'mother of natural law'). This law of nature required us primarily to respect the rights of others—to leave to others, or render to them, what was their own.²²

While Tierney concedes that this was not the innovation of Grotius alone, nevertheless he argues that it was the process of equating natural law with human nature that distinguished Grotius' theory as modern. With this innovation, his theory essentially moved the discussion of rights from the realm of moral theology to the realm of moral philosophy. Tierney argues that it was only after Grotius that rights no longer relied on the Judeo-Christian ethic but rather on human nature, that is, man's sociability and dignity. Thus although the separation of subjective from objective *ius* by the medieval thinkers was important in the development of modern theories, it became even more so after the basis of *ius* was no longer tied to theology. Again, for Tierney it is the latter that distinguished Grotius' theory as modern, because he holds that it was Grotius who asserted and passed down to his

²⁰ Tierney, *Idea of Natural Rights*, 46.

²¹ *Ibid.*, 317.

²² *Ibid.*

successors the explicit idea that human nature was the transcendental category that sustained and reflected a universal law.

In light of the above, it is clear that the stakes of Tierney’s argument are far greater than simply refuting or correcting Tuck. Tierney’s task is to illuminate how and why the concept of dignity emerged as a central underlying component of the Western natural law and natural rights traditions as well as modern human rights. However despite his emphasis on dignity, Tierney too has underemphasized, or perhaps overlooked, the contributions of Renaissance humanism and the Protestant Reformation (as Tuck did as well) to the development of natural law and natural rights theory. It is probable that the latter can be accounted for, in part, because Tierney’s focus on sixteenth-century contributions concerns how the category of dignity—without theological underpinnings—became central. Therefore the exclusion of Protestant discussions of dignity and even Protestant resistance theories makes sense in light of his broader argument.

In the former case, however, given the centrality of dignity to Renaissance humanism, his exclusion is noteworthy. Moreover, linked to his statement that his analysis of the development of natural law and natural rights theories is an attempt “to make the whole tradition of thought more intelligible,”²³ the lack of engagement with Renaissance humanism is even more striking. Indeed, when Tierney turns to the Renaissance, he says very little about it beyond noting that it was not an age receptive to natural law and natural rights theories, because “Humanist authors emphasized above all the duty to uphold the common good; many of them served, or wanted to serve, at the courts of the great rulers of the age.”²⁴

Unlike Tuck, Tierney does not follow this dismissal with a discussion as to why exactly Renaissance humanists did not contribute to the tradition. Instead, after stating that they were not concerned with natural law and natural rights, Tierney turns quickly to an account as to why Protestant resistance theory also falls outside the parameters of the development of modern natural law theories. He then turns to an in-depth and detailed discussion of mid- to late sixteenth century scholasticism, especially in relation to European expansion and the problems of Amerindian slavery. In short, in a text that offers the most detailed, comprehensive, and authoritative discussion of the history of rights in the late-medieval and modern periods, an engagement with Renaissance humanism, and the early sixteenth century more generally, is relatively absent. When humanism enters Tierney’s careful analysis, it is through Grotius’ contributions to the theory. Thus, although Tierney concedes that humanism contributed to the modern theory, it appears that it did so only in the seventeenth century. Despite his disagreement with Tuck on a number of key issues, Tierney appears to accept his exclusion of early Renaissance humanism, and legal humanism in particular, on the basis of their common concern with civil law, civic utility, the common good.

While Tierney and Tuck are correct in their assertions that legal humanists were concerned primarily with civil law, this did not preclude them from an interest in natural law, *ius*, or *ius gentium* or the importance of these categories in regard to human nature and dignity. Likewise, although Tuck and Tierney are correct to argue that the legal humanists were concerned primarily with arguments for the common utility and the common good, this should not be interpreted as the rejection of natural law or a lack of concern with *ius*, but rather as a rejection of the particular conception of natural law, and definitions of *ius* and *ius gentium*, held by scholastic jurists in particular.²⁵

The position that humanism did not contribute to the development of natural law and natural rights, however, was not the innovation of Tuck or Tierney; indeed this position had long dominated

²³ Ibid.

²⁴ Tierney, 253. Tierney’s point here is not invalid in that Budé was in the service of Francis I as was Alciati for a short period. Zasius was also an imperial counselor to the Holy Roman Emperor (Maximilian I). However, being in the service of such rulers as the King of France or the Holy Roman Emperor did not preclude the legal humanists from voicing criticism of their own civil laws: there are numerous instances when the legal humanists used the principles of natural law to criticize violations of natural equity and justice in local civil laws.

²⁵ For detailed discussion of this see Susan F. Longfield Karr, “Nature, Self, and History in the Works of Guillaume Budé, Andrea Alciati, and Ulrich Zasius: A Study of the Role of Legal Humanism in Western Natural Law” (Ph.D. Dissertation: University of Chicago, 2008).

the field well before the publication of their texts. For example, Leo Strauss, Michael Bertram Crowe, A. P. d'Entreves, and Heinrich Albert Rommen—a few among the many scholars who trace the history of natural law and natural rights from the pre-Socratics to the revival of natural law and natural rights in the mid-twentieth century²⁶—do not discuss Renaissance humanism as contributing to the development of natural law and natural rights theories. Moreover, even historians of legal humanism such as Donald R. Kelley, Guido Kisch, Domenico Maffei, Steven Rowan and Paul Emile Viard acknowledged that legal humanists such as Budé, Zasius, and Alciati were in fact interested in and writing about natural law,²⁷ yet these historians did not situate or examine the implication of the discussions by legal humanists within the broader context or history of early-modern legal and political thought. For the most part these two fields of inquiry—the history of natural law and the history of legal humanism in particular, and Renaissance humanism more generally—have remained separate until very recently.

Authors of more recent works on the history of rights in the West gesture, in different ways, to the possible significance of Renaissance humanism, and legal humanism in particular, for the development of modern natural law and natural rights. Yet none do in detail. To show this, it is useful to turn to three of the most significant contributions to the historiography in the last ten years, namely, *The Reformation of Rights: Law, Religion, and Human Rights in Early Modern Calvinism* (2000) by John Witte, Jr.; *The Europeanization of the World: On the Origins of Human Rights and Democracy* by John M. Headley (2008); and *Liberty, Right, and Nature: Individual Rights in Later Scholastic Thought* (2006) by Annabel Brett.

