

# Turning Adam's Disobedience into Opportunity: The Acquisition of Property and Identity in Sir John Fortescue's Theory of Natural Law

***E. Kay Harris***

Waged by Lancastrian and Yorkist dynasties in the second half of the fifteenth century, the English civil wars known as the Wars of the Roses counterposed two royal lines of succession. Through a statute enacted decades before the outbreak of civil strife, Henry IV, the first Lancastrian king, sought to guarantee the English throne for his heirs. This 1406 statute "ordained and established, That the inheritance of the Crown, and of the Realms of England and France, and of all other Dominions of our Lord the King beyond the Sea, with all the Appurtenances, shall be settled and remain in the Person of the same our Lord the King, and in the Heirs of his Body begotten...."<sup>1</sup> The statute was eventually challenged during the reign of Henry VI, the grandson of Henry IV.

Declared and attainted a traitor to the king in 1459, Richard, Duke of York, asserted that his right to the throne preceded that of Henry VI. York traced his lineage, as did the Lancastrian Henry VI, back to Edward III but through Edward's third son, Lionel. John of Gaunt, Duke of Lancaster, was the fourth son. York reasoned that a statute which entailed the Crown attested to the illegitimacy of the very line of descent that it sought to secure. Additionally, he argued that there was a higher law that claimed one's obedience over any statute, observing that the 1406 statute was "of no force or effect ayenst him that is right enheriter of the said Coronnes, as it accordeth with Godd's lawe, and all natural lawes..."<sup>2</sup> As E.F. Jacob has

noted, the eventual success of York's claim, although the higher law was backed up by force, revealed that "God's law of inheritance [was] valid, and not to be defeated by parliament."<sup>3</sup> Indeed, York's subordination of statute law to God and natural law reflects a traditional medieval outlook.<sup>4</sup>

The Yorkists forced Henry VI from England in 1461. Richard was killed in battle; his eldest son, Edward, became the first Yorkist king. Henry and various Lancastrian supporters took up residence in Scotland. Among those accompanying the deposed king was Sir John Fortescue (c1385-1479), Chief Justice of the King's Bench. Early during this exile Fortescue completed *De Natura Legis Naturae, et de Eius Censura in Successione Regnorum Supreme* (c1462, or *The Nature of the Law of Nature, and Its Judgment on the Succession of Sovereign Kingdoms*), a treatise that without referring directly to the Yorkist-Lancastrian debate nevertheless sets out the criteria for distinguishing a true line of royal succession, and thus a natural one, from a false, unnatural one.<sup>5</sup>

Locating the problem of royal descent in the Kingdom of Assyria, Fortescue divides *De Natura* into two parts. Part I explains why natural law should be used to solve the succession question, and Part II devises a courtroom setting in which three claimants to the throne present their respective cases to a judge. Both Parts I and II are designed to solve this dispute. As Fortescue formulates it:

A King, acknowledging no superior in things temporal, has a daughter and a brother; the daughter bears a son. The King dies without sons. The question is, whether the kingdom of the King so deceased descends to the Daughter, the Daughter's Son, or the Brother of the King.<sup>6</sup>

Fortescue's Assyrian allegory introduces a woman into the equation for an important reason. For although the Yorkist line traced its lineage back to the third son of Edward III, the inheritance of that son, Lionel, descended to a daughter, Philippa, his only heir. Thus, it is Fortescue's project to have the Judge determine that natural law excludes women and their heirs from inheriting public property. *De Natura*, therefore, enters deliberately into the politics of royal and non-royal identity through the lens of gender and sexual difference.

Following medieval tradition, Fortescue derives the origin of property from the Fall of Adam and Eve. Yet Fortescue's particular emphasis on God's declaration to Adam that he will henceforth earn his bread through the sweat of his brow exceeds

that tradition.<sup>7</sup> For Fortescue this particular penalty holds within it the right of men and not women to acquire, transfer, and inherit property. While he explicitly appeals to the inalterability of natural gender differences to justify a masculine descent of property, his theory of the natural law of royal succession depends as well on an implicit instability in the relation between gender and perceived sexual difference. I argue that the elasticity of masculine and feminine identities in *De Natura* allows Fortescue to establish royal dignity as a unique property that defines a king as the most masculine of men who has the authority to confiscate and reallocate both the land and the gender of his subjects. In so doing, Fortescue simulataneously inscribes his own authority or property to interpret divine, natural, and secular law in such a way as to benefit kings and, most importantly, himself.

### The Descent of Property

Arguing in Part II of the treatise that he is the rightful heir to the throne of Assyria, the Brother of the King submits that both natural and divine law preclude a woman and her heirs from inheriting public property. Thus, while the Daughter of the King “be the natural and domestic medium between the grandfather and the grandson, by which the *blood* and *private* inheritance of the grandfather may be transferred to the grandson, yet in respect of the kingdom, which is *public* property, and which the daughter cannot receive from the grandfather, she is a strange and foreign medium” (297, emphasis added). To support this thesis, the Brother relates the history of property and describes the law that governs its descent.

As he remarks, Scripture indicates that “before the fall of man, the law of nature in no way revealed” the right of inheritance “to men” (291). That is, before the Fall, “our first parents...possessed all things in common” (291). Indeed, earlier in the text, Fortescue has explained that “the very law which now makes us say, ‘this is mine and that thine,’ before the sin of man forbad” us to do so (211). The origin of property occurs, therefore, as a consequence of the first sin. The Brother, in fact, specifically identifies one particular punishment of the Fall as the origin of the property: When our “first parents...forsook their state of innocence, presently, the Lord said to the human race, ‘In the sweat of thy brow thou shalt eat bread;’ in which words was granted to man a property in things which he should acquire by his labour” (291). Although the biblical narrative of the Fall does indeed have God tell Adam that he will toil for his bread, it says nothing of the acquisition of property. In point of fact, Genesis accentuates punishment, situating the penalty of work between God’s curse

on the earth and the promise that Adam will toil until the day he returns "unto the ground...for dust thou art" (Genesis 3:19). The biblical narrative thus emphasises adverse changes in Adam's relation to God and to the earth. Moreover, the punishments meted out to both Adam and Eve are followed by their joint expulsion from the Garden of Eden. Our first parents, therefore, are dispossessed of what they once enjoyed.

