

§ 2 Renouncing Law

What is decisive at this point is to define the relationship between “rule and life” and the Franciscan *forma vivendi* on the one hand and the sphere of law on the other. This is not only because it is this relation that will provide the kindling for the conflict with the Curia, but also and above all because only a clear comprehension will render it possible to fully evaluate both the novelty and the inadequacy of the Franciscan movement—its extraordinary success and its foreseeable failure, which seems to cloud the final years of its founder’s life with such a desperate bitterness.

It will thus be necessary first of all to examine the entire question of poverty in this light. The *altissima paupertas* (“highest poverty”), with which the founder had intended to define the life of the Friars Minor, is in actuality the place where the fate of Franciscanism is decided, both within the order (with the conflict between the Conventuals and Spirituals) and in its relationships with the secular clergy and the Curia, which reached the point of rupture under the pontificate of John XXII. Historians have reconstructed the events of this controversy in its particulars, from the 1279 bull *Exiit qui seminat*—with which Nicholas III, accepting the theses of Bonaventure, sanctioned the principle that the Franciscans, having abdicated every right of both ownership and of use (*quod proprietatem usus et rei cuiusque dominium a se abdicasse videtur*), maintain however the simple

de facto use over things (*simplex facti usus*; Mäkinen, p. 97)—to the 1322 bull *Ad conditorem canonum*, in which John XXII, abrogating the decision of his predecessor, affirms the inseparability of use from ownership and attributes to the order the common ownership of the goods of which they make use (*nec ius utendi, nec usus facti, separata a rei proprietate seu dominio, possunt constitui vel haberi*; *ibid.*, p. 165).

The attention of the scholars has nevertheless been focused to such a degree on the history of the order and its tormented relationship with the Curia that they rarely attempt to analyze what was at stake in these conflicts at the level of theory. Beyond the diversity of the positions and the subtlety of the theological and juridical arguments of the Franciscans who intervene in the controversy (in addition to Bonaventure, it is necessary to cite at least Olivi, Michael of Cesena, Bonagratia of Bergamo, Richard of Conington, Francis of Ascoli, William of Ockham, and John Peckham), the principle that remains immutable and nonnegotiable for them from beginning to end can be summarized in these terms: what is in question, for the order as for its founder, is the *abdication omnis iuris* (“abdication of every right”), that is, the possibility of a human existence beyond the law. What the Franciscans never tire of confirming—a point on which even the minister general of the order, Michael of Cesena, who had just collaborated with John XXII in the condemnation of the Spirituals, is not prepared to compromise—is the lawfulness for the brothers of making use of goods without having any right to them (neither of property nor of use). In the words of Bonagratia, *sicut equus habet usus facti*, “as the horse has de facto use but not property rights over the oats that it eats, so the religious who has abdicated all property has the simple de facto use [*usum simplicem facti*] of bread, wine, and clothes” (Bonagratia, p. 511). From the perspective that is of interest to us here, Franciscanism can be defined—and in this consists its novelty, even today unthought, and in the present conditions of society, totally unthinkable—as *the attempt to realize a human life and practice absolutely outside the determinations of the law*. If we

call this life that is unattainable by law “form of life,” then we can say that the syntagma *forma vitae* expresses the most proper intention of Franciscanism.

8 The assimilation of the Franciscan form of life to an animal life in Bonagratia and Richard of Conington corresponds faithfully to the special importance that animals had in the biography of Francis (preaching to animals, the liberation of the sheep and the two lambs, his love for worms: *circa vermiculos nimio flagrabat amore*, “Even toward little worms he glowed with exceeding love”; Francis 2, 2, pp. 156/78). If on the one hand animals are humanized and become “brothers” (“he called all creatures by the name of brother”; pp. 156/79), conversely, the brothers are equated with animals from the point of view of the law.

