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Dominium in se ipsum in Antique and Medieval Discourses on Liberty

This chapter provides a glimpse into the history of human freedom. Its aim is to focus on a barely tapped relationship between late antique and medieval discussions of freedom, namely, the relationship between freedom of will as a basis of *dominium in se ipsum* and contemporary conceptions of slavery.

1 Freedom in John Locke: From the End to the Beginning

Among the commonplace statements that are repeatedly uttered in debates about slavery, these two are probably the best known: (1) slavery is the most extreme form of unfreedom, and (2) slavery is characterized by one person owning another. Both propositions, though popular, are useless for research on both historical and modern forms of slavery because they each rely on a vague conception of freedom. Freedom, like property, can be defined in many ways. Those who narrowly define freedom also tend to exclude diverse forms of extreme dependency from their concepts of "slavery".

It is little known that the very terms "freedom" and "property" have been intimately related on a conceptual level since late antiquity. The fact that slavery studies in particular, and modern research in general, usually do not address the intricate relationship between freedom and property may be due to the fact that, in its source work, most researchers usually penetrate the historical record only so far as the ominous language boundary that divides early modernity from the Age of Enlightenment: what was discussed before the advent of the latter can only be learned from Latin sources. Therefore, in the search for the ideological roots of the theory of freedom or property, one rarely encounters studies that stretch back to a time before Thomas Hobbes or John Locke, both of whom have already been published (at least in part) in English.[1]

Before looking back past the European Enlightenment, it is helpful to revisit how Locke, as one of its key figures, defined the terms under evaluation in this chapter.

1 Cfr., for example, Laura Brace, *The Politics of Property: Labour, Freedom, and Belonging* (Edinburgh: Edinburgh University Press, 2004).

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After all, in his *Two Treatises of Government* (1690), Locke treats "liberty", "slavery", and "property" in the same breath but in different respects:

a. "Freedom" (or "liberty") and its restriction by natural law and legal regulations is the guiding theme of Locke's *Second Treatise of Government*. By "freedom", Locke means freedom of action, which can only be affected by natural law, but not by the will of third parties: '[. . .] all men are naturally in [. . .] a *state of perfect freedom*, to order their actions, and dispose of their possessions and persons, as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.'[2]

b. For Locke, slavery is diametrically opposed to freedom. Therefore, he begins his chapter on slavery with yet another definition. This time, it is not self-determination that matters, but rather the absence of domination: 'The *natural liberty* of man is to be free from any superior power on earth, and not to be under the will or legislative authority of man, but to have only the law of nature for his rule.'[3]

c. The chapter following the one on slavery deals with property and the justification for the acquisition of individual property. Here, Locke formulates the proposition of 'possessive individualism',[4] which deals with the concept of ownership of man by himself: 'Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*: this no body has any right to but himself.'[5] Locke does not explain why man has 'property in his own person'. Thus, the connection between freedom and property is, at best, recognizable if one reads between the lines. One might look, for instance, at his statements about the appropriation of goods which initially were common to all men: 'The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*.'[6] With some imagination, therefore, one can understand that 'the labour of his body, and the work of his hands' refer to self-determination.

However, in Locke's account, this connection between "freedom" and "property" remains diffuse. One can recognize it,[7] but one can also easily overlook it. The connection

2 John Locke, *Second Treatise of Government*, cited according to: *Two Treatises of Government. In the Former The False Principles and Foundation of Sir Robert Filmer and his Followers Are Detected and Overthrown. The Latter Is an Essay Concerning The True Original Extent and End of Civil Government* (Dublin: J. Sheppard and G. Nugent Bookfellers, 1779): 155, ch. 2, § 4 (original emphasis).

3 Locke, *Second Treatise of Government*, chap. IV, § 22 (p. 168 f.; original emphasis).

4 The term was coined by Crawford Brough Macpherson, *The Political Theory of Possessive Individualism. Hobbes to Locke* (Oxford: Clarendon Press, 1962).

5 Locke, *Second Treatise of Government*, chap. V, § 27 (p. 171; original emphasis).

6 Locke, *Second Treatise of Government*, chap. V, § 27 (p. 171 f.; original emphasis).

7 As e.g. Ulfried Reichardt, "Sklaverei, Freiheit und Eigentum: Zur Auseinandersetzung über die Sklaverei in der US-amerikanischen Literatur des 19. Jahrhunderts," in *Sklaverei und Recht. Zwischen römischer Antike und moderner Welt*, eds. Iole Fargnoli and Thomas Späth (Zurich: Haupt, 2018): 159.

between "property" and "slavery" is perhaps even more blurred. Although slavery is described as being 'under the dominion of any will, or restraint of any law'[8], Locke does not say that the ownership of things equates to man's 'property in his own person'. The reason for this may be that Locke does not close the circle of definitions: man is the owner of himself insofar as he wills and acts, but not insofar as he can dispose of himself. The theological proposition that man does not owe his existence to himself but to God and, therefore, may neither kill nor sell himself has an effect herein.[9]

The two missing links between freedom and property can only be found by engaging with the predecessors of Locke's concept of freedom, i.e., those developed within Christian moral theology. Centuries before he penned his treatises, various Christian theologians advanced the concepts Locke uses. Indeed, as matters of course, they articulated concepts of freedom based on freedom of action and of property based on freedom of will.

In this chapter, I aim to uncover the conceptual roots of both freedom and property in the history of ideas, at least to some extent. This approach might appear rather strange: a jurist explaining the theological sources of our modern concept of freedom. But both freedom and property are key concepts in modern jurisprudence as well as in other disciplines. I hope to show that it was not Locke, who is often praised for such innovations, nor other contemporary thinkers who shaped the modern concept of freedom and thus laid the foundations for the nineteenth-century abolitionist movement. Instead, theologians and jurists whose names are hardly known to any modern slavery researcher are responsible for laying these important conceptual foundations.

At first glance, this project does not seem to fit well under the title of the present volume: 'Control, coercion, and constraint' are the three key terms attributed to religion as a creator of dependency structures. Nevertheless, the subtitle also points to the role of religion in overcoming such structures. Thus, I would like to emphasize this "light side of the force". In the process, the ambivalence of the modern concept of freedom will become visible. Though the abolitionist movements of the modern era would be unthinkable without them, the normative concept of freedom is still used to justify slavery-like forms of strong asymmetrical dependency. The concept of "freedom of contract" for example stresses the legal freedom to conclude or to terminate a working contract. But it neglects that frequently for economic or social reasons termination is not an option. With the prevailing notion of freedom, as with other constructs, the normative conceptualization is Janus-faced.

8 Locke, *Second Treatise of Government*: 168–69, ch. 4, § 22.

9 For example, in Domingo de Soto, *De iustitia et iure libri decem*, lib. 4, quaest. 2, art. 2 (Venice: Apud Minimam Societatem, 1594): 294–97, esp. 295.

2 Concepts of *libertas* in Antiquity

As we have already seen, Locke employed two concepts of freedom in his *Treatises of Government*:[10] with freedom from external determination on the one hand and freedom to act in a self-determined manner on the other. The concepts of negative and positive freedom used in modern discourses[11] have their roots here.[12] In Locke, these terms still seem to partly converge: he who – within the limits of the law – can act as he pleases is at the same time free from external determination. Nevertheless, the two concepts have quite different foundations.

2.1 Freedom in Philosophy

In ancient philosophy and political theory, "freedom" is mostly understood in the negative, i.e., as freedom from something or from someone.[13] The beginnings of this understanding of freedom, *eleuthería*, stretch far back into Greek history.[14] In philosophy,

10 Whereas in his famous *Essay on Human Understanding* he concentrates on positive liberty, i.e., the liberty to act: John Locke, *An Essay concerning Human Understanding*, book 2, ch. 21, § 8 (London: Thomas Basset, 1690), https://www.gutenberg.org/files/10615/10615-h/10615-h.htm#link2HCH0024 [accessed 25.03.2024]; original emphasis: 'All the actions that we have any idea of reducing themselves, as has been said, to these two, viz. thinking and motion; so far as a man has power to think or not to think, to move or not to move, according to the preference or direction of his own mind, so far is a man *free*. Wherever any performance or forbearance are not equally in a man's power; wherever doing or not doing will not equally *follow* upon the preference of his mind directing it, there he is not free, though perhaps the action may be voluntary.'

11 Esp. Isaiah Berlin, "Two Concepts of Liberty," in *Four Essays On Liberty* (Oxford: Oxford University Press, 1969): 118–72; on this Alan Ryan, "Isaiah Berlin: Four Essays on Liberty," in *The Oxford Handbook of Classics in Contemporary Political Theory*, ed. Jacob T. Levy, Oxford Academic, 10.12.2015, https://doi.org/10.1093/oxfordhb/9780198717133.013.8; Ian Carter, "Positive and Negative Liberty," in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta (spring 2022 edition, https://plato.stanford.edu/archives/spr2022/entries/liberty-positive-negative/ [accessed 23.08.2022]).