Yet while the biblical account bespeaks loss, the penalty for sin in the Brother's narrative leads not to dispossession but to the acquisition of property. The bridge between the Genesis narrative and the Brother's argument hinges on his reading of "sweat" as the catalyst that through a series of steps transforms loss into gain. "For since," he reasons, "the bread which a man gained by his labour was his own, and no man could eat bread without the sweat of his own brow, every man who toiled not was prohibited from eating bread which by his own sweat another man had acquired." Here Fortescue echoes John of Paris who, in the *Tractatus de Potestate Regia et Papali*, observed that possessions are "acquired by individuals through their own manufacture, industry, and labour. And individuals as individuals have right, power, and true dominion."<sup>8</sup> What was once common to all is now earned individually by those who work.

Moreover, the sweat that a man expends translates into bread, and by bread "our ancestors taught us to understand...not only what is eaten and drunk, but everything whereby man is sustained" (291). Sweat also performs another important function: "because property so acquired ensures as a compensation for the sweat by which the body of the acquirer is enfeebled, the reason of the law of nature hath united it to its acquirer, so that the property gained might compensate the damage resulting from his loss of bodily weakness" (291). Indeed, the penalty God imposes on Adam takes on a positive aspect, a means to overcome the dispossession described in Genesis. In the Brother's narrative, the loss of sweat substitutes for the loss of Eden.

The sweat a man expends results in two types of properties: external property, such as land, and internal property, such as an innate right or attribute. It is this two-fold aspect of sweat and property that, according to Fortescue, founds the law of the descent of property. For the property that is gained through labour:

takes the place of the man's bodily integrity, which he has lost and coheres as an accident to the toiler...so thenceforth [it] accompanies his blood. And...property accrues to him by the rules of the law of nature, and, after

the likeness of a natural accident, is united to him....Wherefore such a proprietor hath a son descending from him, a certain right to the patrimony so acquired also descends in the father's lifetime in a latent manner to that son, as being a portion of his father's blood and so a sharer in his toil. And, as the flower bursting forth before the fruit is not the fruit, but a token of coming fruit, so that right which descends to the son in his father's lifetime is not a property in his father's patrimony, but an indication of a property which will descend, whereby on the father's death all his patrimony, following that right as the fruit doth flower, actually descends and imparts itself to the son....Thus then we have discovered the source of the law of descent and succession; and from this we have drawn how property capable of descent originally took its spring; how, also, that property annexed itself to man; and lastly, how, descending from man to man by right of succession, it infuses itself into each succeeding heir (291-292).

By the transmutation of sweat, property is both inside and outside the body; thus, it becomes possible to transmit both forms through the blood. The sin of Adam and its transmission to the human race recede into the background in this narrative that accounts for the origin, acquisition, and transfer of property.

There is, however, a story of dispossession contained within the Brother's account of the origin of property. At this particular point in his narrative, it is not clear if Eve participates with Adam in the acquisition of property. Indeed, he has already observed that God "called Adam and Eve by the one name of Adam<sup>9</sup>...[w]herefore no woman, as also no man, eats her bread without sweat" (281). It would seem, therefore, that women as well as men acquire and internalise the property earned through work. Yet as the Brother's argument unfolds, he focuses on an opposition between property that is movable and personal and property that is immovable and real. This division works to exclude women from the descent of property and royal succession. As he explains, the property Adam acquires through his labour,

does not apply to every kind of property, but only to property in immovable and praedial things, which things are lasting as man's nature is. But things moveable and personal, which are not permanent, though gained by labour, do not always pass to heirs, but often to executors, trustees, legatees, and ordinaries, and sometimes to wives and children, to be divided among them, distributed according to various local customs, in various ways (292).

As the Brother will later remark, movable property is distinct from immovable in that it can be "seized and disposed of" (314).

Up to this point in the treatise, the Brother, along with the Grandson, has argued that natural law prohibits a woman from inheriting public property while it permits her to inherit private property. We recall that she is, according to the Brother, "the natural and domestic medium between the grandfather and the grandson, by which the *blood* and *private* inheritance of the grandfather may be transferred to the grandson, yet in respect of the kingdom, which is *public* property, and which the daughter cannot receive from the grandfather, she is a strange and foreign medium" (297, emphasis added). The critical distinction is between private and public. And since Fortescue has stated that before the Fall all was held in common, his account of the origin and acquisition of property is in effect a narrative of the origin of private property. Thus, women would not be excluded. Yet in this part of his argument, the Brother does not use the terms *public* and *private*. Rather they are tacitly displaced by "immoveable and praedial" and "moveable and personal." The substitution amounts to a rhetorical sleight of hand, lending the aspects of movability and the personal to private property, since a woman can inherit it, and the aspects of permanency and immovability to public property, since only a man can inherit it.

The substitution also implicitly constructs and endorses a stereotypical difference between masculine and feminine identities. Although a woman must earn her bread, the type of property she acquires is "not lasting as man's nature is" and thus is not capable of descent. The movable property she acquires is always subject to confiscation; in turn, inconstancy, instability, and the personal constitute feminine identity—a description that works well with Fortescue's exposition of Eve's disobedience to God and Adam. For although the penalty of earning one's bread is, as the Brother remarks, "indifferent and common to both sexes, the woman sustains other great and grievous penalties," and because of these additional, different penalties, the "Divine judgment evidently shows that she sinned worse than man" (282). Eve's sin is worse because out of a desire to fulfill her own pleasure she presumed to instruct her superior. As the Brother reasons,

it would not have become so great a Judge to deprive of the honour of dominion, on account of his folly, the man who, by the woman's insult fell; but inasmuch as the inferior deserted her original obedience, it was agreeable to reason to increase the weight of the superior's power over the contumacious one more severely than before, even if that superior had been guilty of the greater crime (282).

It becomes clear, then, that the notion that Adam and Eve possessed all things in common before the Fall was not precisely correct. Adam was the superior from the beginning. Indeed, a natural inequity always existed in Paradise for the purpose of organising the created world.