In each case, the authors define their points of departure in relation to different aspects of Tuck's and Tierney's arguments. However, these authors do not challenge the basic account of the most important periods in the history as presented by Tuck and Tierney, nor do they challenge their identification of Renaissance or legal humanism as insignificant to the development of modern rights theories. Or, at least they do not do so directly. Although Witte, Headley, and Brett appear to support Tuck's and Tierney's exclusion of humanism in their own narratives and presentations of the long history of natural law and natural rights prior to the mid-sixteenth century, that is, before the outbreak of the Reformation and the problems and processes of European expansion, it is significant that the main focus of their texts is the mid-sixteenth century onwards, with little—if any—attention to the early sixteenth century.

It is worth pausing to consider the history of the tradition as presented in Witte's and Headley's texts as both include substantive sections wherein they provide a narrative of the development of Western natural law, natural rights, and human rights traditions. Moreover, both Witte and Headley also provide discussions that point to a general influence of Renaissance humanism to modern rights theories. After considering their accounts, it is useful to turn to a specific comment Brett makes within her text. Surprisingly, it is with reference to the latter, not the former, that one is able to observe the beginnings of a new assessment—or at least recognition—of the contribution of legal humanism.

Witte begins his text with the most succinct account of the state of the art of the scholarship to-date:

Over the past three decades, a veritable cottage industry of important new scholarship has emerged dedicated to the history of rights talk in the Western tradition prior to the Enlightenment. We now know a great deal more about classical Roman understandings of rights (*iura*), liberties (*libertates*), capacities (*facultates*), powers (*potestates*), and related concepts, and their elaboration by medieval and early modern civilians. We can now pore over an intricate latticework of arguments about individual and group rights and liberties developed by medieval Catholic

²⁶ Strauss, *Natural Right and History*; D'Entreves, *Natural Law*; Rommen, *The Natural Law*; and Crowe, *The Changing Profile of the Natural Law*.

²⁷ Kelly, *Foundations and History, Law, and the Human Sciences*; Kisch, *Erasmus und die Jurisprudenz seiner Zeit*, Maffei, *Gli inizi dell'umanesimo giuridico*; Steven W. Rowan, *Ulrich Zasius: A Jurist in the German Renaissance, 1461-1535* (Frankfurt: V. Klostermann, 1987); and Paul Emile Viard, *Andrea Alciat, 1492-1550* (Paris: Société anonyme du recueil sirey, 1926).

canonists, philosophers, and theologians, and the ample expansion of this medieval handiwork by neo-scholastic writers in early modern Spain and Portugal. And we now know a good deal more about classical republican theories of liberty developed in Greece and Rome, and their transformative influence on early modern common lawyers and political theorists, eventually on both sides of the Atlantic.²⁸

In this short, but dense paragraph, Witte is referring to the works and arguments of some of the most respected scholars who have engaged with the origins and development of rights, natural, civil, and human—by canonists and by civilians; in theory and in practice—in the late medieval and early modern periods, scholars such as Francis Oakley, Richard Tuck, Brian Tierney, Harold J. Berman, Constantin Fasolt, Quentin Skinner, Martin van Gelderen, J.G.A. Pocock, Michael Zuckert, Knud Haakonssen, and Annabel Brett among others (Headley’s text was not yet published).²⁹

In contradistinction, Witte challenges the existing scholarship by providing a detailed analysis of the contributions of Calvin’s and Calvinist thought to this history. Thus he offers a response to Tuck’s and Tierney’s, among others, exclusion of mid- to late- sixteenth-century Protestantism as contributing to the development of modern natural law and natural rights theory. And it is in the process of challenging the dominant historiography that Witte provides what he calls a “thumbnail sketch of the main watershed periods in the history of Western rights.”³⁰ He does so, he explains, “...to help situate and appreciate what the Calvinist tradition, in particular, contributed.”³¹

Witte begins by explaining that both objective and subjective *ius* were part of Roman law from its origins,³² noting however that with its rediscovery the language of Roman law changed according to its use by medieval jurists and theologians. Before turning to the Protestant Reformation, Witte addresses the period between the fourteenth and mid-sixteenth century with reference to Tierney. He argues that it was Tierney’s work that substantially contributed to our understanding of how precisely subjective rights “were rendered increasingly sophisticated and systematic in the fourteenth through the sixteenth centuries through the work of such scholars as William of Ockham, John Wycliffe, Conrad Summenhart, Richard Fitzralph, Jean Gerson, Francisco de Vitoria, Francisco Suarez, and others.”³³ Part and parcel of providing an account of rights in the late-medieval and pre-Reformation periods, Witte includes a discussion of practical legal charters and instruments, from the *Magna Carta* (1215) through to the late sixteenth century and beyond. As the Protestant Reformation provides the context for his study he does not discuss it in detail in this sketch. Instead, he moves

²⁸ Witte, xi.

²⁹ See Francis Oakley, *Natural Law, Conciliarism, and Consent in the Late Middle Ages* and *Natural Law, Laws of Nature, Natural Rights: Continuity and Discontinuity in the History of Ideas* (New York: Continuum, 2005); Tuck, *Natural Rights Theories*; Tierney, *The Idea of Natural Rights*; Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (Cambridge, MA: Harvard University Press, 1983); Constantin Fasolt, "Visions of Order in the Canonists and Civilians," in *Handbook of European History, 1400-1600*, 31-60 and "A Question of Right: Hermann Conring's New Discourse on the Roman-German Emperor," *Sixteenth Century Journal* 28, no. 3 (Autumn 1997): 739-59; Quentin Skinner, *The Foundations of Modern Political Thought*, 2 vols. Cambridge: Cambridge University Press, 1978); Martin van Gelderen and Quentin Skinner, *Republicanism: A Shared European Heritage*, 2 vols. (Cambridge: Cambridge University Press, 2002); Van Gelderen, *The Political Thought of the Dutch Revolt 1555-1590* (Cambridge: Cambridge University Press, 1992); J. G. A. Pocock, *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition*. 2nd ed. (Princeton, NJ: Princeton University Press, 2003); Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996); and Brett, *Liberty, Right, and Nature*.

³⁰ Witte, *The Reformation of Rights*, 23.

³¹ *Ibid.*

³² To make this claim, Witte refers to the argument made by Charles A. Donahue, Jr., in “*Ius* in the Subjective Sense in Roman Law: Reflections on Villey and Tierney,” in *A Ennio Cortese* (2001).