12 According to its content we later find the division in Gottfried Wilhelm Leibniz, *Die philosophischen Schriften* ed. Carl Immanuel Gerhardt, vol. 7 (Berlin: Weidemann, 1890; repr., Hildesheim: Olms, 1978): 109. It is heavily disputed if Kant used the dichotomy, as well; cfr. Manfred Baum, "Positive und negative Freiheit bei Kant," *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 16 (2008): 43–56; Bernd Ludwig, "'Positive und negative Freiheit' bei Kant? Wie begriffliche Konfusion auf philosophi(ehistori)sche Abwege führt," *Jahrbuch für Recht und Ethik / Annual Review of Law and Ethics* 21 (2013): 271–305.

13 An overview is provided by Walter Warnach, "Freiheit (I)," in *Historisches Wörterbuch der Philosophie (HWPh)*, vol. 2, ed. Joachim Ritter (Basel: Schwabe, 1972): 1064–74; Orlando Patterson, *Freedom in the Making of Western Culture* (New York: Harper Collins, 1991) (telling a history of freedom as opposite of slavery or domination).

14 Kurt Raaflaub, *Die Entdeckung der Freiheit: Zur historischen Semantik und Gesellschaftsgeschichte eines politischen Grundbegriffes der Griechen* (Munich: C.H. Beck 1985).

however, there were also approaches that constructed positive concepts of freedom, for example, in the *prohaíresis* of the Aristotelian doctrine of imputation.[15] *Prohaíresis* can be translated as "free choice" and means the selection of a reasonable action that achieves the set goal or the purpose pursued.[16] Such a choice justifies imputation only if it is made voluntarily (*ekoúsios*), that is, without error or external coercion. This sounds like "voluntariness" in the modern sense, but Aristotle's theory of action has still some distance from what the Christian doctrine of imputation later came to mean. But Aristotelian ethics offers us the first approach to understanding freedom as a precondition of human action, that is, as freedom "to" something.

Similar, but different in approach, is the Stoic concept of human freedom. Although, according to the Stoic view, man is predetermined by the natural order (one could also say: by the deity which ordered nature), unlike animals, he is capable of acting not only out of affect, but out of reason. Here, a free space opens for deliberate and desired conduct.[17] This *ekousía autopragías*, allegedly already mentioned by Chrysippus,[18] does not equate to voluntary action in the modern sense. Rather, it indicates deliberate action based on one's own decision. The design of one's own life, however, cannot exceed the limits that nature or God has set for this life.[19] For example, in the Late Stoa, in Seneca and especially in Epictetus, the freedom of decision, therefore, turns inward: even if one's own decision cannot influence the external course of events, the salvation of the soul depends on moral action.

The *tranquilitas animi*, the goal of the wise man's life, can only be achieved by those who retain the freedom to make their own morally correct decisions. For Epictetus, in particular, this freedom of the will consists in making correct decisions.[20] Frede, therefore, sees Epictetus as the first of the ancient philosophers to acknowledge what Western philosophy later called "free will". Interestingly, however, Epictetus' version of free will is not part of a general theory of action or attribution. Therefore, it does not indicate a freedom *to* something but is rather a freedom *from* something; namely, it is freedom from external constraints that nature or deity imposes on the

15 Cfr. Alfons Fürst, *Wege zur Freiheit* (Tübingen: Mohr Siebeck, 2022): 62–73; Michael Frede, *A Free Will. Origins of the Notion in Ancient Thought* (Berkeley: University of California Press, 2011): 19–30.

16 Aristotle, *Nicomachean Ethics* III, 1–7 (1109b–1115a), esp. III 3 (1111a–b).

17 On the coincidence of volition and predestination in the Elder and Middle Stoa Warnach, "Freiheit (I)": 1069–70; Maximilian Forschner, "Epiktets Theorie der Freiheit im Verhältnis zur klassischen stoischen Lehre (Didd. IV, 1)," in *Epiktet: Was ist wahre Freiheit?* eds. Samuel Vollenweider, Manuel Baumbach, Eva Ebel, Maximilian Forschner, and Thomas Schmeller (Tübingen: Mohr Siebeck, 2013): 97–118; Fürst, *Freiheit*: 73–91.

18 Diogenes Laertius 7,121; on this Frede, *Free Will*: 67.

19 Seneca, *Naturales quaestiones* 2, 38, 3: 'cum de ista re agetur, dicam quemadmodum manente fato aliquid sit in hominis arbitrio; [. . .].' Cfr. Aldo Setaioli, "Ethics III: Free will and Autonomy," in *Brill's Companion to Seneca. Philosopher and Dramatist*, eds. Andreas Heil and Gregor Damschen (Leiden: Brill 2014): 277–99.

20 Frede, *Free Will*: 76–78.

individual.[21] Epictetus' "free will" is not a means or standard for moral action but an inner state, a state of the soul, which only the wise attain. In contrast, anyone who succumbs to the constraints of nature is its slave.

It seems understandable that Epictetus, himself a slave who was later freed, conceives of *inner* freedom as the form of freedom which is to be most ardently desired. Yet, this internalist view can also be explained via reference to Stoic metaphysics, which understands nature to be as immutable as it is normative. In Stoicism, freedom is conceivable only in the open realms that are not predetermined by nature, including reason, which is a realm peculiar to man.

The philosophical designs find a clear echo in the legal sources. In texts from the Roman Republic, *libertas* always means being free "from" something. We see this in the concept of *libera res publica*, but we also see it in private law figures. As stated in the Twelve Tables, the emancipation of the son of the house makes him *a patre liber*.[22] At the same time, the freedman is called *libertus,* that is, the one freed from the power of another. In the classical sources of the second century, however, one also finds (though rarely) texts like that of Florentinus *(Digest* 1, 5, 4 pr.), which asserts, 'Libertas est naturalis facultas eius quod cuique facere libet, nisi si quid vi aut iure prohibetur'.[23] Here, in a way that almost parallels its use in Stoic philosophy, *libertas* is described as the capacity to act. Nevertheless, this definition does not tell modern readers anything about the concept of *libertas* as it was employed in, for example, republican times.[24]

2.2 Libertas in Cicero: *dominum in se ipsum*?

A thoroughly modern-sounding, though Stoic, definition of "freedom" has been handed down to us by Cicero. Like Florentinus, he describes *libertas* as *potestas vivendi, ut velis* (Cicero, *Paradoxa Stoicorum* 34).[25] If one reads the text further,[26] however, one realizes

21 Epictetus 1, 1, 23; 1, 12, 9; further references in Frede, *Free Will*: 76; cfr. as well Fürst, *Freiheit*: 108–19.

22 XII tab. 4, 2 b; cfr. Gaius, *Institutes* 1, 132; *Ulpiani liber singularis regularum* 10, 1.

23 Transl. Watson: 'Freedom is one's natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law.'

24 However, Valentina Arena, *Libertas and the Practice of Politics in the Late Roman Republic* (Cambridge: Cambridge University Press, 2012): 14–15 quotes Florentinus as a witness for "Roman libertas" in general.

25 Similarly, Cicero, *De officiis* 1, 17 and 20.

26 The whole chapter runs as follows: 'Quid est enim libertas? Potestas vivendi, ut velis. Quis igitur vivit, ut volt, nisi qui recte vivit? qui gaudet officio, cui vivendi via considerata atque provisa est, qui ne legibus quidem propter metum paret, sed eas sequitur et colit, quia id salutare esse maxime iudicat, qui nihil dicit, nihil facit, nihil cogitat denique nisi libenter ac libere, cuius omnia consilia resque omnes, quas gerit, ab ipso proficiscuntur eodemque referuntur, nec est ulla res, quae plus apud eum polleat quam ipsius voluntas atque iudicium; cui quidem etiam, quae vim habere maximam dicitur,

that Cicero is not describing what we today call "free will", i.e., the freedom to make a decision and therefore be held responsible for it. According to Cicero, free is the one who voluntarily chooses what is right, what is reasonable, without being forced to do so by laws. Therefore, only the wise man is free;[27] the stupid man is a slave to what drives him to his actions. Two things need to be commented on here: first, the ideal of the Stoic wise man, who makes decisions free of external constraints, also underlies the early Christian image, according to which one who does not follow Christ remains a slave to sin.[28] Second, Cicero makes it clear that he does not go beyond the concept of *ekousía autopragías*[29] in his Stoic description of freedom.

Nevertheless, when viewed from a different perspective, Cicero's insights can be seen in a fresh light. In his writings on political philosophy, Cicero also poses the question of *libertas* and its essence. Valentina Arena has pointed out in her writings that Cicero compares the freedom of the *res publica* with that of a human being: free is he who does not have to obey the orders of others.[30]

That the Roman concept of freedom starts from the negative vantage of being "free from something" has been common knowledge since Rudolf von Jhering[31] or, at the latest, since Fritz Schulz.[32] However, Arena's observation is not based on them but on Pettit and Skinner,[33] who describe Roman *libertas* as "non-domination". Without

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Fortuna ipsa cedit, si, ut sapiens poeta dixit, "suis ea cuique fingitur moribus." Soli igitur hoc contingit sapienti, ut nihil faciat invitus, nihil dolens, nihil coactus.' – Transl. Loeb and Horace Rackham: 'For what is freedom? The power to live as you will. Who then lives as he wills except one who follows the things that are right, who delights in his duty, who has a well-considered path of life mapped out before him, who does not obey even the laws because of fear but follows and respects them because he judges that to be most conducive to health, whose every utterance and action and even thought is voluntary and free, whose enterprises and courses of conduct all take their start from himself and likewise have their end in himself, there being no other thing that has more influence with him than his own will and judgement? to whom indeed Fortune, whose power is said to be supreme, herself submits – if, as the wise poet said, she is moulded for each man by his manners. It therefore befalls the wise man alone that he does nothing against his will nor with regret nor by compulsion.'

