§ 3 Highest Poverty and Use

3.1. The introduction of the concept of *usus* to characterize the Franciscan life comes from Hugh of Digne and Bonaventure. Hugh of Digne's *De finibus paupertatis* (On the Ends of Poverty) appears to be a brief treatise that is, at least in appearance, juridical, which aims to define poverty with respect to ownership. The definition of poverty is purely negative: it is *spontanea propter Dominum abdicacio proprietatis* ("the voluntary abdication of ownership for the Lord's sake"), while property is defined technically as *ius dominii, quo quis rei dominus dicitur esse, quo iure res ipsa dicitur esse sua, id est domini propria* ("the right of dominion, by which someone is said to be lord of some thing, by which right the thing itself is said to be his, that is proper to the lord"; Hugh of Digne 2, p. 283). There follow the definitions of the two ways in which property is acquired according to Roman law: occupation (distinguished according as it refers to someone's goods of property or to things *que in nullis sunt bonis*) and obligation (which can be *mutata* or *non mutata*).

The concept of use is introduced a few pages later, in response to the objection that since natural law prescribes that every person should preserve his or her own nature, one cannot renounce those goods without which this conservation would be impossible. Natural law, Hugh responds, prescribes that everyone have use of the things necessary to their conservation, but does not obligate them in any way to ownership (*Haec siquidem, ut earum habeatur usus,*

sine quibus non conservatur esse nature, sed ut proprietas habeatur, nullatenus compellit; ibid., pp. 288–89). "Conserving one's nature does not in fact represent ownership of food and clothing, but use; moreover it is possible always and everywhere to renounce ownership, but to renounce use never and nowhere [*proprietati ubique et semper renunciari potest, usui vero nunquam et nusquam*]. The use of things is, therefore, not only lawful, but also necessary" (ibid.).

Use, being opposed in this way to the right of ownership, is not, however, in any way defined. It is not surprising, moreover, that as we have seen, Hugh can present the Franciscan condition, even if perhaps ironically, in juridical terms, as the right to have no rights.

In the *Apologia pauperum* (*Defense of the Mendicants*), written in 1269 in response to the attack of the secular masters in Paris against the mendicant orders, Bonaventure distinguishes four possible relations to temporal things: ownership, possession, usufruct, and simple use (*cum circa res temporales quatuor sit considerare, scilicet proprietatem, possessionem, usumfructum et simplicem usum*, "four matters must be considered in dealing with temporal goods, namely, ownership, possession, usufruct, and simple use"; Bonaventure, *Apologia pauperum*, pp. 366/307–8). Of these, only use is absolutely necessary to human life and, as such, unrenounceable (*et primis quidem tribus vita mortalium possit carere, ultimo vero tanquam necessario egeat: nulla prorsus potest esse professio omnino temporalium rerum abdicans usum*; ibid.). The Friars Minor, who have devoted themselves to following Christ in extreme poverty, had consequently renounced any right of ownership, while preserving, however, the use of things that others concede to them. The treatment of use that follows is always developed in strict relationship to law. Bonaventure knows (this was one of the secular masters' objections) that in consumable things ownership cannot be separated from use, but finds in Gregory IX's bull *Quo elongati* the juridical basis for their separation. Establishing that "property may be possessed neither individually nor in common" by the Friars Minor, but that "the brotherhood

may have use [*usum habeat*] of equipment or books and such other moveable property as it is permitted, and that individual brothers may use these things [*his utantur*]," the pope, whose *auctoritas* is superior to any other, "distinguishes between ownership and use [*proprietatem separavit ab usu*], retaining the former for himself and the Church, while conceding the latter for the needs of the friars" (ibid., pp. 368/308). Even more than in Hugh of Digne, the argumentation here is essentially juridical: just as in Roman law the *filiusfamilias* can receive from his father a *peculium*, of which he has use but not ownership, so the Friars Minor are *parvuli et filiifamilias* of the pope, to whom the ownership of the things that they use is due (ibid.). And as one cannot acquire the ownership of a good if one does not have the *animus acquirendi* or *possidendi* ("will to acquire" or "possess"), in the same way the Friars Minor, who by definition lack such *animus* and indeed have the contrary will, "cannot retain or obtain possession of a particular thing" (pp. 370/310).

The claim of use against the right of ownership is taken to such a point, at least in appearance, on the level of law that scholars have been able to ask themselves if *simplex usus* is not something like a royal law for Bonaventure (Tarello, p. 354), or if it is not the law itself that is to produce a juridical void within itself (Coccia, p. 140). If it is nevertheless certain that the juridical argumentation is here bent on opening a space outside the law, it is just as certain that the deactivation of law is carried out not by law itself but through a practice—the *abdicatio iuris* and use—that law does not produce but recognizes as external to itself.