2.2. It is worth analyzing the modalities and the arguments through which the Franciscans actualize this neutralization of law with respect to life. First of all, the very term “Friars *Minor*” had properly juridical implications, which modern scholars, while duly noting them, have curiously left in the shadows in favor of the moral implications, that is, humility and spiritual subjection. Hugh of Digne, in his commentary on the rule, shows himself to be perfectly conscious of this: *fratris autem minoris est iuxta nomen suum, quod minor est, semper attendere* (“it is in keeping with his name always to attend to the minor brother, because he is a minor”; Hugh of Digne 1, pp. 162–63). As “minors,” the Franciscans are, from the juridical point of view, technically *alieni iuris*, equated with the *filiusfamilias* and the *pupillus* subjected to the tutelage of an adult *sui iuris*. In the *Apologia pauperum* (*Defense of the Mendicants*), Bonaventure develops this argument with precision by making reference to Roman law. If all Christians, he argues, are according to common law children of the supreme pontiff, and as such submitted to his authority, but as emancipated children, capable of disposing of ecclesiastical goods, the Franciscans are on the contrary “like little children and sons-in-power entirely subject to the rule of the Supreme Pontiff” (*tamquam parvuli et filiifamilias totaliter*

ipsius regimini deputati). They are like those, moreover, who are according to the Digest juridically incapable of possessing anything, because property belongs solely to the father and they can only use things (*propterea, sicut lege cavetur, quod "filiusfamilias nec retinere nec recuperare posse possessionem rei peculiaris videtur"* [Digest 50.17, *De regulis iuris*], *sed patri per eum quaeritur; sic et in his pauperibus intelligendum est, quod rerum eisdem collatarum et sustentationem ipsorum patri pauperum deputetur dominium, illis vero usus*; "As the law cautions: 'It seems that a son-in-power cannot retain or obtain possession of a particular thing.' Rather it is sought through the son-in-power for his father. So also in the case of these poor it should be understood that the dominion over things they receive for their sustenance is delegated to the Father of the Poor, while their use is conceded to them"; Bonaventure, *Apologia pauperum*, pp. 368/309–10). For the same reason (and the insistence with which Francis qualifies himself not only as *parvulus*, but even as *pazzus* is to be considered from this perspective), they can be compared to the *furiosus*, who cannot acquire by usurpation the ownership of any good, even if it is found in their possession: *Propter quod et iuriconsultus Paulus ait: "furiosus et pupillus sine tutoris auctoritate non possunt incipere possidere, quia affectionem tenendi non habent, licet res suo corpore contingant, sicut si dormienti aliquid in manu ponatur"* ("For this reason Judge Paul states: 'A madman and a minor cannot begin to own without the authorization of a tutor, for they lack the disposition to possess, even though they may be in physical contact with the object as would be the case if something were placed in the hand of a sleeping man'; *ibid.*, pp. 370/311–12).

2.3. In an important study, Tarello has shown how the premise of the Franciscan strategy on the question of poverty is to be sought in the patristic and canonistic reception of the doctrine of the originary communion of goods (Tarello, p. 428). According to this doctrine, approved in Gratian's *Decretum*, in the state of innocence "for natural law all things are everyone's"

(*iure naturali sunt omnia omnibus*); property and all human law begin with the Fall and the construction of a city on the part of Cain. It is on this basis that Bonagratia, developing the theses of Bonaventure, can state that just as in the state of innocence human beings had the use of things but not ownership, so also the Franciscans, following the example of Christ and the apostles, can renounce all property rights while maintaining, however, the de facto use of things (*apostoli et fratres minores potuerunt a se abdicare dominium et proprietatem omnium rerum . . . et sibi in omnibus rebus tantummodo usum facti retinere*, “the apostles and Friars Minor could abdicate from themselves dominion and ownership over all things . . . and retain to themselves at the same time the de facto use of all things”; Bonagratia, p. 505). In the same sense, Hugh of Digne’s treatise *De finibus paupertatis* (On the Ends of Poverty), which defines poverty as *spontanea propter Dominum abdicatio proprietatis* (“the free abdication of ownership for God’s sake”), founds the lawfulness of this abjuration and of the separation between property and use that results from it in natural law, which demands that each can conserve his or her own nature (Hugh of Digne 2, pp. 288–89).