27 Cfr. Cicero, *De officiis* 1, 66–70; on that and similar texts Arena, *Libertas*, 262; Valentina Arena, "Invocation to Liberty and Invective of Dominatus at the End of the Roman Republic," in *Bulletin of the Institute of Classical Studies* 50 (2007): 49–74.

28 John 8:34; Romans 6:16–23.

29 Above, at fn. 17.

30 On these texts Valentina Arena, "Popular Sovereignty in the Late Roman Republic: Cicero and the Notion of Popular Will," in *Popular Sovereignty in Historical Perspective*, eds. Richard Bourke and Quentin Skinner (Cambridge: Cambridge University Press, 2007): 73–95, esp. 74–79.

31 Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, vol. 1.2 (Leipzig: Breitkopf & Härtel, 1854): 134–320.

32 Fritz Schulz, *Prinzipien des römischen Rechts* (Berlin: Duncker & Humblot, 1934): 95–111; since 1936 available in an English translation: Fritz Schulz, *Principles of Roman Law*. Translated by Marguerite Wolff (Oxford: Clarendon Press, 1936).

33 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997): 74–77 and 103–6; Quentin Skinner, *Liberty before Liberalism* (Cambridge: Cambridge Uni-

negating later contributions, it should be noted that Schulz had already succinctly argued,[34]

> Thus, the individual was not free when he was a slave, a whole nation was not free when at its head was an absolute monarch or when it was subject to a foreign yoke. Where there was no "master" in this sense the Romans as individuals or as a people were free, however the degree of *libertas* might vary.

Cicero turns this negative approach into a positive one in *De re publica*: he has Scipio Africanus describe the free republic as *res populi*, i.e., a matter of the people.[35] This *genetivus possessivus* (*populi*) is borrowed from the terminology of property law. One could, therefore, also translate the frequently quoted phrase as 'The government is a thing that belongs to the people'. The possible connection between the rhetoric of freedom and the terminology of property law becomes even more evident when one encounters Scipio's subsequent characterization of the republic: he asserts that, within it, everything (*omnia*) belongs to the people.[36] It is no coincidence that *res publica* is a private law term as well. In that context, it describes things that are accessible to all people and can therefore be used by all.[37] Metaphorically, then, one could say that in a free republic, the people belong to themselves and are, therefore, their own masters.

The Ciceronian construction thus sounds seductively like Locke's formulation that the free man has "property in his own person". Indeed, this is precisely the con-

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versity Press, 1998); cfr. Valentina Arena, "Libertas and Virtus of the Citizen in Cicero's De Re Publica," *Scripta Classica Israelica* 26 (2007): 29–30, 52.

34 Schulz, *Principles*: 140–41; Schulz, *Principles*: 95: 'So ist der einzelne unfrei, wenn er Sklave ist, ein ganzes Volk, wenn an seiner Spitze ein absoluter Monarch steht, oder wenn es dem Dominat eines fremden Staats unterworfen ist. Fehlt aber der "Herr" in diesem Sinne, so ist für den Römer der einzelne wie die Volksgesamtheit frei, so verschieden groß auch das Maß der libertas sein mag.'

35 Cicero, *De re publica* 1, 39: 'Est igitur, inquit Africanus, res publica res populi, [. . .].' 41: '[. . .] omnis res publica, quae ut dixi populi res est, [. . .].' Transl. in Marcus Tullius Cicero, *On the Republic. On the Laws*, trans. Clinton Walker Keyes, Loeb Classical Library 213 (Cambridge, MA: Harvard University Press, 1959): 41: 'Well, then, a commonwealth is the property of a people'; '. . . every commonwealth, which, as I said, is the "property of a people"'. An extensive study on this topos has been published by Claudia Moatti, *Res publica. Histoire romaine de la chose publique* (Paris: Fayard, 2018); Moatti, Claudia, "The Notion of Res publica and Its Conflicting Meanings at the End of the Roman Republic," in *Libertas and Res Publica in the Roman Republic. Ideas of Freedom and Roman Politics*, ed. Catalina Balmaceda (Leiden: Brill, 2020): 118–37.

36 Cicero, *De re publica* 1,42: 'Illa autem est civitas popularis – sic enim appellant – in qua in populo sunt omnia.' Somehow different ("all the power") is the Engl. transl. by Loeb and Keyes: 'But a popular government (for so it is called) exists when all the power is in the hands of the people.'

37 Cfr. Maria Gabriella Zoz, *Riflessioni in tema di res publicae* (Turin: Giapichelli, 1999); Martin Schermaier, "Private Rechte an res communes?" in *Carmina iuris. Mélanges en l'honneur de Michel Humbert*, eds. Emmanuelle Chevreau, David Kremer, and Aude Laquerrière-Lacroix (Paris: De Boccard, 2012): 773–92.

clusion Arena draws in her reading of the Roman concept of freedom. After referencing Florentinus' definition *(Digest* 1,5,4 pr.),[38] she asserts, 'It follows that, according to the *Digest*, one is free when he is under his own *dominium*'.[39] This conclusion may seem obvious, but it is wrong.

First, it should be noted that Cicero's borrowings from private property law do not go beyond the attribution of a thing to a person. He does not fill out his definition with considerations of how an owner may deal with his things. Florentinus' *quod cuique facere libet*, in turn, has nothing to do with the *dominatio* of others. *Dominiatio* and *libertas* touch each other in political discourses (including in Cicero) but not in private law. After all, there are also persons described as *alieni iuris*, i.e., those who are subject to domination even though they are free (*liber*). With *dominium*, again, only the right to demand a thing from another with the *rei vindicatio* is enshrined. We do not find a definition of property in the legal sources because Roman property is conceived procedurally, not materially, i.e., not from the powers it grants.

Conversely, it is true that one is not free if one belongs to the *dominium* of another. This is shown by Cicero's characterization of the *res publica* as well as the Roman jurists' description of the status of a slave.[40] However, the idea of *dominium in oneself* is alien to Roman thought. The lack of an independent conception of ownership is made clear by the structure of the classical trial of freedom, the *status quaestio* in the context of the *vindicatio* in *libertatem*: it is true that freedom (of the supposed slave) and property (of the master) are opposed here, and indeed the trial follows the structure of the (old) *rei vindicatio*, which was created so that one could pursue one's own cause. However, the *adsertor libertatis,* who appears on behalf of the slave, does not claim that the latter has property in himself but asserts his status as a freeman.[41] When a Roman jurist wants to express that someone is "his own master", he speaks of *sui iuris esse*.[42] This expression can be taken quite literally: To be *sui iuris* means that all legal relationships concerning this person are borne and regulated by him or her. A *sui iuris* person is not mediatized in legal relations by a *dominus*, a guardian, or a *pater familias*.

In light of this background and the developments outlined in the next section, one can conclude that the *dominium in se ipsum* only became a description of personal freedom through the justification of "dominion" by a new concept of the will that emerged in moral theology, which at the same time captured the private-law con-

38 Cfr. above at n. 23.

39 Arena, "Libertas": 15.

40 Cfr. *Digest* 1, 5, 4, 2 (Flor. 9 inst.): 'Servitus est constitutio iuris gentium, qua quis dominio alieno contra naturam subicitur.' Engl. transl., Watson: 'Slavery is an institution of the jus gentium, whereby someone is against nature made subject to the ownership of another.'

41 In detail Miriam Indra, *Status quaestio. Studien zum Freiheitsprozess im klassischen römischen Recht* (Berlin: Duncker & Humblot, 2011).

42 Cfr. David Johnston, *Roman Law in Context* (Cambridge: Cambridge University Press, 2012): 30–52.

cept of property. The one who can decide of his own free will whether and how to act thereby dominates himself and the things he brings into his possession. Through the convergence in reasoning, "dominion" and "property" come together here and become interchangeable in content.

Ancient philosophy, when speaking of "dominion" over oneself, used an image that is as simple as it is obvious: he alone, who does not have to obey that which is foreign, commands himself. However, in the history of ideas, this image became a theoretical topos only when the command to perform a certain action is recharged with the concept of free will, which makes man responsible before God. Only then do the concepts arrange themselves in the way Locke presents them to us: freedom establishes property, and this, in turn, characterizes the freedom of the person. The stirrings of a Lockean conception of "free will" are evidenced in the philosophy of the Middle and Late Stoa. However, even the Stoa did not achieve a concept of the will that was free of all determination and teleology. This was only achieved in the Church Fathers' doctrine of attribution.

2.3 Freedom in the Church Fathers

The Stoic concept of freedom comes to the fore in early Christian theology even more clearly than it does in the works of Florentinus. Like the Stoa, Christian thinkers are confronted with the problem of how human freedom is possible in an order created by God. However, theology approaches this paradox differently than Stoic philosophy.[43]

Paul formulates his concept of freedom in a rather traditional way: like Cicero's idea (*Paradoxa Stoicorum* 34), it is turned inward and is thus not conceived as freedom of action. Instead, Paul proclaims a freedom in Christ, a freedom from sin and the law, but not a freedom to shape the external world. Vaucher has recently made this point clear regarding early Christianity's attitude toward slavery.[44] Paul's freedom is soteriologically based; it understands Christ's redemptive death as a renewal of liberation from Egyptian servitude. Thus, Paul is not concerned with freedom of will in the Stoic sense.