3.2. The bull *Exiit qui seminat* (He Who Sows Went Forth), promulgated by Nicholas III in 1279 to put an end to the dispute between secular masters and mendicant orders, accomplishes a further step in the definition of use, but always in relation to law. As has been noted (Mäkinen, p. 96), the pope, who seems to know and approve the theses of Bonaventure (at times almost literally), nonetheless introduces two important variations into Bonaventure's series of four possible relations to *res temporales*

("temporal things"). On the one hand, along with ownership, possession, and usufruct, a fourth juridical figure is introduced, the *ius utendi* ("right of use"). On the other, Bonaventure's *simplex usus* ("simple use") appears here as *simplex facti usus* ("simple de facto use"). The meaning of this specification is defined a little later: it is a matter of a use that is "not the *usus iuris* but the *usus facti* inasmuch as having the name of 'facti' it offers however in the using no right to those so using" (*usus non iuris sed facti tantumodo nomen habens, quod facti est tantum, in utendo praebet utentibus nihil iuris*; *Exiit*, §9).

The specification is important not only because, in this way, the conceptual opposition no longer runs between *dominium* and *usus*, but within use itself, between *ius utendi* ("the right of using") and *simplex usus facti* ("simple de facto use"; Lambertini, p. 176). What is decisive is, rather, the opposition between law and fact, *quid iuris* and *quid facti*, which as such was well known to jurists, not only in a general way but precisely with respect to use. In this sense, Azzo's *Summa istitutionum* distinguished, precisely with respect to consumable things, a use that is right (*ius*) or servitude (*servitus*) from a "use that is a fact or consists in a fact, like drinking and eating [*qui est factum vel in facto consistit, ut bibendo et comedendo*]" (qtd. in Mäkinen, p. 98). It is interesting to note that here the distinction *quid iuris–quid facti* does not serve, as in the juridical tradition, to identify the situation of fact corresponding to a certain juridical case. Instead, as we will see later in the Franciscans' arguments against John XXII, drinking and eating are presented as paradigms of purely factual human practice lacking any juridical implication.

The apparatus on which the bull is founded is, as already in Bonaventure, the separation of ownership and use. It is, however, with perfect consistency that Nicholas III can declare that the ownership of all the goods of which the Franciscans have use pertains to the pope and the Church (*proprietatem et dominum . . . in Nos et Romanam Ecclesiam apostolica auctoritate recepimus*; ibid., §11).

3.3. The dispute between Conventuals and Spirituals, which caught fire after the proclamation of *Exiit qui seminat*, even if it did not yield a new definition of use, fixes some of its characteristics and formulates demands that it is useful to register. From the perspective that interests us here, the stakes in the dispute can be gathered adequately from the objections of Ubertino of Casale to the *Declaratio communitatis*, in which the Conventuals had laid out their theses. According to the *Declaratio*, the *usus facti* in which Franciscan poverty is manifested is identified without remainder with the renunciation of ownership and not, as the Spirituals wished, with an intrinsic characteristic of use itself, the *usus pauper* (poor use): "The perfection of the rule consists in the renunciation of ownership and not in the scarcity of use" (*abdicacio autem dominii et non usus parcitas est illa in qua consistit perfectio regulae*; Ubertino, p. 119). To get around the purely negative character of this definition, the declaration specifies that, like any *preceptum negativum*, this prescribes in truth two positive acts: "wanting to have nothing of one's own as the interior act, and using the thing as not one's own as the exterior act" (*velle non habere proprium quantum ad actum interiorem et uti re ut non sua quantum ad actum exteriorem*; ibid., pp. 119–20). Once more, the exterior aspect of the *abdicatio proprietatis* is defined with a simple reversal of the formula that, in Roman law, defined the *animus possidendi*: to use the thing as one's own (*uit re ut sua*). And precisely insofar as the Friars Minor always use the thing as not their own, continues the *Declaratio*, "one and the same act can be both poor and rich use [*potest esse aliquando idem actus vel usus pauperis et divitis*], as is evident in the case when the poor person eats in the house of a rich person the same food as the latter" (p. 119).

It is this purely negative and indeterminate definition that Ubertino intends to refute:

> The act and its object are correlative and the reason for one is included in that of the other. . . . Since then negative precepts imply that there is not only an interior positive act, but also an external one . . . when one says that the exterior act of poverty is to use the thing as not one's own, I object: the expression "as not one's own"

> does not designate the act or the formal reason of an exterior act, but is identified with the very renunciation of ownership on one's own part; it is necessary, however, that just as those who pronounce the vow of obedience also vow an extrinsic act determined according to the time and place, even if in obeying they use their own will as not their own, so also those who vow themselves to poverty vow the poor use [*usum pauperem*] as well, even if in any case they use things as not their own. (p. 166)