God's decision to "let us make man, and let him preside...over every creature" includes along with the creation of the rational being the creation of justice and law (232).<sup>10</sup> By this double-faceted directive, God endows man with the office of prelacy and the law to govern other creatures; they are his properties, and in Fortescue's words, they are "innate in him, contemporary with him, and eternal" (235). These natural properties then designate the superiority of man over the created world, including woman. It is Eve's disregard for Adam's natural authority, the inconstancy of her obedience, that justifies her greater punishment. Before the Fall, the Brother remarks, the Law of Nature "left the woman to submit herself to the man; decreed that [she] freely obey [him]; and taught that the woman should be advised and directed by the man." But as she "abused her liberty and made light of Adam's authority by presuming to teach him, Divine law has "diminished her freedom...and has appointed him from henceforth to be a stricter schoolmaster than he had [been] before...Man [thus]...has been endowed with power, that, if she rebel, he may be able to compel her to obey" (282-3).

As the Brother explains it, the penalty imposed on Eve for instructing Adam is multifaceted. At its most basic level, the punishment targets the relation between desire and pleasure: "what could have been a more fitting punishment for the woman," the Brother asks, "who for her own pleasure incited the man to death, than that she should bring forth with pain the man whom she longs to bring forth to life?" (282). Eve and her descendants, therefore, are subjected to a punishment that uses desire as both the instrument and object of punishment. It follows then that Eve's disobedience entails a resignification of feminine desire, or a change in its properties, an alteration that complicates the meaning of pleasure. As the Brother reasons, "the subjection of the woman, which had formerly been to her desirable and joyful, was now by that judgment [against Eve] bestrewn with the most bitter circumstances" (304).<sup>11</sup> Now that desire is disassociated from the original pleasure of feminine subjection to masculine authority, it would seem to follow that women would then find pleasure in acts of disobedience to that authority. Hence, by taking away from Eve the alleged original pleasure of subjection, natural and divine law—according to the implicit logic of the Brother's reasoning—produce the very conditions for disobedience that they penalise.<sup>12</sup>

Nevertheless the etiology he presents is used to justify the punishment of women, of feminine desire, by men. As he observes,

What can be more irksome than to be robbed of liberty? or more repugnant than to be deprived of one's own will, and subjected to the will of another? It was also of necessity a torment to the woman to be compelled to tremble under the threats of another, instead of enjoying her former delights....[S]ince the man has been appointed the lord of the woman, he is able to threaten her, and therefore to inflict punishment on her. All these things the said judgment hath worked in the woman's case (304).

Eve and her descendants, therefore, bear the weight of the Fall, and the punishment, as formulated by Fortescue, is delivered through a metaphor of crime: she is "robbed of liberty." Thus, while the consequences of the first sin endow Adam with the power to acquire and transfer property to his sons and they to theirs, they have the opposite effect for Eve and her descendants. She becomes a figure of dispossession, transmitting "the infection of her crime" to her heirs.

Indeed within the Brother's exegesis of royal succession, a woman marks a break in the chain or ladder of descent, a break that corresponds to a fall:

...we may describe descent to be progression from above [from God] by steps of causation. Wherefore, if anything descend not on this ladder step by step, but sink headlong to the bottom, its lapse is not a descent, but a fall and a downthrow, which things threaten death, and are not the marks of life. For a fall is a desertion of the law of nature, and so tends to corruption, and hastens into non-existence; as doth everything which refuses to be led by nature's law....And since every fall is a defect, seeing it is a defection from nature's guidance, every fall is also a vice and a sin, that is, a transgression of the order or nature (293).

A woman, therefore, has not only succumbed to and participated in the first Fall, but she comes to represent the pervasiveness of sin in the temporal world. Like a fall, she is a "defect...vice and sin...a transgression." From this exposition as well, we see that man's original authority over woman has been supplemented: "Thus hath the Lord hired the man with *perpetual wages, the stipend*, namely, of power and the honour of lordship, that he may prevent the woman from further transgressing the precepts of nature's law" (282-3). Adam thus "earns" this "bread," the power and honour of

lordship over woman, through Eve's sin and transfers this authority to his descendants. Through Fortescue's exegesis of the Fall of Adam and Eve, he not only "discovers" the origin of property and the law of inheritance, but in a sense he confiscates the original property of woman, the liberty she held before the Fall, and allocates it to man.

### **The Law of the King and the Confiscation of Property**

The Brother's explication of Eve's relationship to Adam both before and after the Fall demands that a woman be governed by a man; thus, the Daughter has no right to an office that would place her in a position of authority over men. Since, however, the Brother must not only invalidate the Daughter's claim to the throne but the Grandson's as well, it is not enough to have natural and divine law privilege men over women: distinctions must also be made among men. As we will see, the law of the king, which Fortescue identifies as an extension of natural law and the defining feature that separates a regal dominion from a political one, provides the means to do this.

In Part I, Fortescue attempts to trace the history of kingship back to the first king on the earth, but he acknowledges that the task is impossible since the Bible passes over this event in silence. He, therefore, turns to the history of Israel and to its first king. God had told Abraham, Isaac, and Jacob that their progeny would be kings, but the installation of the first king of Israel does not exactly fulfill this divine promise. As Fortescue reports, it was the people of Israel, not God, who decided that it was time to have a king. Wanting to be like other nations, the Israelites approached the prophet Samuel with their request. Since Israel's desire was, according to Fortescue, a sin, tantamount to "chang[ing] king God for king Man," the origin of kings in Israel, like the origin of property, is precipitated by sin. Endeavouring to square this sinful beginning of kingship in Israel with the divine promise and with natural law, Fortescue reasons that:

[A]lthough that people committed a great offence in asking for a king, this proveth not that the kingly dignity which they demanded is an unjust thing, nor doth it condemn the law under which that dignity came into being. What is there more sacred than the Pontifical office, although it is sought by wicked men? Now, the Lord in this proceeding...approved and commended the kingly power in divers ways. For he appointed them a king

chosen by Himself alone, and not by them, and anointed him with the holy oil and made him His Anointed...which He never did for any king before. Moreover, He filled that king with the spirit of strength and prophecy, and changed him into another man (204).

This passage serves at least two important functions, rescuing, as it does, the office of king from any misuse to which a particular king may put it and making it clear that the office itself exempts even bad kings from any punishment that their subjects may wish to impose on them. The deaths of such men are to be prayed for, observes Fortescue, but it is “not lawful for any one to do this thing, least of all their subjects, to whom many times, as required by their own deserts, the Lord appointed wicked kings....let the people fear to kill their king, although a tyrant...the kingdom is his” (197). By anointing Saul, God changed him, altered, augmented his properties, not only giving him the spirit of strength and prophecy but the kingdom as well.