³³ Witte, *The Reformation of Rights*, 27. In addition to Tierney, Tuck, and Brett, Witte also refers to R.W. Davis, ed., *The Origins of Modern Freedom in the West* (Stanford, CA: Stanford University Press 1995); and Michel Villey, *Le Droit et les droits de l’homme* (Paris: Presses universitaires de France, 1983) and *Leçons d’histoire de la philosophie du droit*, new edition (Paris: Dalloz, 1962).

quickly to a consideration of European expansion and the watershed moments of the rights revolutions of the seventeenth and eighteenth centuries in England, America, and France.

He provides this sketch in order to suggest that the inclusion of Calvin's and Calvinists' thought on these later revolutions will provide a "New History of Human Rights."³⁴ A history that "might well surprise, even shock scholars and students of human rights and Calvinism,"³⁵ as

Our schoolboy texts have long taught us that the history of human rights began in the later seventeenth and eighteenth centuries. Human Rights, we often hear, were products of the Western Enlightenment – creations of Grotius and Pufendorf, Locke, and Rousseau, Montesquieu and Voltaire, Hume and Smith, Jefferson and Madison. Human rights were the mighty new weapons forged by American and French Revolutionaries who fought in the name of political democracy, personal autonomy, and religious freedom against outmoded Christian conceptions of absolute monarchy, aristocratic privilege, and religious establishment. Human Rights were the keys that Western liberals finally forged to unlock themselves from the shackles of a millennium of Christian oppression and Constantinian hegemony. Human rights were the core ingredients of the new democratic constitutional experiments of the later eighteenth century forward. The only Christians to have much influence on the development, we are told, were a few early Church fathers who decried pagan Roman persecution, a few brave medievalists who defied papal tyranny, and a few early modern Anabaptists who debunked Catholic and Protestant persecution.³⁶

Aside from the polemical tone of Witte's characterization of the history of rights, it challenges historians to broaden their perspectives, to break out of the traditional narrative of the established canon of the scholarship. However, despite his emphasis on the necessity to rethink the history of rights, he does not include, nor even mention, Renaissance humanism or legal humanism—on the side of theory or practice—in his "thumbnail sketch" presented in his *Introduction*.

Yet, in a later section of his text entitled "Calvin's Early Formulations,"³⁷ Witte offers a brief account of Calvin's education. He explains to the reader that after completing a typical humanist education in Paris, Calvin then took up the study of law with "such legal masters" as "Andrea Alciati at University of Bourges and Pierre L'Estoile at the University of Orléans."³⁸ After Calvin received his licentiate in law, Witte continues, he returned "to Paris for further legal studies, now with the noted legal humanist Guillaume Budé."³⁹ However, this brief reference to Calvin's humanist, and indeed legal humanist, background is not followed with an in-depth (or even broad) examination of what this meant, if anything, for the development of Calvin's thought. Instead, Witte turns directly to Calvin's early writings on religious liberty. Thus despite its absence in his "thumbnail sketch," Witte does not exclude legal humanism as altogether irrelevant to his "New History of Western Rights." Although clearly the advent of legal humanism is not a watershed moment for Witte, nevertheless in his discussion he implied its significance to the development of Calvin's thought—and his conception of religious liberty in particular. This points to at least some recognition that legal humanism contributed 'something' to the development of modern theories.

One might well expect to discover what precisely legal humanism contributed by turning to another recent text, which has as one of its major premises that Renaissance humanism directly and distinctly contributed to the development of Western human rights. Indeed, it is in Headley's text that one finds the opposite of Witte's assessment: an argument that the advent of Renaissance humanism was clearly a watershed moment in the development of human rights. Yet a discussion of precisely

³⁴ Witte, *The Reformation of Rights*, 20.

³⁵ *Ibid.*, 28.

³⁶ *Ibid.*, 20.

³⁷ *Ibid.*, 42-56.

³⁸ *Ibid.*, 42.

³⁹ *Ibid.*

how and why is absent from Headley’s detailed account of “The Career of Natural Rights in the Early Modern Period.”⁴⁰

In his *The Europeanization of the World: On the Origins of Human Rights and Democracy*, Headley argues for the importance of both the Renaissance and the Reformation in the development of modern human rights and constitutional democracy. One of the central tenets of his argument is the importance of the Stoic idea of common humanity, found in the works of Cicero and emphasized by Renaissance humanists onwards. However, for Headley, although the fundamental importance of the idea of common humanity emerged in the early Renaissance, and the humanists were the primary conduits of this idea, “the vehicle of the idea of common humanity”⁴¹ from the mid-sixteenth century and beyond was “secularized natural law.”⁴² It was not, however, the humanists with their emphasis on human nature and dignity that accomplished this secularization. Instead, Headley attributes this “...process of natural law’s secularization and hence the effective removal of it from a theological and expressively Christian framework,” above all, to the “Spanish theologian-jurists of the sixteenth century, in their utterly novel experience of contending with the problem of the American Indian.”⁴³ Therefore as important as Renaissance humanism is to other aspects of Headley’s argument, when he turns to natural law and natural rights theories in the sixteenth century, he focuses squarely on “the Spanish moral theologians,” who “have been frequently recognized as crossing a bridge from the medieval to the modern.”⁴⁴

What is noteworthy about Headley’s account is not that he stresses the importance of scholastic thought in the later half of the sixteenth century. Rather, what is significant is the lack of a discussion of the relevance of early Renaissance humanism, or legal humanism in particular, to the development of modern natural law and natural rights theories. This is a notable exception in a book that has as one of its primary arguments that the Renaissance was absolutely crucial to the development of modern human rights. While Headley does discuss the influence of humanism more generally on the development of modern theories, it is only after he accounts for the innovations of second scholasticism. Thus it appears that it was only in the seventeenth century that humanism had a tangible influence on the development of modern rights theories, natural and human. In other words, for Headley the impact of humanism on specific definitions and articulations of natural law and natural rights, beyond a general notion of common humanity, seems to rest almost exclusively with seventeenth-century Dutch humanists, theologians, and jurists such as Grotius.⁴⁵

Significant on its own terms, Brett’s engagement with the traditional narrative of the theory in comparison to Headley’s is even more interesting. In her text, *Nature, Right, and Liberty: Individual Rights in Later Scholastic Thought*, Brett clarifies and expands nuanced aspects of discussions of subjective right in the late medieval and early modern periods. Her precise attention to language in context—textual and historical—enables her to offer corrections to both Tuck and Tierney, and others, as well as to demonstrate a direct link between second scholasticism and seventeenth-century theorists, especially a link between second scholasticism and Hobbes. A key figure in this transmission and development of key ideas, Brett argues, was Fernando Vazquez (1512-1566/1569):

Fernando Vazquez is a figure of some obscurity in the history of political thought today, despite his having been notorious among contemporaries, a major influence on Grotius and cited consistently throughout the second half of the sixteenth century and first half of the seventeenth. Partly this is because his work has been appropriated to the history of international law, in a century—unlike the sixteenth and seventeenth—wherein the external relations of states are treated largely separately from their internal structures. Partly also it is due to his having been a humanist

⁴⁰ Headley, *Europeanization of the World*, 103-148.