The demand of the Spirituals here is that use not be defined only negatively with respect to the law (*uti re ut non sua*), but that it would have its own formal justification and be worked out in an objectively determined operation. For this reason, mobilizing philosophical conceptuality, Ubertino defines the relationship of poor use and renunciation to poverty in terms of the relation between form and material (*abdicatio enim propiretatis omnium se habet ad pauperem seu moderatum usum, sict perfectibile ad suam perfectionem et quasi sicut materia ad suam formam*; p. 147), or, invoking the authority of Aristotle, as a relation of operation and habit (*sicut operatio ad habitum comparatur*; p. 148). Olivi had already gone down this road, writing that "poor use is to the renunciation of every right as form is to material" (*sicut forma se habet ad materiam, sic usus pauper se habet ad abdicationem omnis iuris*), and that, however, without *usus pauper*, the renunciation of the right of ownership remains "void and vain" (*unde sicut materia sine forma est informis et confusa, instabilis, fluxibilis et vacua seu vana et infructuosa, sic abdicatio omnis iuris sine paupere usu se habet*, "hence just as material without form is formless and confused, unstable, fluctuating, vacant or void, and fruitless, so is the abdication of every right without poor use"; Ehrle, p. 508).

In truth, more than in the pauperistic arguments of the Spirituals, it is in the Conventuals' apparently more indeterminate arguments that it is possible to gather the elements of a definition of use with respect to ownership, which does not insist only on their juridical aspects, but also and above all on their subjective aspects. In one of the treatises published by Delorme, the *uti re ut sua* (using the thing as one's own) as defining characteristic of

ownership is radicalized in psychological terms, to the point of rendering ownership and use incompatible in the exemplary case of the miser and *amator divitiarum*:

> The goal of riches is twofold: one intrinsic and primary, which is the use of things as one's own, and another extrinsic and less primary, by means of which each one uses things either for his own pleasure, as the intemperate one does, or for the welfare and perfect sustenance of nature, as the temperate one does, or for the necessary sustenance of life, as the evangelically poor does, as is appropriate to their condition. That using something for one's own pleasure [*ad delectationem*] does not constitute, in itself, the goal of the one who loves riches is evident in the case of the miser, who loves riches above all, yet does not use them for his own pleasure and in fact almost doesn't dare to eat, and the more the love of riches grows in him the more the use he makes of them diminishes, because he does not want to use them, but to keep them and amass them as his own [*quia eis non vult uti, sed conservare ut proprias et congregare*]. . . . Using things for pleasure thus is not the goal toward which ownership is oriented in itself and, consequently, the one who renounces ownership does not necessarily also renounce this second use. (Delorme, p. 48)

Even if the argumentation here is directed against Ubertino's thesis according to which "one seeks riches in view of use and the one who refuses the first must therefore refuse the second as well to the degree in which it is superfluous," use (in particular insofar as it concerns the pleasure that it brings along with it) is here restored to a concreteness that is generally lacking in Franciscan treatises on poverty.

3.4. The critical moment in the history of Franciscanism is when John XXII's bull *Ad conditorem canonum* once again calls into question the possibility of separating ownership and use and in this way cancels the very presupposition on which Minorite *paupertas* was founded.

The argument of the pope, who had an undoubted competence in both canon and civil law, rests on the identification of a sphere (consumable things such food, drink, clothes, and the

like, essential to the life of the Friars Minor) in which the separation of ownership from use is impossible. Already according to Roman law, usufruct referred only to those goods that could be used without destroying their substance (*salva rerum substantia*). Consumable things, however, with respect to which one speaks not of usufruct but of quasi-usufruct, become property of the one to whom they are left in use. Even Thomas, whose canonization John XXII prepared, had stated that in things "the use of which consists in their consumption . . . the use of the thing must not be reckoned apart from the thing itself, and whoever is granted the use of the thing, is granted the thing itself [*cuicumque conceditur usus, ex hoc ipso conceditur res*]" (*Summa theologica*, 2a, 2ae, q. 78, art. 1).

Founding itself on this tradition, the bull *Ad conditorem canonum* confirms that in consumable things it is impossible to constitute or have a *ius utendi* or a *usus facti*, if one claims to separate them from ownership of the thing (*nec ius utendi nec usus facti separata a rei pripretate seu dominio possunt constitui vel haberi*; qtd. in Mäkinen, p. 165). The difference between *ius utendi* and *usus facti*, on which the theses of Bonaventure and Nicholas III rested, is thus neutralized. And to exclude the very possibility of claiming a de facto use or an *actus utendi sine iure aliquo*, the bull denies that such a use, insofar as it coincides with the destruction of the thing (*abusus*), can be possessed (*haberi*) or even exist as such *in rerum natura*.

Here the bull's argument shows all its subtlety, not only juridical but also philosophical. The purely ontological problem is whether a use that consists only in abuse (that is, in destruction) can exist and be possessed other than as a right of ownership (common law defined ownership precisely as *ius utendi et abutendi*). In use, argues the pope, one must distinguish three elements, a personal servitude devoted to the usuary, a *ius personale*, and the *actus utendi*, which is neither servitude nor right but only a certain practice and use (*tantum actus quidam et usus*). "For if such a use can be had," continues the pope, "it would be had either before the act itself, or in the act itself, or after the

completed act of this sort. But that this cannot happen appears from this: what does not exist cannot be had. Now it is clear that the act itself, before it is performed, or even while it is being performed, or after it has been finished, is not in reality; from this it follows that it cannot at all be had [*actus ipse, antequam exercetur, aut etiam dum exercetur, aut postquam perfectus est, in rerum natura non est: ex quo sequitur, quod haberi minime potest*]" (§6). An act in becoming (*in fieri*), insofar as a part of it has already passed and another is still to come, does not exist properly in nature, but only in memory or expectation (*non est in rerum natura, sed in memoria vel apprehensione tantum*): it is an instantaneous being, which as such can be thought, but not possessed (*quod autem fit instantaneum est, quod magis intellectu quam sensu perpendi potest*; ibid.).