The *abdicatio iuris* (with the return that it implies to the state of nature preceding the Fall) and the separation of ownership from use constitute the essential apparatus that the Franciscans use to technically define the peculiar condition that they call “poverty.”

8 It is significant that the Franciscan theorists obstinately aspire to configure the renunciation of the law in juridical terms. Thus Hugh of Digne, who had written in the treatise *De finibus paupertatis* that the Friars Minor “have only this to call their own, not having anything of their own in transient things” (Hugh of Digne 2, p. 289), again takes up the same formulation in his commentary on the rule, adding however that they “have only this right, not to have any rights” (*Hoc autem est fratrum minorum proprium: nihil sub coelo proprium possidere. Hoc ius: nullum in his que transeunt ius habere*; Hugh of Digne 1, p. 161).

2.4. Along with the *abdicatio iuris*, the other argument the Franciscans used in the polemic with the Curia is an ingenious generalization and at the same time inversion of the paradigm of the state of necessity. Let us follow the argumentation of Ockham in the work that he declares that he has “completed in ninety days, although hastily and in a completely undecorated style, yet with much labor” (*hoc opus nonaginta dierum, quomvis cursim et sermone nullatenus falerato, multo tamen complevi labore*; Ockham, 2, pp. 857/848) and that, despite its apparent impartiality, is in reality a punctilious and savage critique of the bull *Quia vir reprobus*, with which John XXII had responded in 1329 to the *Appellatio* and Michael of Cesena’s retreat.

Ockham, as Bonagratia had already done, begins from the principle already present in Roman law (the *lex Rodia de iactu*), according to which in case of extreme necessity (*pro tempore necessitatis extremae*), each has by natural right the faculty of using the things of others. Against the pope, who states that there is no difference between *ius* and *licentia* (“right” and “permission”) and that therefore there cannot be for the Franciscans a *licentia utendi* separate from the *ius utendi*, Ockham begins by distinguishing between the *ius utendi naturale*, which concerns all human beings and holds only in case of necessity, and the *ius utendi positivum* (“positive right of use”), which derives *ex constitutione aliqua vel humana pactione* (“from a certain human constitution or pact”). The Friars Minor, Ockham states, though having no positive right to the things they use, nevertheless have over them a natural right limited to the case of extreme necessity (Ockham, 1, pp. 561/419). “From these points it is clear that a permission to use is not a right of using [*quod licentia utendi non est ius utendi*].” For the Brothers have permission to use things for a time other than a time of extreme necessity [*pro alio tempore quam pro tempore necessitatis extremae*], but they do not have any right of using at all except for the time of extreme necessity; therefore a permission to use is not a right of using” (ibid.). They have renounced all property and every faculty of appropriating, but not the natural right of use, which is, insofar

as it is a natural right, unrenounceable (*proprietati et potestati appropriandi licet renuntiare, sed iuri utendi naturali nulli renuntiare licet*; *ibid.*, pp. 562/419).

It is necessary not to allow the subtlety of Ockham's strategy with respect to the law to escape us: it is a matter, so to speak, of holding oneself both outside and before the law, of forcefully reaffirming the principle of the *abdcatio iuris* sanctioned by *Exit qui seminat*. At the same time, against John XXII, he must not deprive the Franciscans of recourse to natural law, but limit it to the case of extreme necessity. On closer view, this means that the Friars Minor work a reversal and at the same time an absolutization of the state of exception. In the normal state, in which positive law applies to human beings, they have no right, but only a license to use. In the state of extreme necessity, they recover a relationship with the law (natural, not positive).

It also becomes clearer, from this perspective, what the meaning of the maxim cited from the *Expositio quattuor magistrum* is, according to which *calciari vero dispensationis est regulae in necessitate, non calciari est forma vitae* ("Wearing shoes depends on a dispensation from the rule in case of necessity; not wearing shoes is the form of life"). Necessity, which gives the Friars Minor a dispensation from the rule, restores (natural) law to them; outside the state of necessity, they have no relationship with the law. What for others is normal thus becomes the exception for them; what for others is an exception becomes for them a form of life.