The early Church Fathers, in contrast, start with the Stoic conception and the Aristotelian doctrine of *prohaíresis* in their efforts to substantiate human freedom in the order of creation. Irenaeus of Lyon (d. *ca.* 200) is probably the first to consistently succeed in this task by positing a gradation of divine and human will.[45] According to Ire-

43 On the differences between Stoic and early Christian concepts of freedom esp. Fürst, *Freiheit*: 139–86, esp. 161–86.

44 Daniel Vaucher, *Sklaverei in Norm und Praxis. Die frühchristlichen Kirchenordnungen* (Hildesheim: Georg Olms Verlag, 2017).

45 Cfr. Walter Warnach, "Freiheit (II)," in *Historisches Wörterbuch der Philosohpie*, ed. Joachim Ritter, vol. 2 (Basel: Schwabe, 1972): 1077; Fürst, *Freiheit*: 152–61 argues that Justin Martyr was the first to link freedom and decision in the concept of *prohaíresis eleúthera*.

naeus, God created man in his own image, thus endowing him with free will. Human will cannot reach beyond creation, but because it is free, man is also free to decide for or against God's order. In this, Irenaeus sees the core of human freedom. At this point, Origen takes up the proverbial baton and defines sin as a decision of the free human will against God (and thus against the good).[46] In both Irenaeus and Origen, however, human freedom stands within the dialectic of good and evil, light and darkness, being and non-being. The concepts and arguments brought forward by the theologians are motivated to exonerate God's creation from evil.[47] Thus, it is not yet coordinated with the grace of God on the one hand and the redemptive act of Christ on the other.

The notion of the reconciliation of free human will with divine omniscience arrives on the theological stage in the works of Augustine of Hippo. According to him, man has voluntarily turned away from God (in Adam's Fall) and therefore needs grace and redemption. In his earthly life, the sinful man is indeed unfree, but through the grace of God, he can decide for good and against evil. Therefore, even after the Fall, man has a free decision (*liberum arbitrium*) about his actions.[48] This *liberum arbitrium* seems closely related to what Epictetus called "free decision",[49] but in Augustine, it is – unlike in Epictetus – the basis for a moral judgment. Actions are not good or evil *per se*, but their moral quality results from the volition of the acting subject. Augustine's understanding of the will is similar to the Aristotelian theory of action, in which the choice of what is reasonable (*prohaíresis*) determines imputation. In Augustine, however, the freedom to decide which action is right and suitable is joined in the *liberum arbitrium* by the free choice to choose the wrong action despite knowing better. The decision for the wrong option, i.e., the evil, is, in each case, a turning away (*aversio*)[50] from God. The *prohaíresis*, the reasonable choice of the means to achieve an end, thus receives in the *liberum arbitrium* a kind of controlling instance, which examines whether it responds to God's grace or not.

Evaluating this Augustinian doctrine from a theological standpoint is beyond my competence.[51] Nevertheless, it is widely acknowledged that his doctrine subsequently became the basis of Christian moral theology in scholasticism.[52] The philosophy of

46 On him extensivly Fürst, *Freiheit*: 187–290.

47 Cfr. Fürst, *Freiheit*: 169–75 (concerning Tertullian); Warnach, "Freiheit (II)": 1081.

48 Cfr. *in extenso* Frede, *Free Will*: 167–170; in addition, Warnach, "Freiheit (II)": 1081–82.

49 Vgl. Frede, *Free Will*: 168–69.

50 Augustine, *De civitate dei:* 12, 6; cfr. Warnbach, "Freiheit (II)": 1081.

51 Still important is Albrecht Dihle, *The Theory of Will in Classical Antiquity* (Berkeley: University of California Press, 1982): 123–44.

52 Concerning Early Scholasticism Otto Hermann Pesch, "Freiheit (III)," in *Historisches Wörterbuch der Philosophie*, vol. 2, ed. Joachim Ritter (Basel: Schwabe, 1972): 1083–84; concerning High Scholasticism, Thomas Hoffmann, *Free Will and the Rebel Angels in Medieval Philosophy* (Cambridge: California University Press, 2020): esp. 11–160.

Thomas Aquinas, to name a prominent example, utilizes the Augustinian perspective as a core concept of moral philosophy,[53] though there is a vivid dispute to what extent *liberum arbitrium* is determined by God's creation in the latter's works.[54] Since then and until today, it is common to define freedom as freedom of action, as freedom "to do something", or as agency. Thus, it is not only our modern concept of freedom that has its roots in this concept of agency. Agency, or freedom to do something, is also the basis of important legal institutions, including both property and slavery. The arrival of freedom of action on the stage of conceptual history now brings me to the second focus of my paper: medieval discourses on freedom.

3 From Thomas Aquinas to Spanish Scholasticism

3.1 The Christian Doctrine of Imputation

The construction of *liberum arbitrium* did not solve all the theological problems about the freedom of the sinful man. Is *liberum arbitrium* a freedom to sin? Or is it a freedom to turn to God? In his reference to Aristotle's doctrine of action, Thomas succeeded in separating the question of imputation (i.e., the doctrine of sin) from the doctrine of grace, thus mobilizing the *liberum arbitrium* only for the doctrine of sin. As is known, Martin Luther tried to reverse this separation.[55] Nevertheless, Protestant jurisprudence has held onto the Thomistic terminology and systematics.

Back to Thomas: *voluntas* and *liberum arbitrium* belong to the same *potentia*, but they differ in their function when it comes to the attribution of actions: *voluntas* chooses an action to bring about a certain success, *liberum arbitrium* gauges whether the

53 Dorothée Welp, *Willensfreiheit bei Thomas von Aquin* (Freiburg: Universitätsverlag Freiburg, 1979); Eleonore Stump, "Aquina's Account of Freedom: Intellect and Will," in *Was ist Philosophie im Mittelalter? Qu'est-ce que la philosophie au moyen âge? What is Philosophy in the Middle Ages?* eds. Jan A. Aertsen and Andreas Speer (Berlin: De Gruyter, 1998): 1034–44; Jamie Anne Spiering, "'Liber est causa sui': Thomas Aquinas and the Maxim 'The Free is the Cause of itself'," *The Review of Metaphysics* 65 (2011): 351–76; Luise A. Mitchell, "Free to Be Human: Thomas Aquinas's Discussion of Liberum Arbitrium," *New Blackfriars* 96 (2015): 22–42.

54 Brian Shanley, "Divine Causation and Human Freedom in Aquinas," *American Catholic Philosophical Quarterly* 72 (1998): 99–122; Lawrence Dewan, "St. Thomas and the Causes of Free Choice," *Acta Philosophica* 8 (1999): 87–96; Tobias Hoffmann and Cyrille Michon, "Aquinas on Free Will and Intellectual Determinism," *Philosopher's Imprint* 17 (2017): 1–36; Steven A. Long, Roger W. Nutt, and Thomas J. White, eds., *Thomism and Predestination. Principles and Disputations* (Ave Maria: Ave Maria University Press, 2016).

55 Briefly on this Pesch, "Freiheit (III)": 1087; more detailed Hans Vorster, *Das Freiheitsverständnis bei Thomas von Aquin und Martin Luther* (Göttingen: Vandenhoeck & Ruprecht, 1965); Matthew Knell, *Sin, Grace, and Free Will: A Historical Survey of Christian Thought*, vol. 2, *From Anselm to the Reformation* (Cambridge: James Clarke & Co., 2018): 158–79 and 180–217.

action corresponds to the good (= God's will). Apart from this differentiation, Thomas can rely entirely on Aristotle's theory of action and join him in distinguishing between recognizing (*intelligere*), deliberating (*ratiocinari*), and choosing (*velle*).[56] Only the *velle*, the natural will, is complemented by the *liberum arbitrium* (*eligere*). Sometimes Aquinas combines both aspects of the will and speaks only of *libera voluntas*; other scholastics distinguish between *voluntas naturalis* and *voluntas eligentiae.*[57]

We need not concern ourselves with the individual terminological differences here. What is crucial is that this terminological differentiation lays a solid foundation for a Christian doctrine of imputation. It determines the medieval and modern doctrine of sin and is the *leitmotif* of medieval jurisprudence of confession. Through the Age of Enlightenment, which replaced the concept of "sin" with that of "crime", it still essentially determines modern criminal law theory.[58]

The emphasis on the doctrine of action in Thomistic hamartiology can also be interpreted as the culmination of a tendency towards regulation and control of the lives of believers that has persisted since late antiquity. Although the *liberum arbitrium* leaves the judgement between good or evil to the individual, the doctrine of action creates a dogmatic framework for judicially reviewing this judgement in confession, thus before the *forum internum*. Therefore, I could also have given my contribution the title: "Freedom as a pretence for control."