Like the Brother's interpretation of the Fall, this account of kingship involves sin and punishment, and the punishment comes in the form of the law of the king. For Fortescue, Samuel's warning to the people that a king will “take your fields and your vineyards and oliveyards, and will give them to his servants” constitutes this law (202). Property is, obviously, once again the focus of law and punishment. The law of the king represents “nothing but the king's power, which a prince governing royally can exert over his people; but when that law is referred to the people, to them it is always law, though sometimes good and sometimes bad” (216). The law of the king, like the law of nature, is a supplement to divine law, a remedy for yet another instance of the stubborn willfulness and the disobedience of human beings.

Fortescue, however, acknowledges that the power of the king to take the property of his subjects seems to contradict the basic tenet of natural law, that is, “to do unto others as you would have them do unto you: for this is the law and the prophets” (Matthew 7:12). He asks,

What king ever wishes or could wish this to be done to him, that the best things for which he had laboured should be taken from him and given to one who had laboured not? And if he cannot be suspected of wishing this to be done to himself, and yet can lawfully do this to another, then doth the law which the Prophet pronounces judge that to be lawful to him (the king), which the law of nature forbids to be done (202).

Fortescue attempts to resolve this “war” between the law of nature and the law of the king by arguing that justice requires that each person receive a proper award: “What judge awards good things to him who deserves evil, seeing that every just arbiter recompenses good to the good, evil to the evil?” (208). Indeed the law of the king conforms to this sense of justice, since the people of Israel did an evil thing by asking for a king: they abandoned God who had chosen them “from among all peoples to be His peculiar kingdom, and most tenderly brought up by Him, as an only son by his father, and ruled by laws which He, in His great kindness, gave for their singular rule and favour” (207).

Not every king, however, possesses the power to use the law of the king. Fortescue reserves the use of that law for those kings who rule royally, not politically. As is well known, he describes the English monarchy as a mixed form of rule: the king rules both regally, or royally, and politically. Indeed, in this treatise, which is ostensibly about the problem of royal succession in the kingdom of Assyria, references to the laws and government of England are frequent. Hence, with regard to the regal portion of the English monarchy, Fortescue defines a royal government as one whose laws are authorised by the king, and the kingdom is subject to the king’s dignity, that is, possessed “by kings and their heirs in hereditary right, in such manner as no dominions are possessed which are only politickly ruled” (206).

Although “[r]oyal Law did not take its rise in Paradise...like the law of nature” (221), it nevertheless burst forth “when man’s nature had been polluted by sin, and the purity of original innocence lost under pagan kings in the earth....[such] that [royal] law was allotted out of a certain Divine severity to the king of Israel for the ruling of an inconstant people, stiff-necked and unthankful, who, by desiring a king, had provoked God to wrath” (221). Though Fortescue separates temporally the origin of the law of the king from the origin of property, his description of the moment when the law of the king first appears repeats the original Fall since “the purity of original innocence [was] lost under pagan kings,” though the loss of original innocence by Adam and Eve would seem to preclude the possibility of losing it once again. In effect, Fortescue almost conflates the two falls—he diminishes the distance that separates the two to a single important difference: the creation and restriction of a supreme masculine authority and identity to one man. The natural inequity that existed in Paradise and was subsequently exacerbated through Eve’s insubordination to Adam is exacerbated once again through the constitution of regal dignity and the law of the king as the power to confiscate the property of subjects. Male subjects are

thus threatened by a punishment that feminises them, and Fortescue thus prepares the way to dispossess the Grandson of the King.

This procedure relies on non-static conceptions of feminine and masculine identities and of private and public realms. One of the first extensions of the domestic or private realm into the public follows a statement made by the Daughter in which she argues that only married women are subject to the authority of men. Interpreting his mother's argument as though it had created an opposition between women and the "sacrament of matrimony" rather than between married and single women, the Grandson rejoins:

...in that the first woman had the presumption to guide her husband, she transgressed the rank assigned to her condition in the order of the universe, and thereby merited the punishment decreed by the said judgment. How then could wedlock have been the sinner....It was not wedlock that sinned, but the female sex was the offender; and, therefore, one penalty has now deservedly involved married and single women alike. For the sin of the woman broke out of the vicious disposition of the guilty sex, and not out of the sacrament of matrimony....Nor is a woman when free from the bonds of wedlock released from the power of man; ...she will not escape from obedience to him who bears supreme rule over the country in which she dwells. And, therefore, it is not permitted to think that only married women are subject to men (304-5).

Here the Grandson reasons that a woman holds the position of a wife whether or not she is married on the premise that the relation between a woman and the supreme ruler of her country replicates her relationship with her husband: the domestic relationship has been politicised.

As the boundaries between domestic and political unobtrusively break down, the distinctions between masculine and feminine identities also become less categorical, a necessary tactic if Fortescue is to reconcile the Brother's account of the origin of property with the law of the king. The two narratives indeed pose a tactical problem. Property according to the Brother accrues to men through their labour and becomes infused with the blood and is by that means transferred from father to son. On the other hand, the royal dignity expressed through the law of the king allows a king to confiscate the property of his subjects. How does one go about alienating or abstracting an innate property from the blood?

Although Fortescue does not pose this question directly, he addresses it indirectly. Interrupting the Brother to speak in his own voice, Fortescue refers to an English legal practice that explains how both internal and external properties of subjects are controlled by the law:

[I]n the Kingdom of England there is a law of such a kind that, if any one shall have been convicted, or, to use the words of that law, *attainted*, of felony or treason, his blood is forthwith adjudged by that law to be so corrupted that, although by the prince's favour he escape death, he nevertheless will not be capable henceforth of succeeding his parents in their inheritances, nor will any of his posterity succeed him in his inheritance. Wherefore, if from that time in the lifetime of such an attainted person, or after his death, his father shall have died possessed of a property, however great, the son of the man so attainted will not, by the law of the land, be capable of succeeding his grandfather in his patrimony;...[A]s the inheritance of such a grandfather cannot descend to his son who has been so convicted, so neither can it descend to his grandson by the son so convicted, inasmuch as there is an intermediate step between the grandfather and the grandson, namely that attainted son...because anything which descends cannot leap over or pass by any step (298-9).