ℵ By radically opposing use and consumption, John XXII, in an unconscious prophecy, furnishes the paradigm of an impossibility of using that was to find its full realization many centuries later in consumer society. A use that it is never possible to have and an abuse that always implies a right of ownership and is moreover always one's own indeed define the very canon of mass consumption. In this way, however, perhaps without taking account of it, the pope also lays bare the very nature of ownership, which is affirmed with the maximum intensity precisely at the point where it coincides with the consumption of the thing.

3.5. The responses of the Franciscan theorists assembled around Minister General Michael of Cesena to the decretal of John XXII insist obstinately on the possibility and legitimacy of the separation of *usus facti* from ownership. It is in the attempt to prove this separability that they moreover reach the point of affirming a genuine primordiality and heterogeneity of use with respect to dominion. Already the *declaratio* of the Franciscans, which had provoked the papal decretal, maintained that in the life of the apostles, what was common was not ownership, but only use ("the air and the sunlight are common to all in the sense that they are common only according to common use [*solum secundum usum communem*]"; Mäkinen, p. 160). In his *Tractatus de paupertate*,

Bonagratia develops this thesis by stating that in the state of paradise, the divine commandment to eat from the trees of the garden (save one) implied not only that their use was unrenounceable but that, according to natural and divine law, what was originally common was not ownership but use (*de iure nature et divino communis usus omnium rerum que sunt in hoc mundo omnibus hominibus esse debuit. . . . ergo usus rerum que per usu consumuntur non habet necessarium annexum meum et tuum*; Bonagratia, p. 504). The common use of things also genealogically precedes common or divided ownership of things, which derives only from human law.

Particularly interesting from a philosophical point of view are Francis of Ascoli's objections to John XXII's argument, according to which the de facto use of consumable goods does not exist in nature and thus cannot belong to anyone. To justify in this case as well the possibility of use, Francis elaborates a true and proper ontology of use, in which being and becoming, existence and time seem to coincide.

The use of consumable goods (which, with a significant term, he also calls *usus corporeus*) belongs to the "successive" kind of things, which one cannot have in a simultaneous and permanent way (*simul et permanenter*). As consumable goods exist in becoming (*in fieri*), so also is their use in becoming and successive (Francis of Ascoli, p. 118). "In that whose being coincides with becoming [*cuius esse est euis fieri*]," he argues with extraordinary philosophical subtlety,

> being signifies becoming; but the being of a successive thing is its becoming and, conversely, its becoming is its being [*suum fieri est suum esse*]: so the being of actual use signifies its becoming and, conversely, its becoming signifies its use. It is thus false that actual de facto use [*usus actualis facti*] never exists in nature, otherwise for the same reason one would have to say that a de facto use never happens [*fieret*] in nature, since its being is its becoming, and that which is its becoming, if it never is in nature, never happens in nature [*si numquam est in rerum natura, numquam fit in rerum natura*], which is absurd and erroneous.

Use appears here as a being that is made of time, whose thinkability and existence coincide with that of time: "If use, because it is not, can never be possessed, for the same reason therefore neither can time, which no longer is insofar as it is de facto use, be possessed. But then what is written in Ecclesiastes (3:1) would be false: 'For everything there is a time'" (ibid.). In a different way than in Bonagratia, the heterogeneity and priority of use with respect to law is defined by Ockham in terms of the essential difference between the simple act of using (*actus utendi*) and the right to use (*ius utendi*). At the beginning of the *Opus nonaginta dierum* (*Work of Ninety Days*), after having distinguished four meanings of the term *usus* (use as opposed to *fructio*, use in the sense of custom, use as the act of using an external thing—*actus utendi re aliqua exteriore*—and use in the juridical sense, namely the right to use someone else's things, save their substance), he resolutely identifies the Franciscan *usus facti* with the simple act of using something: "they (the Franciscans) say that de facto use is the act of using some external thing—for example, an act of living in, eating, drinking, riding, wearing clothes, and the like" (*actus utendi re aliqua exteriori, sicut inhabitare, comedere, bibere, equitare, vestem induere et huiusmodi*; Ockham, 1, pp. 300/58). In the same sense, Richard of Conington distinguishes from law the *applicatio actio utendi ad rem*, which in itself is "a purely natural thing" and, as such, is neither just nor unjust: "In fact the horse applies the *actus utendi* to the thing, and thus its act is neither just nor unjust" (Richard of Conington, p. 361).