3.2 Free Will and Freedom

However, I am more interested in the anthropological embedding of free will, which eventually becomes the pivotal point of a new, ultimately enlightened understanding of freedom. The development of this conception is evidenced by the Thomistic assertion, *liberum sit quod sui causa est,*[59] borrowed from Aristotle, for whom it is a rule of metaphysics. Thomas, however, does not relate it to man's existence but to his freedom of action: 'The free is not the cause of itself in being, but the cause of itself in acting.'[60] Man is free because he can freely choose the goal and purpose of his action. In short, as an agent, he is free. Thomas does not say: 'I act (or I will); therefore, I am.'

56 Summa theologica I, qu. 83 art. 4 resp.

57 On that, see Tilman Anselm Ramelow, "Der Begriff des Willens in seiner Entwicklung von Boethius bis Kant," *Archiv für Begriffsgeschichte* 40 (2004): 42–43 (concerning Bonaventura); Anselm Ramelow, "Wille (II)," in *Historisches Wörterbuch der Philosophie*, vol. 12, eds. Joachim Ritter, Karlfried Gründer, and Gottfried Gabriel (Basel: Schwabe, 2005): 772; but see already Johannes Verweyen, *Das Problem der Willensfreiheit in der Scholastik. Auf Grund der Quellen dargestellt und kritisch gewürdigt* (Bonn: C. Winter, 1909).

58 See, for example, Pascal Gläser, *Zurechnung bei Thomas von Aquin: eine historisch-systematische Untersuchung mit Bezug auf das aktuelle deutsche Strafrecht* (Munich: Alber 2005).

59 Thomas, *Summa Theologica*: I qu. 83 art. 1 ad 3: 'Free is what has its cause in itself.'

60 Spiering, "Liber est causa sui": 352.

Man owes his existence to God's creation; his being has its *causa* in God. Likewise, the freedom of his will flows from the same source. That said, divinely prompted free will enables man to freely conduct his earthly life. To this extent, he is *causa* to himself. Thus, man is his own master, which alone makes him responsible to God.

This Thomistic construct sounds similar to that of Cicero, but in its metaphysical justification, it goes beyond the thought of the Roman philosopher. To be *causa* of oneself is an attribute of God, the creator, who is not himself created. Thomas transposes this image of the unmoved mover to the human being capable of sin: he is not predetermined by anything in his decisions and wills, is entirely free, and for that very reason, responsible. If he were not himself the *causa* of his will, his actions and wills could not be imputed to him as sin: that is why man is not simply master of himself but of his actions.[61]

Nevertheless, free will constitutes man in his humanity. Since man can freely decide on his actions, Thomas calls him *dominus sui actus*, the master of his actions.[62] This concept, which Thomas shares with Bonaventura[63] (it is impossible to say which of the two was the first to formulate it), has two meanings that are deliberately not delineated from one another in the scholastic discussion: one meaning, which constitutes its anthropological-philosophical aspects, is that man is his own master and therefore does not have to follow any orders except those derived from natural law and legitimate public laws.[64] Incidentally, we can see from this outline that Locke built on Thomas. The other meaning of *dominus sui actus* derives from Roman law sources, where *dominus* does not only mean "master" but also includes the concept of an "owner". Bonaventura expressly refers to these dual meanings. Indeed, he applies both *imperium* and *dominium* to his definition of man's mastery of his actions.[65]

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61 Herein is found the theological reason why man can acquire slaves but not enslave himself; cfr. at n. 10.

62 For example, Thomas, *Summa Theologica*: I qu. 29 art. 1 (resp.): *dominium actus sui* as a characteristic of *persona*.

63 Bonaventura, *Commentaria in lib. II Sententiarum Petri Lombardi*: dist. 25, art. 1, qu. 1, ed. Adolphe Charles Peltier, Opera omnia Sancti Bonaventurae 3 (Paris: Luis Vivès, 1865): 200–201.

64 Cf. Thomas Aquinas, *De perfectione spiritualis vitae*: cap. 11 lin. 116–19: 'Nihil autem est homini amabilius libertate propriae voluntatis. Per hanc enim homo est et aliorum dominus, per hanc aliis uti vel frui potest, per hanc etiam suis actibus dominatur.' ('Nothing is dearer to any man than the freedom of his will, whereby he is lord of others, can use what he pleases, can enjoy what he wills, and is master of his own actions;' this and all other translations of texts of Aquinas are taken from https://aquinas.cc/ [accessed 04.12.2023]).

65 Cf. Bonaventure, *Commentaria in lib. II Sententiarum Petri Lombardi*: dist. 25, art. 1, qu. 1 (my emphasis): 'Illa autem potentia dominium habet ex libertate respectu objecti, quae non est arctata ad aliquod genus appetibilis, sed nata est omnia appetibilia appetere, et omnia fungibilia respuere. [. . .] Nam voluntas in rationabilibus non solum compescit manum exteriorem, vel pedem, sed etiam compescit seipsam et refraenat, incipiens odire frequenter quod prius diligebat. Et hoc ex sui ipsius *imperio et dominio*.' ('This has the facility to domination, with regard to an object, because of the liberty, which is not restrained to desirable things, but has been given to desire the desirable and to spurn the

Considering these definitional complexities, one might ask, how can we imagine man as the "owner" of his actions? A jurist would never formulate a question in this way. As previously suggested, in Roman law, ownership can only be imagined regarding external and corporal things. Nevertheless, Thomas and perhaps Bonaventura, also use the legal meaning of *dominium* to justify why people acquire ownership of worldly goods (as does Locke some four hundred years later). The Roman *occupatio*, the appropriation of ownerless things, thus acquires an anthropological basis: ownership of one's action is extended to the thing seized and therefore constitutes the agent as its owner. Starting from freedom of action, the High Scholastics thus arrive at a justification for the acquisition of private property.[66]

3.3 Corresponding Concepts: Free Will, Property, and Freedom

Whether or not private property can be justified theologically has been discussed by theologians since the third century.[67] We do not need to rehash this discussion in detail here because it leads us away from our subject. However, one point is still important for us to consider. Namely, that since the late thirteenth century, there has again been a fundamental dispute about whether Jesus had private property, whether Christians are allowed to have private property and whether the Church should organize itself without property. In the so-called "Poverty Controversy", fought mainly from the early fourteenth century (under Pope John XXII) onwards, both theological and legal arguments have been deployed for and against propertylessness. Strict proponents of the Franciscan movement, on the one hand, strove to define the concept of property as narrowly as possible in order to avoid the need to construe diverse notions of property and trust as prohibited. John XXII, on the other hand, argued that every right that conveys the use and yield of a thing should be classified as property. In his *opus nonaginta dierum,* William of Ockham sought to refute the pope's argument. There, Ockham defines property according to two criteria: property only exists

profitable things. [. . .] Because will rational beings not only tempers hand or foot, but as well tempers and bridles itself and thus it starts to hate what it desired before. And from that one has sovereignity and property of one's own.').

66 For more details see Martin Schermaier, "Dominus actuum suorum. Die willenstheoretische Begründung des Eigentums und das römische Recht," *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* 134 (2017): 49–105, esp. 61–76.

67 Martin Schermaier, "Habebant omnia communia. Überlegungen zum Gemeineigentum in Philosophie, Theologie und Recht," in *De rebus divinis et humanis. Essays in honour of Jan Hallebeek*, eds. Harry Dondorp, Martin Schermaier, and Boudewijn Sirks (Göttingen: Vandenhoeck & Ruprecht, 201): 241–63; still useful because of its rich material are Otto Schilling, *Reichtum und Eigentum in der Altkirchlichen Literatur. Ein Beitrag zur sozialen Frage* (Freiburg: Herder Verlag, 1908); Paul Christophe, *L'usage Chrétien du droit de propriété dans l'écriture de la tradition patristique* (Paris: P. Lethielleux, 1963); Charles Avila, *Ownership: Early Christian Teaching* (London: Sheed and Ward, 1983).

if (first) the entitled person can reclaim the thing from anyone and (second) he can do with it whatever he wants.[68]

Ockham's second criterion is new, at least regarding Roman law. Yet, it is not entirely new from a theological perspective. The Church Fathers already condemned wealth (in connection with the parable of the rich young man[69]) solely if the owner attached his heart to a thing.[70] For Ockham, however, it is not the heart, but – more precisely – the will that is decisive: the *voluntas* of the owner turns possessions into sinful property. Free will thus not only explains why someone acquires property, but conversely, property entails the owner's power and discretion to deal with the thing he owns as he wills. In this way, the acquisition and content of property are both described in terms of a will theory.

There is still another connection between will and freedom, which becomes apparent when one considers the ownership of human beings by other human beings or institutions. According to Roman law, a slave is the property of his *dominus*. Under Ockham's new definition of property, this right means that the owner can use a slave as he pleases. If one applies this definition to contemporary (i.e., late medieval) dependency relationships, they cannot be classified as slavery: a master cannot do as he pleases with his vassals, nor with bondsmen or serfs, nor with apprentices or domestic workers. Therefore, they cannot be considered slaves, even if they are still called *servi* or *ancillae* in legal language.