2.5. Emanuele Coccia, in an exemplary study dedicated to the analysis of the monastic rules from the legal point of view, defined the novelty and, at the same time, the aporia of Franciscanism in the form of a "juridical paradox." If what is proper to monasticism in general is the attempt to constitute as an object of law not so much the relationships among subjects or between subjects and things, but rather life itself in its relation to its own form, the specificity of Franciscanism would consist in making out of a juridical apparatus, which the rule is according to

Coccia, the operator of a “juridical void” (Coccia, p. 140), of a radical subtraction of life from the sphere of law.

We have seen how the Franciscans operate in their unreserved claim of a life outside the law. It is not the rule so much as the state of necessity that is the apparatus through which they seek to neutralize law and at the same time to assure themselves an extreme relationship with it (in the form of *ius naturale*). But just as the rule is not a juridical apparatus, neither can the state of exception be properly defined as such. It is instead the threshold in which the Franciscan form of life touches on the law. At the end of his commentary, Olivi compares the Franciscan rule to a sphere, which has Christ as its center and which touches the level of earthly goods only at the “point of simple and necessary use” (*haec regula tanquam vere sphaerica non tangit planitiem terrenorum nisi in puncto simplicis et necessarij usus*; Olivi I, p. 194). The state of necessity is the other tangent point, in which the Franciscan form of life (the rule-life) touches on (natural, not positive) law. It is between these two tangent points, the *punctum usus* and the *tempus necessitatis*, that we must situate the sphere of the Minors’ rule-life that, in the words that immediately follow, “is entirely reflected in a circle around Christ and his Gospel as its own center and, in accordance with the form of a circle, it ends where it begins (*totaque se reflectit circa Christum circulariter et Evangelium eius tanquam circa suum intimum centrum, sicut instar circuli, unde exordium sumpsit, in idipsum finit*; *ibid.*). Use and the state of necessity are the two extremes that define the Franciscan form of life.

2.6. The moment has perhaps come, then, to again take up our analysis of the monastic rules from where we interrupted it in order to examine their relation with liturgy. Cenoby had appeared from this perspective as a field of forces charged by two opposed tensions, one bent on transforming life into liturgy and the other tending toward making a life out of liturgy. It is not possible, however, to fully understand the sense of these tensions if one does not consider them in their relation—at once

antithetical and tightly entangled—with the paradigm of the priestly Office which the Church had been progressively elaborating. If the life of the priest is here presented as an *officium*, and if the *officium* institutes, as we have seen, a threshold of indifference between life and norm and between being and practice, the Church at the same time decisively affirms the sharp distinction between life and liturgy, between individual and function, that will culminate in the doctrine of the *opus operatum* and the sacramental effectiveness of the *opus Dei*. Not only is the sacramental practice of the priest valid and efficacious *ex opere operato* (“from the work done”) independently of the unworthiness of his life, but as is implied in the doctrine of the *character indelebile*, the unworthy priest remains a priest despite his unworthiness.

To a life that receives its sense and its standing from the Office, monasticism opposes the idea of an *officium* that has sense only if it becomes life. *To the liturgicization of life, there corresponds here a total vivification of liturgy.* The monk is in this sense a being who is defined solely by his form of life, so that at the limit, the idea of an unworthy monk seems to imply a contradiction in terms.

If the monastic condition is thus defined through its specific differences with respect to the priestly Office (that is, with respect to a practice whose efficacy is independent of form of life), it is thus clear that it is precisely in the articulation of the dialectic between these two figures of the relation life-*officium* that the historical fate of monasticism must be decided. The softening of this difference will correspond to the progressive clericalization of monks and their increasing integration into the Church, while its accentuation will correspond to tensions and conflicts between the orders and the Curia.