The difference between *usus facti* and *usus iuris* coincides in Ockham with that between the pure factual exercise of a vital practice and the right to use, which is instead always "a certain determinate positive right, established by human ordinance, by which one has the licit power and authority to use things belonging to another, preserving their substance" (*quoddam ius positivum determinatum, institutum ex ordinatione humana, quo quis habet licitam potestatem et auctoritatem uti rebus alienis, salva rerum substantia*; Ockham, 1, pp. 301/60). There is, in this sense, a radical heterogeneity between right and act: "In whatever way *usus iuris*

is taken, therefore, it is always a right and not an act of using. Thus anyone who rents a house to live in has *usus iuris* in the house even while he is outside the house and not currently living in it. *Iuris* is added to distinguish it from *usus facti*, which is a certain act performed in relation to an external thing" (ibid., pp. 302/60–61).

א It is from this sharp separation of ownership and use that scholars like Michel Villey and Paolo Grossi have been able to locate the foundations of a modern theory of subjective law and a pure theory of ownership understood as *actus voluntatis* precisely in the Franciscan masters. It is necessary, however, not to forget that the definition of the right of ownership as *potestas* in Ockham and that of ownership as *uti re ut sua* and will for dominion in both the treatises published by Delorme and in Richard of Conington and Bonagratia were formulated only to found the separability and autonomy of use and to legitimate poverty and the renunciation of any right. The theory of subjective law and *dominium* was elaborated by the Franciscans in order to deny or rather to limit the power of positive law, and not, as Villey and Grossi seem to think, to found its absoluteness and sovereignty. Moreover, precisely for this reason, it is just as certain that they had to define its proper characteristics and its autonomy.

3.6. Perhaps nowhere does the ambiguity of the Franciscan gesture with respect to law appear with greater evidence than in Olivi's question: *Quid ponat ius vel dominium?* Since what is at stake for Olivi is the need to respond to the question of whether ownership or royal or priestly jurisdiction add something real (*aliquid realiter addant*) to the person who exercises them or to the things or persons over whom they are exercised, and furthermore whether signification in act adds something real to the substance of signs or the things signified, one can say that the *quaestio* contains nothing less than an ontology of right and of signs (including those peculiar efficacious signs that the sacraments are).

The connection of the sphere of law and that of signs is not fortuitous, because it shows that what is in question is the mode of existence and the proper efficacy of those beings (law, command,

signs) on which the powers that regulate and rule human society are founded (including those special societies that the monastic orders are). The treatment of the problem unfolds by opposing seven positive arguments (which prove that rights and signs *aliquid realiter addant*, add something real) and the same number of negative arguments (which argue that they *nichil realiter addant*, add nothing real).

Grossi has read this text as the first work in the history of law in which "being proprietary, *proprietarietas*, was the object of a theoretical construction that raised it to the status of a genuinely distinct sociological type, a type constructed on solid theological presuppositions" (Grossi, p. 335). If it is true that Olivi proposes in the *quaestio*, as we have seen, an ontology of law and of signs, one nonetheless risks allowing the essential thing to escape if one does not specify the modality in which this ontology is articulated. Let us consider Olivi's conclusion with respect to the opposing arguments: "Regarding the understanding of these arguments and without prejudice to a better opinion, it seems that one can affirm with probability that the above-mentioned customs (ownership, royal jurisdiction, etc.) truly set down something real, but do not, however, add any different essence that really informs the subjects of which and in which they are said" (*vere ponunt aliquid reale, non tamen addunt aliquam diversam essentiam realiter informantem illa subiecta, quorum et in quibus dicuntur*; Olivi 2, p. 323). In the terms of medieval philosophy, this means that the realities in question are not situated on the level of *essence* or of the *quid est*, but only in that of *existence* or of the *quod est*; they are thus, as Heidegger will write many centuries later, purely *existential* and not *essential*.

The importance of this *quaestio* from the point of view of the history of philosophy is, thus, that in it we see articulated, according to an intention that undoubtedly characterized Franciscan thought, an ontology that is so to speak existentialist and not essentialist. This means that in the very moment in which one admits a real efficacy to right and signs (*ponunt aliquid reale*), they are demoted from the level of essences and made to hold

as pure effectualities that depend solely on a command of the human or divine will.

This is particularly evident in the case of signs: "Insofar as you can consider them with subtlety and clarity," writes Olivi,

> you will find that signification does not add to the real essence of the thing that is used as a sign anything other than the mental intention of those who have instituted it and accepted its validity and of those who accept it in action in order to signify and of those who hear it or receive it as a sign. But in the voice or gesture that are produced by the command of this intention [*ab imperio talis intentionis*], signification adds to the intention of the one signifying and to the essence of the thing that functions as a sign the habit of commanded effect [*habitudinem effectus imperati*] and the command produced by the intention of the one who signifies. (ibid., p. 324)

In the case of those special signs that the sacraments are and in the case of royal authority, the foundation of their efficacy is to be sought in the last analysis in the divine will, yet this does not take anything away from the fact that even here we have to do with a pure and absolutely inessential command. The sphere of human practice, with its rights and its signs, is real and efficacious, but it produces nothing essential, nor does it generate any new essence beyond its own effects. The ontology that is in question here is thus purely operative and effectual. The conflict with law—or rather, the attempt to deactivate it and render it inoperative through use—is situated on the same purely existential level on which the operativity of law and liturgy acts. Form of life is the purely existential reality that must be liberated from the signature of law and office or duty (*ufficio*).