The English practice of attainder derives from Roman law, as Floyd Seyward Lear's account of the Roman concept of attainder reveals:

Section One [of *Codex Justinianus* 9.8.5 *Ad Legem Iuliam Maiestatis*] adds the concept of attainder or corruption of blood since the sons of such an offender will be spared their lives although they merit the fate of their father because the inclination to commit his crime is inherited. The infamy of their father will accompany them always. They will always be debarred from holding public office or performing public duties. Their lot in life will be perpetual want; death will be a solace and life a punishment.<sup>13</sup>

Through the process of attainder, then, the reverse of the acquisition of property is put into play, that is, crime dissolves a person's possessions, both internal and external. In effect, the attainted is relegated to the position of a woman who, according to the Brother's argument, cannot annex, internalise, or inherit immovable property.

Fortescue then connects the consequences of attainder to the question of succession:

Wherefore, if the case which we are discussing shall have arisen in that kingdom, we cannot doubt that the kingdom in question cannot descend to the grandson, seeing that his mother, through whom as a medium he would obtain it, cannot by any right possess it....Wherefore...the grandson....since his mother by judgment of the law of nature is incapacitated for her father's kingdom, and so he cannot succeed his mother therein, cannot *à fortiori* succeed his grandfather through the medium of his mother (298-9).

With this further explanation of attainder, Fortescue goes beyond Justinian. Rather than inheriting an incapacity from a father who has been condemned as a traitor, the Grandson has acquired it from his mother. While the attainder for felony and treason is imposed on him by English law, the Daughter is by the law of nature always already attainted: she is by Eve's unnatural act of disobedience represented as a natural criminal, as naturally corrupt.

Inheriting her tainted blood, the Grandson shares that criminal state. The "vicious disposition of the guilty sex" he had attributed to his Mother now becomes his as well. Therefore, the Brother of the King urges the Judge to "put [the Grandson] to silence by thy sentence" (300). He is to share his mother's fate; and she, as the Brother directs, is to be prohibited "from any more demanding her father's kingdom, since...its entrance [is] shut against her with so many bolts and bars, that henceforth all ingress is for her impossible" (284). Although not guilty of having committed any crime, both the Daughter and the Grandson are attainted, the Daughter naturally and the Grandson legally. In this case, however, "legally" operates as an empty term, since no crime has been committed. Using the English law of attainder, Fortescue in effect turns the Grandson, and with him the Yorkist Edward IV, into a woman, thereby justifying the exclusion of both men from the political realm.

Such a transformation in gender relies on an interpretation that feminine desire is not only the origin of the sin of disobedience but of the crime of rebellion as well. One of the earliest associations of women with rebellion occurs immediately after the Brother has explained how Eve and all women have been made to suffer as a consequence of Eve's original act of disobedience. He asks, "And what is better fitted to restrain the arrogance of a *rebellious subject* than to subject the rebel with a firmer

bond to the authority which *he* hath despised?” (282, emphasis added). The question actually produces two pertinent resignifications: Eve’s sin against Adam now encompasses a political act, the crime of rebellion, and the use of the masculine pronominal *he* where we would expect to see the feminine *she* signals a move from the punishment of a woman to the punishment of a man. Two contradictory but politically expedient transformations are performed: the disobedience of Eve moves into the public arena as rebellion, but this move is countered by excluding the rebellious male offender from the public realm. The man who engages in rebellion is in effect assigned a feminine identity, and now without any property, he does not properly belong within the public or political domain.<sup>14</sup>

Turning men into women by an act of law indicates, as I have mentioned, that the feminisation, the dispossession, and the corruption of men is not natural to men as corruption is natural in the case of women. Such a legal procedure as attainder registers the fact that the rebellious male subject was at least once a man. The differentiation process that exiles attainted traitors and felons from the political domain, therefore, is secondary to the exclusionary practices that produce gendered identities on the basis of perceived natural sex/gender differences between men and women.<sup>15</sup> As Gayle Rubin has observed, “[m]en are of course also trafficked—but as slaves, hustlers, athletic stars, serfs, or as some other catastrophic social status, rather than as men. Women are transacted as slaves, serfs, and prostitutes, but also simply as women.”<sup>16</sup> Being an attainted traitor amounts to a “catastrophic social status.” In an essay that traces the history of representations of women, Elizabeth V. Spelman calls attention to the importance of seeing to “what extent the images and arguments used to denigrate women are similar to those used to denigrate one group of men vis-à-vis another, children vis-à-vis adults, animals vis-à-vis humans, and even...the natural world vis-à-vis man’s will....For to see this is part of understanding how the oppression of women occurs in the context of, and is related to, other forms of oppression or exploitation.”<sup>17</sup> Not only authorising the confiscation of external properties of traitors, acts of attainder thus altered gendered identities by declaring the attainted to be disabled at law, bereft of all civil privileges, and their blood to be corrupt.<sup>18</sup> Diagnosing bodies to be corrupt, bills of attainder provided the justification to restrict the movements of traitors within society, to quarantine them, and distinguish them from the general population.<sup>19</sup>

In England, attainder had long been a punishment for treason before the fifteenth century, but the procedure had tended to be an informal one. The proscription

of the Duke of York and his supporters in 1459, however, generated a standard for future acts. Enacted by Parliament, but under the close supervision of the king, attainder in the latter half of the fifteenth century was not the consequence of a trial in which an accused had been found guilty of treason. In point of fact, fifteenth-century attainder operated only in the absence of judicial process<sup>20</sup> and can be seen as a legislative form of summary judgment, and as a manifestation of the law of the king.<sup>21</sup>

The attainders of Jack Cade, the Duke of York, and the Earl of Northumberland during the reign of the Lancastrian Henry VI provided not only for the confiscation of their lands, but also for their disablement at law and the corruption of their blood. In the case of Cade, parliamentary rolls record that in addition to the forfeiture of goods, lands, and income, his blood was declared corrupt; hence, through his blood his heirs were "disabled for ever."<sup>22</sup> Likewise, attainders of York and his allies required that they be "disabled for ever to have or enjoye any enheritaunce in any wise hereafter...an in lyke wise their heires."<sup>23</sup> A record of a petition made by Henry Percy to reverse the attainder of his father, the Earl of Northumberland, describes the severity of such a penalty by reciting its consequences.