⁴¹ *Ibid.*, 64.

⁴² *Ibid.*, 103.

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.*, 108-116.

jurist and therefore escaping the categories of enquiry into the scholastic political thought of sixteenth-century Spain and of the counter-reformation in general.⁴⁶

In this passage Brett points directly, intentionally or not, to the influence of legal humanism on modern theories. She does so in interrelated and interesting ways. Not only does she assert Vazquez's influence on Grotius, she also notes this as part of her introduction as to why and how Vazquez's works influenced Hobbes. Here is a link between a legal humanist and arguably the two most important 'modern' natural and natural rights theorists in the first half of the seventeenth century. However, rather than investigate how Vazquez's background in humanist jurisprudence influenced second scholasticism or seventeenth-century theories, Brett primarily focuses on how second scholasticism influenced Vazquez's thought. In other words, Vazquez's works represent a link between late-medieval and modern thought, not because he was a humanist, but rather because in arguing against second scholastics such as Domingo de Soto (1494-1560), Vazquez drew upon an older tradition of scholastic political and legal thought to do so. Notwithstanding, it remains significant that in arguing for Vazquez as a link between medieval and modern ideas of rights, that Brett notes that Vazquez may very well have escaped the attention of natural law and natural right historiography more generally precisely because he was a humanist jurist and precisely because of his emphasis on *ius gentium*.

Aside from their departures from Tuck and Tierney, and even in light of Witte's, Headley's, and Brett's gestures to the importance of humanism, a detailed investigation of the contribution of Renaissance or legal humanism to modern natural law and natural rights theories remains relatively absent in the literature. This is partly the case because all too often, as Brett implies above, the relation between natural law and natural rights is treated by modern scholars to be distinctly different from the relation between natural rights and *ius gentium*. As a result, attention to *ius gentium* in the early-modern period has been informed by contemporary understandings of *ius gentium* as international law. Although the idea of *ius gentium* as modern international law, distinct in form and extent from both natural or civil law, became manifest in the late-eighteenth century, it has come to frame how scholars explore the history of legal and political thought from the Renaissance onwards. Yet, *ius gentium* as customs in common, as universally shared moral principles and practical conventions, prior to the eighteenth century was not necessarily seen as distinct from natural or civil law, but rather to be fundamentally related to both, and indeed, *ius gentium* was understood to be a form of natural law and the source of natural rights by such legal humanists as Budé, Zasius, and Alciati.

The Moral Authority of Nature and the Historical Authority of Rights

Throughout their works Budé, Zasius, and Alciati were occupied with questions concerning the origins and the nature of governance in general, as well as particular questions of political and legal authority in France, Germany, and Italy. They consistently engaged with questions of rights in their discussions of Roman law before and during the early stages of the European Reformation. Because they were already using Roman law as a means to legitimize and to critique the expansion of secular political and legal authority before the outbreak of the Reformation, their works stand outside the traditional confines of theology in which historians tend to discuss natural law and natural rights in the sixteenth century.⁴⁷

Moreover, Budé, Zasius, and Alciati also stepped back from traditional scholastic methods that were predominant in the Roman and Canon law faculties at the time.⁴⁸ Rather than attempting to

⁴⁶ Brett, *Liberty, Right, and Nature*, 165.

⁴⁷ Compare with Brett's statement above at note 49.

⁴⁸ For good discussions of the origins and development of the scholastic methods see John W. Baldwin, *The Scholastic Culture of the Middle Ages, 1000-1300* (Lexington, MA: Heath, 1971); Neal W. Gilbert, *Renaissance Concepts of Method* (New York: Columbia University Press, 1960); A. S. McGrade, ed., *The Cambridge Companion to Medieval Philosophy* (Cambridge: Cambridge University Press, 2003); Norman Kretzmann, Anthony Kenny and Jan Pinborg, eds., *The Cambridge History of Later Medieval Philosophy: From the Rediscovery of Aristotle to the Disintegration of Scholasticism, 1100-1600* (Cambridge: Cambridge University Press, 1981); and Katherine Park and Lorraine Daston,

reconcile the contradictions and discrepancies in the entire *corpus* of Roman law by means of logical distinctions—as the scholastics had done—they studied Roman law with reference to the *studia humanitatis*.⁴⁹ In doing so they investigated how civil laws changed over time in order to study the universal principles such as justice, good, and equity that underlie them. Thus their historicist methods did not lead them to a position of relativism, but rather to an understanding of natural law, *ius, ius gentium* based on universal moral principles—which in turn they invoked to call for a wholesale reform of jurisprudence (Budé),⁵⁰ to argue for the necessity to reform specific civil laws (Zasius),⁵¹ and to argue for the right of war or self-defense by powers locked into conflict (Alciati).⁵²

Significantly, there are a number of striking similarities between the sixteenth-century legal humanists' discussions of the natural law, *ius, ius gentium* and the so-called moderns in the seventeenth century, theorists such as Grotius, Hobbes, Pufendorf, and John Locke (1632-1704). This can be accounted for in part because the sixteenth-century legal humanists and their seventeenth-century successors employed similar methods, namely, methods associated with the *studia humanitatis*. However, these similarities can also be accounted for in relation to their contexts: the sixteenth-century legal humanists and the seventeenth-century theorists were each writing during a period of uncertainty, instability, and conflict wherein questions of law and rights were thrown into sharp relief.⁵³

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eds. *The Cambridge History of Science: Volume 3, Early Modern Science* (Cambridge: Cambridge University Press, 2006). For an example of the scholastic method as applied to questions of natural law and natural right, see Thomas Aquinas, specifically *Chapter II: Law* and *Chapter IV: Right, Justice and Judgment* in *The Political Writing of Thomas Aquinas*, translated and edited by R.W. Dyson (Cambridge: Cambridge University Press, 2002), 58-204. For an classic example of the scholastic method as applied to questions of Roman law in particular see any edition of Accursius' *Glossa Ordinaria* (the standard gloss used in the universities from about 1230 onwards) or Bartolus de Saxoferrato's *Commentaria* (the standard commentary used in the universities from 1330 onwards).