3.7. We will attempt to pull together, albeit only provisionally, the conclusions of our analysis of poverty as use in the Franciscan theorists. It is necessary first of all not to forget that this doctrine was elaborated within a defensive strategy against attacks first from the secular masters of Paris and then from the Avignon Curia, which called into question the

Franciscan refusal of any form of ownership. The concept of *usus facti* and the idea of a separability of use from ownership undoubtedly represented an effective instrument from this perspective, which permitted them to give consistency and legitimacy to the generic *vivere sine proprio* ("living without property") of the Franciscan rule, and even secured, at least early on with the bull *Exiit qui seminat*, a perhaps unexpected victory against the secular masters. However, as often tends to happen, this doctrine, precisely insofar as it essentially proposed to define poverty with respect to the law, revealed itself to be a double-edged sword, which had opened the path to the decisive attack carried out by John XXII precisely in the name of the law. Once the status of poverty was defined with purely negative arguments with respect to the law and according to modalities that presupposed the collaboration of the Curia, which reserved for itself the ownership of the goods of which the Franciscans had the use, it was clear that the doctrine of the *usus facti* represented for the Friars Minor a very fragile shield against the heavy artillery of the Curial jurists. It is possible, in fact, that in accepting Bonaventure's doctrine on the separability of use from ownership in *Exiit qui seminat*, Nicholas III was conscious of the usefulness of defining a form of life that presented itself as otherwise unassimilable for the ecclesiastical order in juridical terms in this way, even if purely negative ones.

One can say that from this point of view, Francis was more prescient than his successors, in that he refused to articulate his *vivere sine proprio* in a juridical conceptuality and left it completely indeterminate. But it is also true that the *novitas vitae* that could be tolerated in a small group of young monks (since such were the Franciscans at first) could hardly be accepted for a large and powerful religious order.

One can say that the arguments of the Franciscan theorists are the fruit simultaneously of an overvaluation and an undervaluation of law. On the one hand, they use its conceptuality and never call into question its validity or foundations, while on the other,

they think they can secure with juridical arguments the possibility, through abdicating the law, of pursuing an existence outside the law.

Thus the doctrine of *usus facti*: it is obviously founded on the possibility of distinguishing de facto and de jure use and, more generally, *quid iuris* and *quid facti* (what pertains to law and what pertains to fact). The force of the argument is in laying bare the nature of ownership, which is thus revealed to have a reality that is only psychological (*uti re ut sua*, intention to possess the thing as one's own) and procedural (power to claim in court). However, instead of insisting on these aspects, which would have called into question the very ground of property law (which, as we have seen in Olivi, loses all essentiality, presenting itself as a mere signature, even if an effective one), the Franciscans prefer to take refuge in the doctrine of the juridical validity of the separation of de facto use and right.

However, this amounts to disregarding the very structure of law, which is constitutively articulated on the possibility of distinguishing *factum* and *ius* by instituting between them a threshold of indifference, by means of which the fact is included in the law. Thus, with respect to ownership, Roman law knew figures, like the *detentio* or *possessio*, which are solely states of fact (having a thing factually in one's own possession, independently of a juridical title, as happened precisely in the Franciscans' de facto use), but that as such could have juridical consequences. Dedicating an already classic work to this theme, Savigny thus wrote that "possession in itself, according to the original notion of it, is a simple fact [*ein blosses Factum ist*]; it is just as certain that legal consequences are bound up with it. Therefore, it is at the same time both a right and a fact [*Factum und Recht zugleich*], namely, fact according to its nature, and equivalent to a right in respect of the consequences by which it is followed" (Savigny, pp. 43/17). Accordingly, Savigny could define possession as "the condition of *fact* [*factische Zustand*], corresponding to property as the condition of *law* [*rechtlichen Zustand*]" (ibid., pp. 27/3). The *factum* of possession forms a system, in this sense, with the right of ownership.

In the same way, in Roman law things that are not the property of anyone, like shells abandoned on the seashore or wild animals, are called *res nullius*. But since the first one who collects or captures them becomes ipso facto their owner, they are only the presupposition of the act of appropriation that sanctions their ownership. The factual character of use is not in itself sufficient to guarantee an exteriority with respect to the law, because any fact can be transformed into a right, just as any right can imply a factual aspect.