The explosion of religious movements between the twelfth and the thirteenth century is the moment when these tensions reach their critical point. It is significant that it is precisely the principle of the separation between *opus operans* and *opus operatum* that the movements intended above all to call into question.

Thus the Waldensians' objection to the Church is not only the inefficacy of sacraments administered by an unworthy priest, but even more radically, the principle according to which the law of binding and loosing, of consecrating and blessing and or administering the sacraments do not derive from *ordo* and *officium* but from merit. It is, that is to say, a question not of right and hierarchical succession, but of imitation of the apostolic life. In the words of Alan of Lille:

Aiunt predicti heretici, quod magis operantur meritum ad consecrandum vel benedicendum, ligandum et solvendum quam ordo et officium. . . . Dicunt etiam se posse consecrare, ligare et solvere, quia meritum dat potestatem, non officium et ideo qui se dicunt apostolorum vicarios, per merita debent habere eorum officia [The heretics say in their preaching that merit works more toward consecrating and blessing, binding and loosing than order and office. . . . They also say they can consecrate, bind, and loose themselves, since merit gives them that power, not office, and indeed those who call themselves vicars of the apostles must have their offices through merit.]; *De fide contra hereticos*, PL, 210, 358; qtd. in Grundmann, pp. 93/42)

The principle according to which it is not office that is to confer priestly power, but the *meritum vitae*, is stated also by the jurist Hugh of Speroni, to which the *magister* Vacarius objects in the name of the Church that "the priesthood is a matter of law" (*Sacerdotium res juris est*) and that office has nothing in common with religion and love (*quid enim commune habet officium administrationis, qui est in rebus ipsis, ad meritum religionis et caritatis, quae est in mente ipsius hominis*; Grundmann, p. 515).

What in both cases is stigmatized as heresy is not, in truth, a doctrinal principle, but only the necessary consequence of a spiritual attitude that makes form of life and not office the decisive question.

✠ Grundmann recalls that it is precisely to confront this heresy that Innocent III makes reference to the principle of the distinction

between *opus operans* and *opus operatum*: *In sacramento corporis Christi nihil a bono maius, nihil a malo minus perficitur sacerdote . . . quia non in mente sacerdotis, sed in verbo conficitur creatoris. . . . Quamvis igitur opus operans aliquando sit immundum, semper tamen opus operatum est mundum* (“In the sacrament of the body of Christ nothing more is accomplished by a good priest, and nothing less by a bad priest . . . because it is confectioned not through the merit of the priest, but through the word of the Creator. . . . Therefore, although the one doing the work is sometimes unclean, nevertheless the work done is always clean”; *De sacro altaris mysterio*, PL, 217, 844; qtd. in Grundmann, pp. 519). The separation between life and office could not be expressed in clearer terms.

2.7. Franciscanism represents the moment when the tension between *forma vitae* and *officium* is released, not because life is absorbed into liturgy, but on the contrary, because life and Divine Office reach their maximum disjunction. In Francis, there cannot be any claim of *meritum vitae* against *ordo* as in the religious movements contemporary with him, nor as in the origins of monasticism, a transformation of life into liturgy and incessant prayer, because the life of the Friars Minor is not defined by *officium* but solely by poverty. Naturally both the Rule and the Testament and letters mention the Office, but it is evidently only the point in which “living according to the form of the holy Gospel” intersects with “living according to the form of the holy Roman Church.” It is significant that the Testament, after having distinguished the two forms of life and defined poverty, recalls without any emphasis and almost fleetingly that *officium dicebamus clerici sicut alios clericos, laici dicebant pater noster* (“the clergy say the Office like other clergy, and the lay brothers say the Our Father”). And the *Regula bullata* can soberly pronounce: “The clerical brothers shall celebrate the Divine Office according to the rite of the holy Roman Church. . . . The lay brothers, however, shall pray twenty-four Our Fathers . . .” (Francis I, I, p. 139). For the clerics, “who live rightly according to the form of the Roman Church [*qui vivunt recte secundum formam Ecclesiae*