⁴⁹ I follow Paul Oskar Kristeller's definition of the *studia humanitatis*. According to Kristeller humanist education was based on a clearly defined curriculum of study that included five fields: grammar, rhetoric, history, poetry, and moral philosophy. See Paul Oskar Kristeller, *Renaissance Thought: The Classic, Scholastic, and Humanists Strands* (New York: Harper and Row Publishers, 1955) and Kristeller, *Renaissance Thought and Its Sources*, ed. Michael Mooney (New York: Columbia University Press, 1979). However, there is currently an emerging debate concerning Kristeller's emphasis on the formal qualities of humanism. See Christopher Celenza, "Late Antiquity and the Florentine Renaissance: Historiographical Parallels," *Journal of the History of Ideas* 62, 1 (2001): 17-35, and *The Lost Italian Renaissance: Humanists, Historians, and Latin's Legacy* (Baltimore: Johns Hopkins University Press, 2004); Riccardo Fubini, *Humanism and Secularization: From Petrarch to Valla* trans. Martha King (Durham: Duke University Press, 2003); Kenneth Gouwens, "Perceiving the Past: Renaissance Humanism after the 'Cognitive Turn,'" *The American Historical Review* 103, 1 (1998): 55-82; Charles G. Nauert, "Humanism as Method: Roots of Conflict with the Scholastics," *Sixteenth Century Journal*, vol. 29 (Summer 1998): 427-38, and "Renaissance Humanism: An Emergent Consensus and Its Critics," *Indiana Social Studies Quarterly* 33 (1980): 5-20; Ronald G. Witt, *'in the Footsteps of the Ancients': The Origins of Humanism from Lovato to Bruni* (Brill: Koninklijke, 2000) and "The Humanist Movement," in *Handbook of European History, 1400-1600*, ed. Thomas A. Brady Jr., Heiko Augustinus Oberman and James D. Tracy (Grand Rapids, MI: William B. Eerdmans Publishing Company 1984), 93-120.

⁵⁰ See Budé, *Annotationes in quattuor et viginti pandectarum libros* ([Paris]: Ex officina Ascensiana, 1508) and *De asse et partibus eius libri quinque* ([Paris]: Venundantur in edibus Ascensianis, 1514).

⁵¹ See Zasius, "De iustitia et iure, lecture [1550]," in *Opera Omnia* (Aalen: Scientia Verlag, 1964), fo. 241-69; "[Praefatio] in iuris civilis originem, scholia," in *Lucubrationes* (Basil: Ioannem Frobenium, 1518), 1-3 [Hereafter: 1518 Preface]; and *Neue Stadtrechte und Statuten der Stadt Freiburg im Breisgau* [1520] (Aalen: Scientia-Verlag, 1968).

⁵² See Alciati, "De iustitia et iure, lecture" in *Omnia Opera* (Basil: Isingrinus, 1546), 1-14; "Bona Fides," in *De verborum significatione* (1535), cols. 305-313; and *De singlari certamine liber. Eiusdem consilium in materia duelli, exceptum ex libro quinto Responsorum* (Venice: Vicentium Vaugris, 1544).

⁵³ For discussions of instability, exclusions, and violence as distinguishing characteristics of the history of rights, natural and human, see Michael Geyer, "When Human Rights Disappear: Observations on Human Rights in History," (forthcoming manuscript); William J. Novak, "Human Rights in Historical Perspective," (forthcoming manuscript); Hannah Arendt, "The Decline of the Nation State and the End of the Rights of Man," *The Origins of Totalitarianism*, (New York: Meridian Books, 1958), 267-302; Costas Douzinas, *The End of Human Rights* (Oxford: Oxford University Press, 2000); Lynn Hunt, Jeffrey N. Wasserstrom, and Marilyn B. Young, eds. *The Paradoxical Origins of Human Rights* (Lanham, MD: Rowman & Littlefield, 2000); Roberto J. Vernengo, "Human Rights and Axiological Inconsistencies," *Law and*

Budé, Zasius, and Alciati wrote in an age in which the authority and ideal of Universal Latin Christendom—which was always challenged and had never been truly realized—was being replaced by independent sovereign entities.⁵⁴ The seventeenth-century theorists were writing in an age characterized by the transition of these independent sovereignties into early modern states. Throughout this period, from the late-fifteenth century through to the late-seventeenth century and beyond, Europe was characterized by rapid changes in economic, social, and religious life, as well as international and civil conflicts. And it was in the context of these conflicts and changes that the legal humanists and the seventeenth-century theorists attempted to define a common understanding of natural law and natural rights, shared among all and by all, in order to address local as well as international problems of authority. Indeed, many of the fundamental legal and political issues that legal humanists were trying to solve in the sixteenth century were still very much at the center of political and legal thought in the seventeenth century.⁵⁵ Furthermore, in addressing similar issues the early sixteenth-century legal humanists and their seventeenth-century successors alike turned to human nature as the source of moral authority to ground their discussions of the necessity for civil society, civil laws, and political authority.

Like their seventeenth-century successors, by comparing laws and customs over time, humanist jurists were led to identify universal moral principles, or natural laws, shared by all. Moreover, just as the ‘modern’ theorists of the seventeenth century, Budé, Zasius, and Alciati turned to the historicity of law in order to identify—through observation and comparison; actual and imagined—a set of innate attributes and inclinations, that is, universal characteristics (reason; dignity; will; passions) that all men shared in common by virtue of being human.⁵⁶ Once identified—usually the very first steps of the theory—the legal humanists and so-called modern theorists then abstracted from these universal attributes or inclinations a conception of man’s natural condition—man *qua* man. It was this natural condition that was then extended, by analogy, to man’s condition prior to civil society, e.g., the ‘state of nature’ or man’s natural state, and to the establishment of civil society.