For this reason, the Franciscans must insist on the "expropriative" character of poverty (*paupertas altissima . . . est expropriativa, ita quod nichil nec in communi nec in speciali possint sibi appropriare, nec aliquis frater nec totus ordo*, "highest poverty . . . is expropriative, because it can appropriate nothing either in common or individually, neither to any brother nor to the whole order"; Ehrle, p. 522), and on the refusal of any *animus possidendi* on the part of the Friars Minor, who make use of things *ut non suae* (as not their own) but in this way entangle themselves more and more in a juridical conceptuality by which they will finally be overwhelmed and defeated.

3.8. What is lacking in the Franciscan literature is a definition of use in itself and not only in opposition to law. The preoccupation with constructing a justification of use in juridical terms prevented them from collecting the hints of a theory of use present in the Pauline letters, in particular in 1 Corinthians 7:20–31, in which using the world as not using it or not abusing it (*et qui utuntur hoc mundo, tamquam non utantur*; the original Greek *hōs mē katachromenoi* means "as not abusing") defined the Christian's form of life. This could have furnished a useful argument against John XXII's theses on the use of consumable things as *abusus*. In the same sense, the conception of poverty as "expropriative" on the part of the Spirituals could have been generalized beyond law to the whole existence of the Friars Minor, connecting it to an important passage from the *Admonitiones*, in which Francis identified original sin with the appropriation of the will (*ille enim*

comedit de ligno scientiae boni, qui sibi suam voluntatem appropriat; Francis 1, 1, p. 83). Precisely at the point in the elaboration of scholastic theology when the will had become the apparatus that permitted the definition of liberty and the responsibility of the human being as *dominus sui actus*, in the words of Francis the *forma vivendi* of the Friars Minor is, by contrast, that life which maintains itself in relation, not only to things, but even to itself in the mode of inappropriability and of the refusal of the very idea of a will of one's own (which radically gives the lie to the theses of historians of law who, as we have seen, perceive in Franciscanism the foundation of subjective law).

The exclusive concentration on attacks (first of the secular masters and then of the Curia), which imprisoned use within a defensive strategy, prevented the Franciscan theologians from putting it in relation with the form of life of the Friars Minor in all its aspects. And yet the conception of *usus facti* as a successive being that is always *in fieri* in Francis of Ascoli and its consequent connection with time could have furnished the hint for a development of the concept of use in the sense of *habitus* and *habitudo*. This is exactly the contrary of that put forth by Ockham and Richard of Conington, who in defining *usus facti* once again by opposing it to law, as *actus utendi*, break with the monastic tradition that privileged the establishment of *habitus* and (with an obvious reference to the Aristotelian doctrine of use as *energeia*) seem to conceive the life of the Friars Minor as a series of acts that are never constituted in a habit or custom—that is, in a form of life.

Holding firm to this conception of use as act and *energeia* ended up blockading the Franciscan doctrine of use within the totally sterile conflict between the Conventuals, who underlined its nature as an *actus intrinsecus*, and the Spirituals, who demanded that this be translated into an *actus extrinsecus*. Instead of confining use on the level of a pure practice, as a fictitious series of acts of renouncing the law, it would have been more fruitful to try to think its relation with the form of life of the Friars Minor, asking how these acts could be constituted in a *vivere secundum formam* and in a habit.

Use, from this perspective, could have been configured as a *tertium* with respect to law and life, potential and act, and could have defined—not only negatively—the monks' vital practice itself, their form-of-life.

א Beginning in the twelfth century, we see alongside the rule in Augustinian, Benedictine, and Cistercian convents the birth of texts called *consuetudines* and at times *usus* (*usus conversorum*), which reach their greatest development later in the *devotio moderna*. The interpretation of these texts—which on the surface simply describe the monk's habitual restrictions, often in the first person (*Suscitatus statim volo surgere et incipere cogitare de materia preparando me studendo et habere sensus meos apud me in unum collectos . . . facto prandio et hymno dicto sub silentio, calefacio me si frigus est*, "Having arisen I immediately wish to get up and begin to think about the materials to be prepared while studying myself and have my feelings before me collected into one. . . . Having eaten and said a hymn silently, I warm myself, if it is cold"; *Consuetudines*, pp. 1–2)—as complements or completions of the rules is misleading. In reality it is a matter of a restoration of the rules to their originary nature as transcriptions of the monks' *conversatio* or way of life. The rule that, while arising out of habit and custom, had been progressively constituted as a Divine Office and liturgy returns now to presenting itself in the humble garb of use and life. The *Consuetudines*, that is to say, are to be read in the context of the process that, beginning in the thirteenth century, shifts the center of gravity of spirituality from the level of rule and doctrine to that of life and *forma vivendi*. But it is significant that form of life is attested in these writings only in the form of *consuetudo*, as if the actions of the monk acquired their own sense only by being constituted as use.