Howbeit that by force of an Acte made ayenst his Fader...the same late Erle, among other persons, was unable to have, hold, enherite or joic, any name of dignities, estate or preeminence, within this Reaume...and the heires of the same late Erle, were unable to clayme or have by the same late Erle, any suche name estate or preeminence.<sup>24</sup>

With their blood declared corrupt and their civil rights denied, attainted traitors were a new creation whose exclusion from the public realm and the possibility of restoration depended on the king's prerogative.

Acts of attainder thus illustrate the capacity of the law to enter into the interior spaces of the body for the purpose of condemning and regendering it. As we have seen, divine, and natural law define the disease of crime, especially that of rebellion and treason, as the (un)natural disease of women. As a consequence of crime, the law transfers the natural disposition of the guilty sex to men, a move that not only dispossesses male subjects of their land, but of their "innate" masculinity as well. In the Brother's exegesis of the origin of property and its ramifications, it is the identity of the King alone that fused with the property of the kingdom remains thoroughly

masculine, thoroughly autonomous, thoroughly royal, profiting in every case as did Adam from both the obedience and disobedience of his subjects.

## **Fortescue and the Law**

The power which Fortescue allocates to a regal monarch or to a regal and political one, such as the English monarch, is secure only within his text. The Wars of the Roses blatantly attest to its fiction. With the throne of England oscillating between the Lancastrian Henry VI and the Yorkist Edward IV from 1460-1471, neither line was thoroughly and unchangingly royal and masculine enough to exempt itself from the attainders that were legislated against it once the rival dynasty had gained ascendancy. In a sense, then, Fortescue through his writing creates and sustains the regal properties of the king, interposing himself between the law and the king; in other words, he is the liaison between the ordained properties of the king and the person of the king.

As mentioned earlier, the proscription of the Yorkists in 1459 set the standard for future acts of attainder. It is highly unlikely that Fortescue did not have a part in writing the bills that declared the Duke of York and his heirs to be traitors and their blood corrupt. If the preamble to York's attainder is compared to Fortescue's description of the ingratitude of the people of Israel for abandoning "king God for king Man," similarities emerge. The confiscation of York's land and the corruption of his blood is justified by the Duke's ingratitude:

Please it your Higness to calle to youre noble remembrance, howe Ye had Richard Duc of York in his yong age, in your most high presence and noble Court, and hym all that tyme cherisshed and favoured; and afterward at gretter age, for the love, trust and affiance that Ye had in his persone, made hym youre Lieutenant of youre Realme of Fraunce and Duchie of Normandie, and created his 11 eldest sonnes Erles, and graunted hym Offices and grete benefettes....So that it could not be thought a sujet...[would] have had more cause to have been true, obeisaunt, and diligent to serve and love his Sovereigne Lord then he had.<sup>25</sup>

According to this record, the Duke of York and his sons, like the Israelites in their relationship with God, owed everything to Henry VI, and they, too, failed to acknowledge this debt.<sup>26</sup> Thus Henry, like Adam and Saul, profits, however briefly,

from the disobedience of his subjects, and so do the royal jurists who in composing this bill fulfill Samuel's role. As Ralph A. Griffiths has observed, the royal jurists undertook this task "with an eye on the rewards which might come their way for a job well done."<sup>27</sup> And they were rewarded for their labour; Henry redistributed his newly acquired property to his loyal supporters. For example, shortly after the attainders had been passed, Fortescue was entrusted with some of the confiscated lands.<sup>28</sup>

It must be remembered, however, that Fortescue writes *De Natura* from what seems to be a weak or "catastrophic" position. For he along with Henry VI was attainted as a traitor by a Yorkist parliament soon after Edward IV became king. But *De Natura* works for Fortescue in two important ways. First, by proclaiming a line of descent that includes a woman to be unnatural and false, Fortescue invalidates the new identity that Edward IV and his parliament have imposed on him. In fact, it is the descendants of a woman who are naturally prone to deviate from natural law and instigate rebellion: Edward and the Yorkists are the traitors. Although *De Natura* does not refer explicitly to the wars fought by the Yorkists and Lancastrians, the topic of civil war both introduces and ends the treatise. After the Judge has ruled in the Brother's favor, Fortescue remits his text to examination of the "Supreme Pontiff," and explains,

If in the preceding Treatise we have arrived at firm and impregnable conclusions, we have extinguished that fuel of malice which has kindled up to this time such unceasing wars among kings. I mean that inveterate error by which women, and their heirs through them, have been thought able to succeed to the throne in sovereign kingdoms (331).

According to this logic, Philippa, the granddaughter of Edward III and the conduit by which the Yorkist dynasty traces its line of descent back to Edward III, has passed on through her blood the "inveterate error" of presumption which now escalates into usurpation and civil war. In effect, the claim of the Grandson or the claim of the Yorkists to the right to rule represents another fall, in that they seek to acquire property that does not belong to them and to alter the natural hierarchy of king and subject. Thus their pretensions require a punishment comparable in severity to that which God imposed on Eve. Edward and his supporters are to be treated as women.

*De Natura* also goes far to enhance Fortescue's position as an authority on law and the governance of the kingdom, and it completes the task he has set for himself

at the beginning of the treatise. Emphasising in the beginning of the treatise the need to explain the law of royal succession, Fortescue proclaims:

Oh, then, what a pious and holy thing it would be to reveal the truth which here is sought, stripped of every veil of error, naked and shining! Seeing that under the cloud of this ignorance so many hard-fought wars, so many civil contests, pervading the whole world, have prevailed, not only in the most noble kingdoms of France and England, but in very many other regions also, where the bloody sword, accompanied only by the justice of this truth, has devoured thousands upon thousands of men. This truth, therefore, if it can be made plain by a definition beyond doubt, will, by the guidance of God, appease wars not a few already begun, and will withdraw material for the beginning of the like hereafter (191).