It is hardly a coincidence that the first jurist to adopt Ockham's definition of *dominium*, Bartolus de Saxoferrato, is also the first jurist to decisively state that slavery does not exist among Christians.[71] However, in his statement, he does not refer to the *dominium in se ipsum* but to a text by the classical jurist Ulpian (*Digest* 49,15,24), in which the latter explains who was considered a prisoner of war and could therefore be enslaved. Prisoners of war (and thus slaves) would only be made in the case of war by foreign powers against the Roman people. Bartolus translates this principle into the circumstances of his time: in the politically fragmented Europe of the fourteenth century, he equates Roman citizenship to membership in the Roman Church.[72] In wars between Christian rulers, Bartolus sees it as a matter of customary law that no prisoners of war should be taken in order to enslave them.[73] Therefore, according to Bartolus, Christians could not be enslaved in Christian countries.

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68 Cfr. Schermaier, "Dominus actuum suorum": 72–76.

69 Mark 10:17–26; Matthew 19:16–27; Luke 18:18–27.

70 On this Schermaier, "Habebant omnia communia": esp. 249–50 (with further references).

71 Bartolus de Saxoferrato, *Commentaria super secunda Digesti Novi*, ad D. 49, 15, 24 (Turin: Nicolaus Bevilaqua, 1574): fol. 227 v.–228 r.; on this Thomas Rüfner, "Die Rezeption des römischen Sklavenrechts im Gelehrten Recht des Mittelalters," in *Sklaverei und Freilassung im Römischen Recht. Symposium für Hans Josef Wieling zum 70. Geburtstag*, ed. Thomas Finkenauer (Berlin: Springer, 2006): 201–21, 214–19.

72 Cfr. Bartolus, *Commentaria*: ad D. 49, 15, 24, n. 3–6 (fol. 228 r.).

73 Bartolus, *Commentaria*: ad D. 49, 15, 24, n. 16 (fol. 228 r.): 'Certe de iure gentium antiquis moribus introducto deberet esse ius captivitatis et postliminii [. . .] sed secundum mores moderni temporis

It remains speculative to assert that this rule is linked to the notion that property is based on a specific theory of will. Bartolus does not establish such a link himself. Nevertheless, the following circumstances suggest that there is a connection.

a) Firstly, private property and slavery have constituted formative social institutions since the time of the Church Fathers. In theological terms, these institutions are not natural states but came into the world through the Fall of man and are permitted to continue by God under certain restrictions until the Last Judgement. Here it is advisable to consider Locke once again. Like earlier thinkers, he continues to deal with property and slavery together.[74]

b) Secondly, a conceptual link between property and slavery can be observed not only in Ockham's definition but also from the legal construction of *dominium*: as his master's property, a slave cannot simultaneously be *dominus sui actus.* The master's property also covers the slave's actions. Yet, because every Christian is personally responsible before God, he must remain *dominus sui actus*. Christians being slaves of other Christians would eliminate or at least restrict this principle of personal responsibility.

c) Finally, as one might imagine based on the last point, Bartolus expends significant energy in his argument that, since the enslavement of a Roman by Romans was already prohibited by Roman law, through membership in the Roman Church, this prohibition is extended to all who share faith in Jesus Christ, regardless of national origin and across national borders.

Christian thinkers in Bartolus' time had at hand all the arguments needed to conclude that, based upon the theoretical relationship between free will and man's self-rule, slavery should be rejected, at least among Christians. Indeed, the *dominium in se ipsum* would be the perfect legal argument to support the position that no one can be the property of another person. Anyone who accepts the *dominium in se ipsum* as a legal maxim must exclude slavery among Christians. Every Christian is, per definition, *dominus* of himself. This early theory of self-ownership constituted a narrative that has survived, barely interrupted, to our days: slavery exists only where a person becomes the property of another person, thus an object of his *dominium*. According to this definition, other forms of dependency, even those of extreme asymmetrical nature, are not slavery.[75] Slavery has thus become not only a social or legal concept but

consuetudinis antiquitus observate inter Christianos quantum ad personas hominum non observamus iura captivitatis et postliminii nec venduntur nec habentur servi captivi.' ('For sure, according to ancient mores the law of captivity and postliminium had been introduced [. . .] but according to the mores of modern times we do not, among Christians, adhere to the rights of captivity and its reversion as observed in antique costumes and captive slaves are neither sold nor kept').

74 Ch. 4 and 5 in his Second Treatise.

75 See also Richard J. Helmholz, "The Law of Slavery and the European Ius Commune," in *The Legal Understanding of Slavery. From the Historical to the Contemporary*, ed. Jean Allain (Oxford: Oxford University Press, 2012): 17–39; according to Helmholz, the concept of *servus* recedes into the background because the different semi-freemen had to be treated differently in different contexts.

an ideological one: what slavery is depends on the range and scope of freedom and property.

4 *Dominium in se ipsum* as a Source of Fundamental Rights

That which modern readers might propose as a conjecture was self-evident in the moral-theological discussion of Bartolus' time. Yet, as we try to wrap our minds around the discourse of another period, we can conclude without further ado that generations of engagement with the *dominiatio sui actus* lead to the conclusion that everyone is his own master, *sui dominus*. As argued by Thomas, for example, 'homo constituitur dominus sui ipsius per liberum arbitrium':[76] free will establishes ownership of oneself.[77] In recent decades, there has been intensive research on the idea of property of oneself, its preconditions and, above all, its consequences for philosophical and legal discussions. Some see it as the foundation of subjective rights and, thus, the basis for the modern concept of human dignity. The works of Brian Tierney[78] and Annabel Brett[79] are worth mentioning here. That said, we do not need to enter into this discussion in order to shed light on the consequences of *dominium in se ipsum* for the discourse on freedom.

4.1 Legal Implications of *dominium in se ipsum*

I only want to give a few examples of how the concept was used and how it might have contributed to the development of the modern notion of human dignity. Thomas Aquinas referred to the *dominium in se ipsum* as the area for which man is responsible because of his free will. If man transgresses God's commandments while acting upon such responsibility, he sins. However, subsequent generations of theologians un-

76 Thomas, *Summa Theologica* II–II 64 art. 5 ad 3: 'Man is made master of himself through his free-will.' There it says further: 'et ideo licite potest homo de seipso disponere quantum ad ea quae pertinent ad hanc vitam, quae hominis libero arbitrio regitur.' ('wherefore he can lawfully dispose of himself as to those matters which pertain to this life which is ruled by man's free-will').

77 Thomas, *Summa Theologica* I–II qu. 1, art. 2; ii–II, 1 u. 66 art. 1; idem, *summa contra Gentiles* 3, 81 and 3, 111 (this and further references in Brian Tierney, "Dominium of Self and Natural Rights before Locke and After," in *Transformations in Medieval and Early-Modern Rights Discourse*, eds. Virpi Mäkinen and Petter Korkmans (Dordrecht: Springer, 2006): 173–200, 180.

78 Brian Tierney, *The Idea of Natural Rights: Studies on Natural Rights, Natural Law and Church Law, 1150–1625* (Grand Rapids: William B. Eerdmans Publishing, 1997).

79 Annabel S. Brett, *Liberty, Right and Nature. Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997).

derstood the *dominium in se ipsum* as a subjective right of man founded in natural law. They, therefore, proceeded differently than Thomas: instead, they endeavoured to measure the content and scope of *dominium* by considering how far such ownership extends without becoming sin. Thus, "ownership of oneself" is no longer merely a metaphor for the free human will but is equated with a right to one's own body.[80] The link between free will and self-ownership can be seen, for example, in the way Henry of Ghent discusses the classical question[81] of whether a person condemned to death is allowed to escape.[82] Although Henry does not speak of the *dominium* in Thomistic terms, that is, in reference to *proprietas* of one's own body or *potestas*, he concludes that the condemned person, as the owner of their body, has a greater right to it than the *iudex saecularis,* who only has some kind of limited right to it:

> To understand this, one has to know that on a certain thing, one might have power or a right in a double sense: one concerns property on the substance of a thing, and the other concerns the use by treating the thing in a certain way. The secular judge has by no means more power or right in the first sense on the body of the condemned than he has on his soul. But he only has (power) in the second sense, which consists in three forms: to capture the body, to enchain or imprison it, or to put it to death. Only a devout soul (a soul under God) has power as regards property in the substance of the body, and therefore he is bound to guard his right, without (making use of) another's wrong.[83]

The condemned person's "ownership" of his body and the punitive power of the state are described here in the terminology of Roman property law. The judge has only the right to deal with the body of the condemned person in a certain way. Henry classes such a right as a right *in rem*, like an *usus* or an *ususfructus*. Just as the owner is not allowed to deprive the usufructuary of the thing, the condemned person is not allowed to escape. Only if the judge neglects the condemned person, for example, by

80 Matthias Kaufmann, "Welches Eigentum gehört zum Menschenrecht auf Freiheit?" in *Freiheit als Rechtsbegriff*, eds. Matthias Kaufmann and Joachim Renzikowski (Berlin: Duncker & Humblot, 2016): 115–34 does not sharply distinguish both aspects (the legal and the thelogical) on *dominium in se ipsum*.

81 'The problem is as old as Socrates [. . .]', says Tierney, in *Natural Rights*: 80 and Brian Tierney, "Natural Rights in the Thirteenth Century: A Quaestio of Henry of Ghent," *Speculum* 67 (1992): 58–68, 60.