With reference to universal natural inclinations, the seventeenth-century theorists and early sixteenth-century legal humanists attempted to provide a historical account of why and how man entered civil society in the first place, which in turn provided the laws that governed a particular society with both moral and historical authority. The historical fiction at the base of these discussions was constructed on the basis of whichever natural attribute or inclination a theorist chose to emphasize in order to account for (1) the original transition to civil society, and (2) the principles by which society should be governed. For example, Grotius identified sociability as the most basic inclination in man; man entered mutual company because he had a desire to both help and interact with others. Hobbes, on the other hand, identified man’s most basic inclination as fear, thus man’s impulse to enter political society was based on his desire to quit the *bellum omnium contra omnes*.

In the end, however, these theories were less about natural man than they were explanations of the necessity for and the justification of particular forms of political and legal authority. The historical fiction of the state of nature was secondary in comparison to the historical fiction of the original moment—whether this was described as a gradual historical process or articulated in terms of a break with the past—in which man agreed to live in accordance with civil laws. The account of how this came to be provided the historical justification for the existence of legal authority within these

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Philosophy 8, no. 1: Rights, Duties, and Legal Reasoning (April 1989): 65-82; and Robert M. Cover, “Violence and the Word,” *The Yale Law Journal*, vol. 95, no. 8, Charles L. Black, Jr. Festschrift (Jul., 1986): 1601-1629.

⁵⁴ See note 6 above.

⁵⁵ A good text to compare the continuities—and of course changes—between pre-Reformation and post-reformation Europe is Brady Jr., Oberman, and Tracy, eds. *Handbook of European History, 1400-1600*.

⁵⁶ See for example, Hugo Grotius, *On the Freedom of the Seas* (1609) or *The Rights of War and Peace* (1625), 3 vols; Thomas Hobbes, *Elements of the Law, Natural and Political* (1640) or *The Leviathan* (1651); Samuel Pufendorf, *Of the Laws of Nature and Nations* (1672) or *The Whole Duty of Man According to the Law of Nature* [a.k.a.: *On the Duty of Man and Citizen*] (1673); or John Locke, *Concerning the Law of Nature* (1664) or *Two Treatises on Government* (1689).

discussions, whereas the historical fiction of the ‘state of nature’—which reflects man’s natural attributes and inclinations—provided the moral justification for the existence of political authority.

It is in this respect that the concern with the categories of natural law, *ius*, and *ius gentium* by legal humanists is especially significant. Like their seventeenth-century successors they offered accounts for the transition to and the formation of civil society, governed by civil laws, based on man’s natural attributes, which were minimal, secular, and universal. These characteristics provided moral authority to civil authorities as well as rulers within society. For Budé and Zasius the transition from mutual company to civil society was the result of a natural historical progression, and thus the moral authority of society was rooted in man’s natural inclination to live in mutual company and pursue the common good, i.e., his sociability.⁵⁷ For Alciati, on the other hand, the transition was the result of an intervention, a break from nature and the past, whereby only after men were persuaded to pursue peace, security, and the common good in mutual company did they submit themselves to become equal before civil law.⁵⁸ It was man’s choice to abandon his unsociable condition outside of society that stood as the source of the moral authority of civil society for Alciati.

Furthermore, Budé, Zasius, and Alciati used their explanations of the transition from mutual company to civil society in order to either legitimize or critique the expansion of authority underway in the first half of the sixteenth century. They did so because the creation of new forms—and the expansion of existing forms—of legal authority introduced a historical problem into the study of law, namely, how to protect customary rights and obligations in the face of new laws and *vice versa*.⁵⁹ This was the fundamental problem that the legal humanists attempted to solve in the early sixteenth century, that the ‘modern’ theorists attempted to resolve in the seventeenth century, and that contemporary rights scholars—lawyers, philosophers, historians, and political scientists—are still trying to solve today.

The contexts in which each of the legal humanists were writing—Budé in France, Zasius in Germany, and Alciati in Italy and France—helps to account for how they used categories of natural law, *ius*, and *ius gentium* to accept or reject changes in civil law and by extension customary laws in the early sixteenth century. For example, Budé accepted the absolute authority of the king and thus rejected what he deemed as the attempt by professional lawyers (especially those trained in and following the teaching of Italian jurisprudence) to usurp the king’s legislative power and privilege.⁶⁰ To do so, Budé used the categories of natural law, *ius*, and *ius gentium* to demonstrate how jurists had corrupted Roman law as well as customary laws in order to serve their own ends. As a lawyer, city councilor, and Imperial councilor in Germany, Zasius participated in the extension of the legal, political, and economic power of the city of Freiburg over its countryside, but rejected aspects of the inverse, the tightening of the Emperor’s grasp over legal, political, and economic structures within Freiburg.⁶¹ In both cases he used the fundamental categories of *ius* and *ius gentium* (a form of natural

⁵⁷ Budé, *Annotationes* and Zasius, “De iustitia et iure, lecture [1550]”

⁵⁸ See specifically, Alciati, “Oratio Andreae Alciati, dum Bononiam,” in *Opera*, vol. 3. (Basil: Isingrinus, 1546), 1051/1052; and “De iustitia et iure, lecture.”

⁵⁹ For good discussions of the importance of lawyers and jurists in this process see William J. Bouwsma, “Lawyers and Early Modern Culture,” *The American Historical Review*, vol. 78, no. 2 (1973): 303-27; Berman, *Law and Revolution I* and *Law and Revolution II: The Impact of the Protestant Reformation on the Western Legal Tradition* (London: Belknap, 2004); Fasolt, “Visions of Order in the Canonists and Civilians” (1984); Myron Piper Gilmore, *Argument from Roman Law in Political Thought, 1200-1600* (New York: Russell & Russell, 1967) and Gilmore, *Humanists and Jurists: Six Studies in the Renaissance* (Cambridge: The Belknap Press of Harvard University Press, 1963); Kelley, “The Rise of Legal History in the Renaissance.” In *History, Law, and the Human Sciences: Medieval and Renaissance Perspectives*, 174-94 (London: Variorum Reprints, 1984); Stephan Kuttner, “Revival of Jurisprudence,” in *Renaissance and Renewal in the Twelfth Century* eds. Robert L. Benson and Giles Constable (Cambridge, MA: Harvard University Press, 1982), 299-323; and Franz Wieacker, *A History of Private Law in Europe with Particular Reference to Germany* (Oxford: Oxford University Press, 1995).