By uncovering and declaring this truth, “a pious and holy” act, Fortescue is the vessel by which rebellion in any kingdom will be destroyed. Moreover, he makes the case that jurists who for their years of study in all laws, including divine law, are especially equipped to uncover the relation between divine, natural, and human law (241-2). The “higher mysteries of the law,” as he explains, “remain for those who are learned in the law” (247).<sup>29</sup>

The Lancastrians, however, were ultimately defeated in 1471, and Fortescue’s treatise did not have one of its desired effects: that of restoring Henry to the throne. His treatise, nevertheless, stood him in good stead. For although Fortescue was one of the lawyers that the Yorkists were “intent on bringing...to book” for drafting the bills of attainder against them,<sup>30</sup> he was not put to death when he was captured. The fact that he was not attests in part to his successful representation of himself as an authority on all aspects of law. Fortescue’s attainder was reversed, and he once again enjoyed a privileged position within a royalist circle, Yorkist not Lancastrian. As a condition for the reversal of the attainder, Edward IV stipulated that Fortescue retract those writings he had composed in Scotland. And the way in which Fortescue retracts the argument of *De Natura* manifests once again his tacit and skillfull allocation of feminine characteristics to a man. In this case, it is he who occupies the feminine role by acknowledging to the king that his exegesis on natural law and royal succession is inadequate—not an objective exposition but an “informal tale” based on his partiality for Henry VI (534). Through this dutiful submission to Edward IV, Fortescue regains both his masculinity and his property.<sup>31</sup>

Fortescue's capacity to prove himself eminently invaluable to two rival kings challenges the idea held by a number of legal scholars that he was an early constitutionalist. In his preface to Fortescue's *De Laudibus Legum Anglie*, for example, Harold Dexter Hazeltine remarks that this fifteenth-century Chief Justice "was in revolt against authority."<sup>32</sup> Nevertheless, Hazeltine remarks near the end of his preface that Fortescue's "books anticipate some of the reformatory measures which in fact led to the establishment of the Tudor kingship in the sixteenth century as the strongest English monarchy since the time of the Normans and the Angevins."<sup>33</sup> Indeed, based on his ability to shape and allocate feminine and masculine properties—whether his own or a king's or a traitor's—Fortescue did not revolt against authority. Rather, in a godlike performance, he created authority; and he created it both masculine and royal.

## **University of Southern Mississippi**

### **Notes**

1 7 Henry IV. c. 2, *Statutes of the Realm* (rep. London: Dawson, 1963), 2: 151. Earlier in the same year, Henry had wished to restrict succession to his male heirs. Advised against such a strategy, however, the King acceded to the more inclusive formulation "Heirs of his Body begotten" without marking the sex/gender of those heirs. See Paul E. Gill, "Politics and Propaganda in Fifteenth-Century England: The Polemical Writings of Sir John Fortescue," *Speculum* 46 (1971), pp. 331-47, p. 338.

2 *Rotuli Parliamentorum: ut et petitiones, et placita in parlamento*, ed. J. Strachey, et al. (London, 1767), 5:376. See E.F. Jacob, "Sir John Fortescue and the Law of Nature," *Bulletin of the John Rylands Library* 18 (1934), pp. 359-76, p. 362.

3 Jacob, p. 362.

4 Another current of thought, however, was emerging in fifteenth-century England that offered an alternative, positivist legal thesis: that laws were the creation of men, designed for the common good rather than for the morality of individuals. Although it was hoped that secular law would embody natural law, a discrepancy between the two did not justify disobedience to statute law. Only a subsequent law, made by men, could invalidate a prior law. See Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge, 1990), pp. 1-83.

5 In *De Natura* Fortescue relies chiefly on the older tradition that secular law is subordinate to natural law. But by also positing that the laws of men are supplements to both natural and divine law, Fortescue clouds his position. As supplement, the secular law may be seen as a corrective to natural and divine law and/or as ultimately divine in its origins. Such ambiguity is typical of Fortescue, even present in his most famous elucidation of the English monarchy as both political and regal. See Doc on the irreconcilable tensions in Fortescue's works, especially Chapters 2 and 3.

*De Natura* is not as well known as two of Fortescue's later works, *De Laudibus Legum Anglie* and *The Governance of England*, and in comparison with these two texts, it has received much less attention. While critical editions are available for these two works, *De Natura* exists in an 1869 edition only. In addition to Doe and Jacob, *op. cit.* *De Natura* is discussed in J.H. Burns, "Fortescue and the Political Theory of Dominion," *Historical Journal* 28 (1985), pp. 777-97; J.L. Gillespie, "Sir John Fortescue's Concept of Royal Will," *Nottingham Medieval Studies* 23 (1979), pp. 47-65; J.G.A. Pocock, *The Machiavellian Moment: Florentine political thought and the Atlantic republican tradition* (Princeton, 1975), 25-29; Walter Ullman, *Principles of Government and Politics in the Middle Ages* (London, 1961), pp. 178 n., 191.

6 All references to Fortescue's treatise are taken from *The Works of Sir John Fortescue*, collected, arranged, and translated by Thomas (Fortescue) Lord Clermont 2 vols (London: Printed for Private Distribution, 1869), by page number.

7 In effect Fortescue's exegesis of the origin of property through the Fall of Adam and Eve combines two strands of thought in the evolution of property and natural rights: The older, theological tradition that links property to sin and the Aristotelian concept which gained currency from the twelfth century onwards that justifies property as integral to society, which according to Aristotle, is the natural state of man. See *Cambridge History of Later Medieval Philosophy*, ed. Norman Kretzmann, Anthony Kenny, and Jan Pinborg (Cambridge, 1982), pp. 707-8 and pp. 760-1. Fortescue's emphasis on the relation between property and work has led some scholars to regard him as the defender of private property or the champion of the middle class. Richard Schlatter, for example, in *Private Property: The History of an Idea* (New Brunswick, N.J., 1951) observes that Fortescue "combined the various medieval theories of property in the very fashion in which they were going to serve the purposes of bourgeois apologists for the next three or four hundred years. His defence of property is at once a summary of medieval, and an introduction to modern, history" (72).

8 Qtd. in Schlatter, p. 66. According to Schlatter, Fortescue's theory of property and "its insistence on labour as the basis of man's title to property ... is indistinguishable from the theories of Locke and the eighteenth-century proponents of natural right" (74).

9 Cf. Augustine: "Now Seth is called 'resurrection,' and Enos his son is called 'man,' not as Adam was; for Adam is man, but in the Hebrew it is common to male and female: for it is written: 'Male and female made He them, and called their name Adam': so that Eve doubtless was so properly called Eve, but that Adam was a name common to them both. But Enos is so properly a man, that it excludes all woman-kind (as the Hebrew linguists affirm), as importing the son of the resurrection where they shall not marry nor take a wife. For regeneration shall exclude generation from thence." *The City of God*, trans. John Healey (London, 1957), 2: 82.