82 Henricus de Gandavo, *Queastiones quodlibetales*, Quodlibetum IX, qu. 26 ('Utrum condemnatus morti licite possit abire, si tempus et locum habeat'), in *Henrici de Gandavo opera omnia*, vol. 13, ed. Raymond Macken (Leuven: Leuven University Press, 1965): 306–9, https://drive.google.com/file/d/1aGvC4Jzoo1QKdhgF1z37_3n-riWubdCx/view [accessed 25.03.2024); on this in detail Tierney, *Natural Rights*: 83–89 and Tierney, "A Quaestio of Henry of Ghent": 62–66.

83 'Ad cuius intellectum sciendum est quod supra rem aliquam dupliciter haberi potest potestas sive ius: una quoad proprietatem in substantia rei, alia quoad usum in actione aliqua exercenda circa rem. Primam potestatem aut ius nullatenus habet iudex saecularis super corpus damnati plus quam super animam illius, sed secundam tantum, quae consistit in tribus, scilicet in corpus capiendo, in vinculando sive incarcerando, et in occidendo. Potestatem autem quoad proprietatem in substantia corporis sola anima habet sub Deo, et tenetur ius suum in hoc custodire absque iniuria alterius.'

not imprisoning or guarding him, does the condemned person have a right to flee. This consideration clearly shows that, by the thirteenth century, the *dominium in se ipsum* had become a right *in rem* to one's own body.

The example discussed by Henry of Ghent seems far-fetched, perhaps even absurd to us, when it comes to describing a man's right to his own life. By contrast, the example given by Konrad Summenhart, a theologian and canonist from Tübingen of the late fifteenth century,[84] is much more practical. His most famous work is *De contractibus*, about contracts. Summenhart attempts to base his understanding of contract law of his time on moral-theological doctrine. In other words, he examines canon and Roman law to see whether it is correct from a moral-theological perspective.[85] Of course, he also assumes that free will establishes man's ownership of himself.[86] Therefore, he discusses (among other things) whether a person can grant someone a claim to surrender his own body. In his view, a contract of employment concluded for an indefinite period is paradigmatic for such a claim. Such a contract would be similar to slavery, though selling oneself into slavery is impossible[87] under natural law. In the end, however, Summenhart considers an employment contract for an indefinite period or a lifetime to be valid. The arguments put forward in favour of this are rather pragmatic: if such agreements were invalid, a series of employment relations, whether in the church and monasteries or the profane sphere, could not be filled.

Summenhart's explanations are valuable to us in two ways: on the one hand, they represent one of the earliest attempts to define dependent labour in legal terms and to justify it from a moral-theological perspective. On the other hand, all this is done under the banner of man's free self-determination; it is therefore described as a (partial) problem of the inalienable freedom of man, the *dominium in se ipsum.*

Later theologians, especially those of so-called Spanish Scholasticism, continued this discourse. Well-known[88] is the work of Balthasar Gómez de Amescúa, the *Tracta-*

84 On Summenhart, see Helmut Feld, "Summenhart, Konrad," in *Neue Deutsche Biographie (NDB)*, vol. 25, ed. Maximilian Lanzinner (Berlin: Duncker & Humblot, 2013): 705–6; Jussi Varkemaa, *Conrad Summenhart's Theory of Individual Rights* (Leiden: Brill, 2011).

85 The "moral transformation" of contract law is not – as Decock assumes – the achievement of the Second (or "Spanish") Scholasticism, but started already in late medieval jurisprudence and theology; cfr. Wim Decock, *Theologians and Contract Law. The Moral Transformation of the Ius Commune (ca. 1500–1650)* (Leiden: Martinus Nihoff Publishers 2013).

86 Cf. Konrad Summenhart, *De contractibus licitis vel illicitis tractatus*, tract. 1, quaest. 1) Venice: Franciscus Zilettus, 1580): 5–6; an interesting circular argument: *anima* belongs to itself, body belongs (property = right) to the soul; freedom is a right as well, and one that entitles to act (with reference to I. 1,1).

87 Summenhart, *De contractibus*, tract. IV, qu. 74, p. 335–38; on that Tierney, "Dominium of self": 183–85.

88 Especially since the publication of Maria Sole Testuzza, *Ius corporis, quasi ius de corpore disponendi. Il Tractatus de potestate in se ipsum di Baltasar Gómez de Amescúa* (Milan: Giuffré, 2016).

tus de potestate in se ipsum, which was published at the beginning of the seventeenth century (1604)[89]. This treatise discusses all imaginable circumstances in which a person could give up his freedom. The vast majority (such as suicide, self-mutilation, and self-sale into slavery) are considered sinful and unlawful. Others (such as a permanent employment contract or prostitution) are accepted under certain conditions. However, Gómez de Amescúa, also questions whether one may sell one's name or one's honour.

It is obvious that scholastic theology thus initiates a discussion that anticipates our modern discourse on fundamental rights both in public ("human rights") and in private law ("personal rights"). Indeed, the scholastic foundations of modern human rights theory might be the most important aspect of the theological discourse on freedom. Two brief examples will make this linkage clear. By the sixteenth century, the rule *puella est domina sui corporis* argued in support of the assertion that an unmarried woman could have intercourse if she pleased. Neither her father nor anyone else has control over her body. Although the woman sins, she is legally entitled to have sex.[90] Furthermore, today's heavily disputed question about compulsory vaccination was already discussed in late scholastic literature.[91] Within the scholastic corpus, coercive medical treatment might offend personal liberty, but it is legally arguable if the common welfare requires such treatment.

4.2 Not Only Christians

All these examples of personal freedom are discussed in the sources under the phrase *dominium in se ipsum*. However, within the texts surveyed thus far, personal liberty is not yet addressed as a universal right. This changed significantly at the beginning of the sixteenth century when the "New World" came into the view of theologians and jurists. With the "discovery" of new continents, the question arose as to whether the indigenous people were to be treated like Christians or like infidels (such as Muslims). Debates on this issue included the question of whether they could be enslaved. In 1511, the Dominicans of the Convent of Santo Domingo had already spoken out against their enslavement in the *encomienda* system.[92] They argued that the Amerindians were endowed with reason and were, therefore, just as human as the Spaniards.

89 Baltasar Gómez de Amescúa, *Tractatus de potestate in se ipsum* (Palermo: Erasmus Simonis, 1604).

90 On this cfr. Sven K. Knebel, "'Puella est domina sui corporis.' Sexuelle Selbstbestimmung in der Theologie um 1600," in *Freiburger Zeitschrift für Philosophie und Theologie* 61 (2014): 141–79.

91 Cfr. Jan-Luca Helbig, "So wahr dir Gott helfe. Die Impfpflicht im Lichte der spanischen Scholastik," in *Frankfurter Allgemeine Zeitung (FAZ)*, 15.12.2021, no. 292: 5.

92 Furthermore, see Tilman Repgen, "Die gleiche Menschennatur. Einige Annäherungen an die Gleichheit im Recht," in *Von formaler zu materialer Gleichheit. Vergleichende Perspektiven aus Geschichte, Kranz der Disziplinen und Theorie*, eds. Stefan Grundmann and Jan Thiessen (Tübingen:

Similar arguments were brought forward by Bartolomé de Las Casas (1484 / 85–1566)[93] and, a few years later, by Francisco de Vitoria (1483–1546). They argued that the Amerindians are rational beings and, therefore, able to have property in land and goods, not because they are Christians but because they are humans. Both de Las Casas and de Vitoria refuted the traditional (Aristotelian) position espoused by Juan Ginés de Sepúlveda (1490–1573). De Sepúlveda argued that the Amerindians were natural-born slaves, while his interlocutors declared that they were free irrespective of whether they were *fideles* (believers) or not.

Let us have a look at de Las Casas' later arguments in the *Principia Quaedam*:[94]

> From this principle we deduce, 1: the infidels are entitled to ownership on things. This is proved by the fact, that God made other creatures which are inferior to man, without distinction for every rational creature and for the help of all peoples [. . .] and he did not distinguish between believers and non-believers. This is why we must not distinguish either.[95]
>
> From this second principle we deduce, 1: even the infidels have ownership (on things) and jurisdiction on men as far as the duty to provide advice affords. This is proved: because every man, believer or non-believer, is a rational and social creature, and therefore society (or rather to live in society) is natural for all men.[96]
>
> All men, all things, all the land, all jurisdictions and all regimes are presumably free, if there is no proof for the contrary. This is proved: because from the very beginning of rational beings all are born free.[97]

Mohr Siebeck, 2021): 31–66, esp. 38–45, with further references, e.g., to Michael Sievernich, "Anfänge prophetischer Theologie. Antonio de Montesinos Predigt (1511) und ihre Folgen," in *Conquista und Evangelisation. 500 Jahre Orden in Lateinamerika*, ed. Michael Sievernich (Mainz: Matthias-Grünewald-Verlag, 1992): 77–98.

93 Cfr. in general Marianne Mahn-Lot, *Bartolomé de Las Casas et le droit des Indiens* (Paris: Payot, 1982); André Saint-Lu, *Las Casas indigéniste: études sur la vie et l'œuvre du défenseur des Indiens* (Paris: Éd. L'Harmattan, 1982).

94 de Las Casas, *Principia quaedam ex quibus procedendum est in disputatione ad manifestandam et defendendam iusticiam Indorum* (Sevilla: Sebastianus Trugillus, 1546?); furthermore, see Patrick Huser, *Vernunft und Herrschaft. Die kanonischen Rechtsquellen als Grundlage natur- und völkerrechtlicher Argumentation im zweiten Prinzip des Traktates Principia quaedam des Bartolomé de Las Casas* (Münster: LIT Verlag, 2011): esp. 69–94.