⁶⁰ Bude, *Annotationes*.

⁶¹ Compare Zasius, *Neue Stadtrechte und Statuten der Stadt Freiburg im Breisgau [1520]* with “De iustitia et iure, lecture [1550]”.

law according to Zasius)⁶² to make arguments for both the limits and the legitimacy of new civil laws. And finally Alciati, under the patronage of conflicting rulers in and beyond Italy, argued for the necessity to recognize limits and boundaries that existed—or should have existed—between different princes, kings, and dukes in relation to one another as well as between them and their own subjects.⁶³ Furthermore the rights and customs practiced among men prior to the founding of civil society (before man agreed to become equal before civil law) mirrored the rights of rulers' *vis-à-vis* one another in times of war and peace for Alciati.⁶⁴

The application of natural law and natural rights language to rulers on the one hand, and explanations that posit the conditions of international society as similar to—even a reflection of—the conditions among individuals outside of society on the other, are characterized in the historiography as the innovation of seventeenth-century theorists in particular.⁶⁵ Within the theories, these two periods of the historical fiction at the basis of the so-called 'modern' natural law and natural rights represent two corresponding levels: (1) a 'state of nature' from which people implicitly contract into civil society and (2) an international realm in which states explicitly contract into conditions of war and peace. For the legal humanists, the category of *ius gentium* was central on each level, for man and for rulers, because it was a form of natural law known through right reason; it was an expression of customary law within communities; and it included customs in common between communities (i.e., between societies who did not share a common ruler and thus did not share the same civil laws). *Ius gentium* was central precisely because it encompassed both moral and historical authority, and therefore could be invoked as a means to either legitimate or reject changes in political and legal authority within communities (with the creation of new civil laws), and it could be used to either support or question moral and political claims by dukes, princes, kings, popes, and emperors against one another. In other words, because it had both moral and historical authority, *ius gentium* could hold those who protected the peace within communities to a higher criterion of justice at the same time as it could be used to justify relations of war and peace between communities.

Significance of Legal Humanism

Yet the significance of the legal humanists for the history of natural law and natural rights theories does not rest merely on their similarities with later theorists or a shared context of instability in Europe throughout the early modern period more generally. One could make such comparative arguments about any two periods and any two traditions within early modern Europe. The legal humanists are particularly important because in applying their methods to the study of Roman law they offered a fundamental re-interpretation of the key categories within it—especially in their discussion of the first title of the *Digest*, *De iustitia et iure* (*On Justice and Law*). In their discussions of this title, Budé, Zasius, and Alciati did nothing less than directly challenge long-established assumptions of late-medieval and early-modern political and legal thought, especially the interpretations of Roman law by such jurists as Bartolus de Saxoferrato (1313-1357) and his student Baldus de Ubaldis (1327-1400), as well as Accursius (1182-1263).⁶⁶

⁶² The first quality of natural law for Zasius concerns reproduction, preservation and instruction; the second quality concerns the conflict between man's corporal and rational nature: it teaches him to temper his passions with reason and to desire the common good—it governs one's internal inclinations. Finally, the third quality teaches man how to seek peace, security, and the common good in mutual company—it concerns one's external actions in society. The fourth quality of natural law, Zasius argues, is *ius gentium*. "De iustitia et iure, lecture" col. 250-251.

⁶³ See Alciati, "De iustitia et iure, lecture"; Alciati, *Bona fides*; and Alciati, *De singlari certamine liber. Eiusdem consilium in materia duelli, excerptum ex libro quinto Responsorum*.

⁶⁴ See Alciati, "De iustitia et iure, lecture."

⁶⁵ For example, see Tuck, *The Rights of War and Peace*; T. J. Hochstrasser and P. Schröder, eds., *Early Modern Natural Law Theories: Contexts and Strategies in the Early Enlightenment* (Boston: Kluwer Academic Publishers, 2003); and Ian Hunter and David Saunders, eds., *Natural Law and Civil Sovereignty: Moral Right and State Authority in Early Modern Political Thought* (New York: Palgrave, 2002).

⁶⁶ For a discussions of Bartolus' and Baldus' legal and political thought see Berman, *Law and Revolution*; Francesco Maiolo, *Medieval Sovereignty: Marsilius of Padua and Bartolus of Saxoferrato* (Delft: Eburon Academic Publishers, 2007);

That Budé, Zasius, and Alciati departed substantially from traditional jurisprudence is not surprising, in large part because they each, in different ways, had set out to offer alternative interpretations in their works.⁶⁷ Indeed, each explained in great detail why and how they disagreed with Accursius, Bartolus, and Baldus and those who followed them, and each attempted to persuade their respective audiences of the value, and indeed, the immediate necessity of correcting traditional jurisprudence with reference to the methods and sources of the *studia humanitatis*. Their reinterpretation of natural law, *ius*, and *ius gentium* in this process is likewise not surprising given the contexts, as outlined above, in which they applied their new *modus docendi* to the study of Roman law. In other words, they each emphasized foundational categories of natural law, *ius*, and *ius gentium*, and the principles to which they referred, such as justice and *ius*, in order to address local (Budé and Zasius) and European-wide (Alciati) problems.

Moreover, it is crucial to note that in relation to their reinterpretation of Roman law, the legal humanists were in large part exemplary, not exceptional. They were exemplary because the application of their *modus docendi* to the *corpus* of Roman law and medieval jurisprudence was an attempt to re-trace and re-examine the legal traditions that they had inherited from their past. In this respect they were not unlike the medieval jurists, second scholastics, seventeenth-century theorists, and those who contributed to the development of this tradition of Western political and legal thought throughout the eighteenth, nineteenth, and early twentieth centuries. In all of the above cases, changes in the interpretation and the significance of natural law, *ius*, and *ius gentium* were related to, and the result of, major political, legal, economic, and social changes on the ground. Throughout the long history of the development of natural law and natural rights theories, jurists, theologians, philosophers, and scholars have attempted to re-think an inherited tradition precisely because it no longer fit the circumstances under which they lived.