10 For an overview of the complex history of evolving theories of natural law during the Middle Ages, see *The Cambridge History of Later Medieval Philosophy*, pp. 705-770.

11 Cf. the Daughter's argument that a woman is not subject to man before Eve's sin (301). In fact, it is her line of reasoning that leads the Brother into an extended discussion of the subjection of women to men.

12 Although the unnatural act of disobedience to men becomes natural to women—with normative deviance now constituting feminine identity—the Brother's analysis evokes an inherent lack in the original pleasure; without such an inadequacy an act of disobedience would have been impossible.

13 *Treason in Roman and Germanic Law* (Austin, Texas, 1965), p. 44. For more on the English use of attainder, see John G. Bellamy, *The Law of Treason in England in the Later Middle Ages* (Cambridge, 1970), pp. 177-205; Michael A. Hicks, "Attainder, Resumption, and Coercion, 1461-1529," *Parliamentary History* 3 (1984): 15-31; J.R. Lander, "Attainder and Forfeiture, 1453 to 1509," *Historical Journal* 4 (1961), pp. 119-51.

14 Cf. Plato's discussion of cowardice: "[t]o have more concern for your body than your soul is to act just like a woman." He concludes, "[T]he most proper penalty for a soldier who surrenders to save his body, when he should be willing to die out of the courage of his soul, is for the soldier to be turned into a woman...." This is Elizabeth V. Spelman's paraphrase of *Laws*, 944e, in "Woman as Body: Ancient and Contemporary Views," *Feminist Studies* 8 (Spring 1982), pp. 109-31, p. 115. For a

succinct overview of the history of anti-feminism in the Middle Ages, see Howard Bloch, *Medieval Misogyny and the Invention of Western Romantic Love* (Chicago, 1991).

15 There are rare instances of women being attainted in England as a result of their husband's act of treason. In these cases, it seems that the king wanted to make absolutely sure that family properties were indeed forfeited to him. See Anne Crawford, "Victims of Attainder: The Howard and de Vere Women in the Late Fifteenth Century," *Reading Medieval Studies* 15 (1989), pp. 59-74.

16 "The Traffic in Women: Notes on the 'Political Economy' of Sex," in *Toward an Anthropology of Women*, ed. Rayna R. Reiter (New York: Monthly Review Press, 1975), pp. 157-210, pp. 175-6.

17 Spelman, p. 120.

18 As power was increasingly centralised in the late Middle Ages, more and more distinctions between men had to be made in order to justify the crystallisation of power into one image, that of the king's royal majesty. Operating exclusionary processes, acts of attainder may be seen as one facet of this consolidation. See my study of representations of treason in Arthurian literature and late medieval law, forthcoming.

19 Attainder was a civil death. Swift's description of the place of the immortal *struldbruggs* in Luggnaggian society succinctly describes a civil death procedure. After turning eighty years old, the *struldbruggs* "are looked on as dead in law....[T]hey are held incapable of any employment of trust or profit; they cannot purchase lands, or take leases, neither are they allowed to be witnesses in any cause, either civil or criminal...." *Gulliver's Travels* in *The Norton Anthology of English Literature*, 6th ed. 2 vols (New York, 1993), 1:2135. See also Foucault's discussion of the leper and the distribution, organisation, and image of power in *Discipline and Punish: The Birth of the Prison* (New York, 1979), pp. 195-230.

20 J.G. Bellamy, *Law of Treason*, pp. 169-70. He notes an instance in which attainder was part of an actual trial in Parliament (p. 176).

21 This summary of the history of attainder is taken from my "Evidence against Lancelot and Guinevere in Malory's *Morte Darthur*: Treason by Imagination," *Exemplaria* 7 (1995), pp. 179-208, pp. 200-201, which relates attainder to the noise of infamy.

22 *Rot. Parl.*, 5: 224.

23 *Ibid.*, 5: 349.

24 *Ibid.*, 5: 389. Depending on the king's prerogative, attainders could be reversed, but, in many instances, reversals amounted to a piecemeal process. For example, if a traitor succeeded in obtaining a pardon, it was not always accompanied by a restoration of blood, and honors need not be made part of the pardon.

25 *Rot. Parl.*, 5: 346.

26 The Yorkists were intentionally excluded from the parliament that passed the bills of attainder against them, and they along with certain chroniclers of the period proclaimed the injustice of the action taken against them. The outcry generated another piece of royalist propaganda defending the king's use of attainder, the *Somnium Vigilantis*, a text often attributed to Fortescue. See *Somnium Vigilantis*, printed by J.P. Gilson in "A Defence of the Proscription of the Yorkists in 1459," *English Historical Review* 26 (1911), pp. 512-25.

27 *The Reign of King Henry VI: The Exercise of Royal Authority, 1422-1461* (Berkeley, 1981), p. 824.

28 *Rot. Parl.*, 5: 70, 355. See Paul Eugene Gill, "Sir John Fortescue: Chief Justice of the King's Bench, Polemicist on the Succession Problem, Governmental Reformer, and Political Theorist," Ph.D. Dissertation, Pennsylvania State University (Ann Arbor, 1968), pp. 41-42.

29 Cf. *Sir John Fortescue: De Laudibus Legum Anglie*, ed. and trans. S. B. Chrimes (Cambridge, 1946; rep. Holmes Beach, Florida: W. W. Gaunt, 1986), 9-13, and *The Governance of England*, ed. Charles Plummer (Oxford, 1885), pp. 118-20, pp. 138-40, and p. 144 where jurists are compared with priests and prophets.

30 Griffith, p. 824.

31 Cf. Eve K. Sedgwick's analysis of Horner in *The Country Wife*: "Because of his ability to submit to, gain momentum from, and thus expropriate the irrepressible and divisive power of gender representation, Horner constructs for himself an intelligible two-phase narrative of feminisation followed by (rather than contradicted by) masculine recuperation." *Between Men: English Literature and Male Homosocial Desire* (New York, 1985), p. 60.

32 *De Laudibus*, xix. See also D.W. Hanson, *From Kingdom to Commonwealth: The Development of Civic Consciousness in English Political Thought* (Cambridge, Mass., 1970), p. 218.

33 *De Laudibus*, p. 1.