3.9. From this perspective, Olivi's statement according to which *usus pauper* is to *abdicatio iuris* as form is to material acquires a new and decisive significance. *Abdicatio iuris* and life outside the law are here only the material that, being determined by means of *usus pauper*, must be made a form of life: *Sicut autem forma ad sui existentiam preexigit materiam tanquam sue existentie fundamentum, sic professio pauperis usus preexigit abdicationem omnis iuris tanquam sue grandissime existentie et ambitus capacissimam*

materiam, "Just as form requires for its existence material as a foundation by which it has existence, so the profession of poor use requires the abdication of every right as the most capacious material by which it will have the greatest existence and scope" (Ehrle, p. 508). *Usus* here no longer means the pure and simple renunciation of the law, but that which establishes this renunciation as a form and as a way of life.

And it is precisely in a text of Olivi that this decisive relevance of the level of form of life reaches full theoretical consciousness and therefore also and for the first time an explicit justification in eschatological terms. In the eighth question *De perfectione evangelica*, Olivi accepts Joachim of Flora's theses on the six ages of the world, divided according to three *status*: the Father (the Old Testament), the Son (the New Testament), the Spirit (end and fulfillment of the law), to which he adds eternity as the seventh period. However, according to Olivi, what defines the excellence of the sixth and seventh periods is the appearance not simply of the "person" of Christ, but of his "life":

> The sixth and seventh period could not constitute the end of the preceding periods, if in them the life of Christ did not appear in a special and unique way [*nisi in eis vita Christi singulariter appareret*] and if, through the spirit of Christ, there was not given to the world the special peace of the love of Christ and of his contemplation. As indeed the person of Christ is the end of the Old Testament and of all persons, so the life of Christ is the end of the New Testament and, so to speak, of all lives [*sic vita Christi finis est Novi Testamenti et, ut ita dicam, omnium vitarum*]. (Olivi 3, p. 150)

Let us reflect on the theology of history that is implied in these theses. The advent of the age of the Spirit coincides, that is to say, not with the advent of the *persona* of Christ (which defined the second stage), but with that of his *vita*, which constitutes the end and fulfillment not only of the new law, but even of all lives (the "so to speak"—*ut ita dicam*—shows that Olivi is perfectly conscious of the novelty of his statement). Certainly the life of Christ had also appeared in the preceding epoch, according to a

principle of epochal dispensation of "modes of life" in the history of the Church ("it is certain that the life of Christ is one and better than any other, but in the five preceding stages of the Church there have appeared successively many lives and many ways of life [*multae vitae et multi modi vivendi successive apparuerunt*]"; ibid., p. 157). Nevertheless it is only at the end of times (*in fine temporum*) that it can be manifested "according to full conformity to its unicity and its form" (*secundum plenam conformitatem suae unitati et specie*; ibid.). And just as at the moment of Christ's first advent, John the Baptist had been elected "as a prophet and more than a prophet," so also in the last time, Francis was chosen "to introduce and renew the life of Christ in the world" (*ad introducendam et renovandam Christi vitam in mundo*; ibid.).

The specific eschatological character of the Franciscan message is not expressed in a new doctrine, but in a form of life through which the very life of Christ is made newly present in the world to bring to completion, not the historical meaning of the "person" in the economy of salvation, so much as his life as such. The Franciscan form of life is, in this sense, the end of all lives (*finis omnium vitarum*), the final *modus*, after which the manifold historical dispensation of *modi vivendi* is no longer possible. The "highest poverty," with its use of things, is the form-of-life that begins when all the West's forms of life have reached their historical consummation.

Threshold

What was lacking in the Franciscan doctrine of use is precisely the connection with the idea of form of life that Olivi's text seems to implicitly demand. It is as if the *altissima paupertas*, which according to the founder was to define the Franciscan form of life as a perfect life (and that in other texts, like the *Sacrum commercium Sancti Francisci cum Domina Paupertate*, effectively has this function), lost its centrality once it was linked to the concept of *usus facti* and ended up being characterized only negatively with respect to the law. Certainly, thanks to the doctrine of use, the Franciscan life could be affirmed unreservedly as that existence which is situated outside the law, which must abdicate the law in order to exist—and this is certainly the legacy that modernity has shown itself to be incapable of facing and that our time does not seem to be at all in a position to think. But what is a life outside the law, if it is defined as that form of life which makes use of things without ever appropriating them? And what is use, if one ceases to define it solely negatively with respect to ownership?

It is the problem of the essential connection between use and form of life that is becoming undeferrable at this point. How can use—that is, a relation to the world insofar as it is inappropriable—be translated into an ethos and a form of life? And what ontology and which ethics would correspond to a life that, in use, is constituted as inseparable from its form? The attempt to respond to these questions will necessarily demand a confrontation with

the operative ontological paradigm into whose mold liturgy, by means of a secular process, has ended up forcing the ethics and politics of the West. Use and form of life are the two apparatuses through which the Franciscans tried, certainly in an insufficient way, to break this mold and confront that paradigm. But it is clear that only by taking up the confrontation again from a new perspective will we perhaps be able to decide whether and to what extent that which appears in Olivi as the extreme form of life of the Christian West has any meaning for it—or whether, on the contrary, the planetary dominion of the paradigm of operativity demands that the decisive confrontation be shifted to another terrain.