The legal humanists are also exemplary of a broader shift that occurred throughout the early-modern period: while it was the case that Budé, Zasius, and Alciati were—and continue to be—the most famous legal humanists of the early sixteenth century, their application of the *studia humanitatis*, in terms of methods as well as sources, in interpreting Roman law was not their unique innovation. Throughout Europe, these new methods were being applied to explore and reinterpret inherited bodies of knowledge, including theology and philosophy, both within the university faculties and outside of them. However, Budé, Zasius, and Alciati were exceptional in relation to their scholastic counterparts precisely because through the applications of their methods they offered a fundamentally different, and alternative, interpretation of the key categories within both Roman law and scholastic jurisprudence. In doing so, in rethinking and re-evaluating the foundational categories within Roman law, the legal humanists departed from both the Romans and the scholastics, especially in terms of their emphasis on *ius gentium*.⁶⁸

(Contd.) _____

Guido Kisch, *Bartolus und Basel, Basler Studien zur Rechtswissenschaft* (Basel: Helbing and Lichtenhahn, 1960); Fasolt, *Limits of History* (Chicago: University of Chicago Press, 2004); Gilmore, *Argument from Roman Law in Political Thought, 1200-1600*; and J. Canning, *The Political Thought of Baldus De Ubaldis* (Cambridge: Cambridge University Press, 1987).

⁶⁷ Both Zasius and Alciati do so in their orations and in their prefaces, Budé was different in this respect, because it was within *Annotationes*, not in the preface or the dedication letter, wherein he explained his methods and stated his objections to the methods and interpretations of scholastic jurisprudence most directly, see especially *Annotationes*, fo. XI. Zasius sets his out his methods and criticisms of the scholastic Doctors most directly in three works, namely, the 1518 Preface; the "Praefatio. Dn. Udalrici Zazii iureconsulti clarriss. In primam digestorum, sive pandectarum partem paratitla. 1550," in *Opera omnia*, vol. 1, cols. 13-14; and in his oration "In laudem legum oratio," in 1518 *Lucubrationes*, 112-115. In Alciati's case, all of his works include a direct assessment of the problems of the methods and interpretations of traditional jurisprudence, joined to a defense of his own methods. For his most succinct accounts see: "In tres posteriores codicis Justiniani libros, annotatiunculae," in *Paradoxorum* (Basil: [Hercules Gallicus], 1523), specifically the preface 240-241; "Oratio in laudem iuris civilis, principio studii cum Avenione profiteretur," in *Omnia Opera* vol. 3. 506-511; "Oratio Andreae Alciati, dum Bononiam," (1546); and *Commentaria de verborum significatione* [1539] in *Omnia Opera* (Basil: Isingrinus, 1546), 1025.

⁶⁸ For a detailed discussion of this see Longfield Karr, "Human Liberty in Legal Humanism" (forthcoming article, 2010).

Conclusion

In light of the above, it is perhaps surprising that the legal humanists have been, for the most part, excluded from the history of the development of natural law and natural rights theories. However, the exclusion of legal humanism in the scholarship makes sense to the extent that legal humanists did not discuss natural law, *ius*, and *ius gentium* in similar terms or in similar ways as their scholastics predecessors or counterparts. That they discussed these categories so differently—especially the category of *ius gentium*—may account for why they have escaped the attention of historians who have as their primary focus to show how the scholastic tradition influenced the seventeenth-century theorists. Indeed, because legal humanists approached questions of natural law, *ius*, and *ius gentium* through the lens of Roman law, they might appear to have been merely concerned with civil law, civic utility, and the common good.

However, in order to make determinations as to the justness of civil law, civic utility, and the common good, the legal humanists invoked fundamental moral and legal categories to show that law changed over time and to argue that despite these changes, there remained universal, minimal, timeless, and immutable principles to which laws referred. In other words, the fact that specific civil laws could be unjust signified justice for the legal humanists. If there were no higher criteria of justice, then these civil laws could not be deemed as unjust, nor could they be in contradiction with one another or even in conflict. If civil law is arbitrary, if it can be held to no higher standard, then there is no need to justify changes in law or reconcile contradictions between them in the first place. The question as to why and on what grounds practices, rights, or obligations change becomes irrelevant; they simply change because the civil law changes, they change as a matter of whim and interests.

If civil law is random, there can be no security accomplished in living under it. In this respect civil law has the potential to be nothing more than force, enabling whomever has authority over civil law, and whomever administers it, to have unlimited, unrestrained, and arbitrary power over those who live under it. If this were the case, both the early sixteenth-century humanists and their seventeenth-century successors held, nothing in society could be secure, not even one's life, body, family, property, or *patria*. By extension there would be no reason for men to live in mutual company and no possibility to cultivate justice. However, if civil laws can be held to a higher standard of justice, if there are criteria by which one can determine whether changes in civil law were just or unjust, this would give moral authority to civil society, as well as those who created and administered the laws that governed it. Thus although it might appear that attention to variability in civil law signifies a lack of interest in or disregard for natural law, *ius*, *ius gentium*, in effect the concern by the legal humanists with civil law required attention to those fundamental categories, categories which continue to inform—and structure the interpretation of civil and international laws, and the conflicts between them, today.

In closing, attention to the legal humanists discussion of natural law, *ius*, and *ius gentium* has the opportunity to offer new insights and perspectives to human rights scholars, especially as they continues to wrestle with exploring the history of natural rights in order to show what it shares with contemporary human rights theory. Rather than exclude discussions that appear to be concerned only with civil law, it may be well worth taking a closer look at what role civil laws, and the rights (natural and customary) that they are meant to protect, uphold, and vindicate, played in this transition. Moreover, integrating discussions of the moral and historical authority of civil law also offers the opportunity for exploring the history of rights in the early-modern period beyond the conventional canon and framework established by scholars in the mid-twentieth century. By broadening the perspective of the investigation, beyond the lens of scholasticism and beyond the mid- to late sixteenth century, contemporary scholars who wish to provide a coherent account of the transition from natural rights to human rights in the early-modern period, may find that integrating legal humanism into this history has the potential to enable us to rethink and reevaluate the relation between natural law, *ius*, *ius gentium*, and civil law both prior to the eighteenth century and in light of the

“Often we are deceived, and we suffer glaucoma”

transformation of civil rights into human rights with the creation of the modern human rights regime in the mid-twentieth century.⁶⁹

Susan Longfield Karr

Max Weber Fellow, 2008-2009

Max Weber Visiting Fellow, 2009-2010

⁶⁹ For an account of the latter process—the transformation of civil rights into human rights—through the drafting of the 1949 UNDHR see in particular Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* (Philadelphia: University of Pennsylvania Press, 1999).