Romanae]" (Francis 1, 1, pp. 100/35), it is a matter of observing an ecclesiastical precept, for lay people of reciting the prayer that Francis preferred above all others—but in no case does the Divine Office define Franciscan identity (supposing that it would make sense to speak of identity for a life that refuses any property). For this reason, Francis's gesture knows none of the "anticlericalism" that is so characteristic of many spiritual movements that are contemporary with him. He can always give to the Church what is the Church's without polemic, namely the administration of the *officium* that belongs to it. "No one is to judge [the priests] even if they are sinners" (Francis 1, 100/35), reads one admonition; and even if Francis, faithful in this respect to the monastic tradition, can remind the clerics in the *Letter to the Whole Order* that they should say the Office with devotion, "so that the voice may blend with the mind" (*ibid.*, pp. 208/60), both the Testament and the admonitions confirm that the ministry of the "most holy Body and Blood of our Lord Jesus Christ" belongs solely to priests (pp. 222/53).

The distinction between the two forms of life which come into contact in the Office was, however, so sharp that in the first "form of life or rule," written *paucis verbis et simpliciter* ("simply and in a few words"), the Office was not mentioned at all. The first life of Thomas Celano relates, in the same sense, that the brothers who assembled around Francis at Rivortorto "did not yet know the Office" and he "insistently told them for this reason that he was teaching them to pray" (Francis 2, 78/44).

✠ The importance of the clear distinction between the two forms of life in the Testament of Francis ("living according to the form of the holy Roman Church" and "living according to the form of the holy Gospel") has escaped scholars and commentators, and yet it is only starting from this distinction that Francis's strategy with respect to the Church becomes fully understandable.

Even if Francis affirms many times the unconditional subjection of the Friars Minor to the clergy, this is possible and acquires its sense

only on the basis of the radical heterogeneity of the two forms of life. And it is significant that when Francis composes for the brothers an Office for the passion, he chooses to begin with the verse of the Psalms (55:8) that rings out: *Deus vitam meam annuntiavi tibi*, "I have declared to you my life" (Francis I, 1, pp. 130/81).

2.8. An analogous disjunction occurs, as we have seen, between life and law. Franciscanism, more radically than other contemporary religious movements and more than any other monastic order, can be defined as the invention of a "form of life," that is, of a life that remains inseparable from its form. This is not because it is constituted as an *officium* and a liturgy, nor because the law has for its object the relation between a life and its form, but precisely by virtue of its radical extraneousness to law and liturgy. Certainly monasticism is from the beginning the invention of a way of life, but this was essentially a *regula vitae*, an unprecedented intensification of prayer and *officium*, which (in having become coextensive with life) was to exercise a decisive influence on the elaboration of Church liturgy. Precisely for this reason, however, it was to fatally clash with the problem of a growing integration into the sphere of the Church, which made of liturgy and the Divine Office its practice par excellence. The religious movements contemporary with Franciscanism, on the other hand, certainly decisively placed their claims, including their claims to poverty, on the level of life, but precisely insofar as they did not succeed in identifying in form of life an element that was radically heterogeneous to institutions and law, they were to end by putting themselves forward as the true Church and entering into conflict with the Church hierarchy.

If Franciscanism succeeded in avoiding the decisive conflict with the Church for almost a century after the death of its founder, this is due to the foresight of Francis, who in distinguishing *forma vitae* and *officium*, "living according to the form of the holy Gospel" and "living according to the form of the holy Roman Church," had succeeded in making of the Minors' life not an unceasing liturgy, but an element whose *novitas*

seemed completely extraneous to both civil and canon law. Life according to the form of the holy Gospel is situated on a level that is so distinct from that of the life according to the form of the holy Roman Church that it cannot enter into conflict with it. *Altissima paupertas*, “highest poverty,” is the name that the *Regula bullata* gives to this extraneousness to the law (Francis 1, 2, pp. 114/182), but the technical term that defines the practice in which it is actualized in the Franciscan literature is *usus* (*simplex usus, usus facti, usus pauper*).

§ 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 abdicatio 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,*