95 de Las Casas, *Principia*, f. A IIr (Princ. 1): 'Ex hoc principio sequitur. I. Apud infideles iuste esse rerum dominia. Probatur quia indifferenter pro omni rationali creatura et in ministerium cunctis gentibus fecit deus alias creaturas homine inferiores [. . .] nec distinxit inter fideles vel infideles: ergo nec nos distinguere debemus.'

96 de Las Casas, *Principia*, f. A IIIIr (Princ. 2): 'Ex hoc secundo principio sequitur. I. Apud infideles sunt etiam dominia et iurisdictiones super homines in quantum importat officium consulendi. Probatur: quia omnis homo tam infidelis quam fidelis est animal rationale et sociale et perconsequens societas seu viuere in societate est omnibus hominibus naturale.'

97 de Las Casas, *Principia*, f. A IIIIv (Princ. 3): 'Omnis homo, omnis res, omnis terra, omnis iurisdictio, et omne regimen [. . .] presumuntur libera, nisi contrarium probetur. Probatur: quia ab origine creature rationalis, omnes liberi nascebantur [. . .].'

In these texts, de Las Casas concedes to all people, believers and non-believers alike, that according to God's will and the order of natural law, they can own property and are free to do so. For him, however, freedom and property do not depend on each other – as they did in the doctrine of High Scholasticism – but are independent rights of every human being. All are free because God created them free; all can acquire ownership of the goods of this world because God has entrusted the earth to all people. This assertion by de Las Casas can be justified via reference to the Stoic doctrine of natural law as well as from the theology of the Church Fathers. The moral-theological approach, which based ownership of oneself on free will and the ability to acquire ownership of external goods, retreats before the arguments of the sixteenth-century bishop of Chiapas.

In an early work by de Las Casas,[98] the arguments that he later refined in *Principia Quaedam* still sounded somewhat different:

> We have to consider that the one is deemed to be a free man, who is master of his will, according to Aristotle [. . .]. Hence, they have the free possibility to dispose of their own people and things, as they want.[99]

Here, freedom is still understood – following Aristotle and Thomas – as the freedom to act. However, even at this early stage, de Las Casas no longer refers to the scholastic freedom of will when he speaks of freedom. Rather, it is – similar to ancient philosophy – freedom of action *par excellence*.

This "secular turn", as I would like to call it, is not sporadically recognized in the relevant literature. Only a few authors suspect de Las Casas to diverge (at least partially) from scholastic moral theology.[100] Those who elide the differences between antique philosophy and Roman law on the one hand and scholastic philosophy on the other are not able to realize that de Las Casas did not keep up with the antique concepts but returned to them diverging from the will theory of late antique and medieval theology.[101] But de Las Casas was not the one and only to separate *dominium in se*

98 Bartholomé de Las Casas, *Explicatio quaestionis: utrum reges vel principes jure aliquo vel titulo, et salva conscientia, cives ac subditos a regia corona alienare et alterius domini particularis ditioni subjicere possint*, ed. Wolfgang Griesstetter (Jena: Johannes Gollner, 1678): 8, § 1 n. 4.

99 'Est autem considerandum, quòd ille dicitur liber homo, qui est sui arbitrij secundum Aristot. I. Metaph.l.fin.ff.de lib.hom.exhib. Vnde habent facultatem liberè, de personis proprijs et rebus disponendis, prout volunt.'

100 E.g., Rolando Pérez, "Las Casas' Articulatio of the Indian's Moral Agency. Looking Back at Las Casas through Fichte," *Ethnic Studies Review* 43 (2020): 77–93.

101 As, for example, Thomas Francis Xavier Varacalli, "The Thomism of Bartolomé de Las Casas and the Indians of the New World" (PhD diss., Louisiana State University, 2016), https://digitalcommons.lsu.edu/cgi/viewcontent.cgi?article=2663&context=gradschool_dissertations [accessed 25.03.2024]: esp. 141–46; Manuel Méndez Alonzo, "Between Thomism and Roman Civil Law: The Eclectic Concept of Liberty of Bartolomé de Las Casas and his Theoretical Defence of Native Americans during the Sixteenth Century," *Ars and Humanitas* (2017): 281–92.

ipsum from the capacity to discern right and evil. As previously referenced, a comparable approach can also be found in Francisco de Vitoria (1485–1546). De Vitoria was one of the first theologians who tried to justify the right of indigenous peoples to their land with moral-theological and legal arguments. In his *relectio de Indis*,[102] he argued that the Amerindians themselves were the owners of their land because they, too, were *domini sui actus*.[103] De Vitoria based this *dominium* on the *liberum arbitrium*, which was due to all rational creatures. Behind this argument lies the debate about whether heretics or sinners could also be owners, which was a question relevant to the formation of a theological basis for *dominium in se ipsum*. De Vitoria's point, however, is that whether someone can be an owner according to divine or human law is not a matter of orthodoxy or freedom from sin. For him, the theological question is whether someone can use his body rationally.[104]

That the Amerindians are also rational is inferred by de Vitoria from the organization of their community.[105] Nevertheless, what is the basis of the *liberum arbitrium* of the Amerindians, which makes them owners of themselves? As his interlocutors regularly point out, the Amerindians know neither God nor divine law, which is embodied in the Christian tradition. Vitoria reshapes the blank space created by this question into a detailed justification for his conviction that natural law can also be followed by those who do not know its divine origin.[106] Vitoria did not deny that the *lex naturalis* was

102 Francisco de Vitoria, *De Indis, sive de iure belli Hispanorum in barbaraos*, ed. Johann Georg Simon (Cologne: Augustus Boetius, 1696); repr. in *Franciscus de Victoria, De Indis et de iure belli relectiones being Parts of Relectiones Theologicae XII*, ed. Ernest Nys (Washington: Carnegie Institution: Washington, 1917), https://babel.hathitrust.org/cgi/pt?id=mdp.39015039506772&view=1up&seq=284&skin=2021 [accessed 25.03.2024].

103 On this already Anselm Spindler, "Der Handlungsbegriff als Grundbegriff der praktischen Philosophie. Francisco de Vitorias Thomas-Rezeption und ihre Wirkung auf die Relectio de Indis," in *Francisco de Vitorias "De Indis" in interdisziplinärer Perspektive*, eds. Norbert Brieskorn and Gideon Stiening (Stuttgart: Frommann-Holzboog 2011): 61–95.

104 Cfr. de Vitoria, *De Indis*: sect. 1, qu. 5–7 (p. 317–23).

105 de Vitoria, *De Indis*: sect. 1, qu. 23 (p. 333): 'Nec [. . .] ex hac parte impediuntur barbari ne sint veri domini. Probatur, Qvia secundum rei veritatem non sunt amentes, sed habent pro suo modo usum rationis. Patet, Qvia habent ordinem aliquem in suis rebus, postquam habent civitates, quae ordine constant, et habent matrimonia distincta, magistratus dominos, leges, opificia, commutationes, quae omnia requirunt usum rationis: item religionis speciem: item non errant in rebus, quae aliîs sunt evidentes quod est indicium usus rationis.' – transl. by John Pawley Bate, p. 127: 'The Indian aborigines are not barred on this ground from the exercise of true dominion. This is proved from the fact that the true state of the case is that they are not of unsound mind, but have, according to their kind, the use or reason. This is clear, because there is a certain method in their affairs, fort hey have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops, and a system of exchange, all of which call for the use of reason; they also have a kind of religion. Further, they make no error in matters which are self-evident to others; this is witness to their use of reason.'

106 In detail, Anselm Spindler, "Der Handlungsbegriff als Grundbegriff der praktischen Philosophie": 89–90.

founded in God's creation, but according to him, even those who have not heard of God can distinguish between good and evil. Natural law reveals itself to every living being endowed with *anima rationalis*. Within de Vitoria's thought, this acknowledgement provides a secular framework for the *liberum arbitrium*. It is not faith in God but man's reason that reveals the natural order. The turn toward humanity's rational capacity, rather than being Christian as a foundation for self-ownership and freedom, marks an essential step from the concept of a divine natural law to one arising from the sociality of man.

Had Summenhart and other predecessors of the Spanish scholastics known about the New World and not written in a world divided between members of different faiths, this secular-natural law approach might have emerged earlier.[107] However, there is little point in speculating about alternative possibilities in the historical formation of concepts here. Only the encounter with people who had not yet heard of the Christian God nor rejected him like the Muslims or heretics led the theologians to a new justification of freedom based on natural law.

Vitoria says little about the freedom of the Amerindians. Since they were owners of themselves and, therefore, also owned their land, it was obvious to him that they were not slaves. Elsewhere he writes,[108]

> Again, this is the difference between freemen and slaves [. . .] that masters exploit slaves for their own good and not for the good of the slaves, while freemen do not exist in the interest of others, but in their own interest.

This argument that free men act in their own interest, not for that of others, is rather general. It expresses what we have already assumed for Bartolus: he who is the owner (of himself) cannot be the property of another. Here, too, the indirect reasoning that we know from medieval philosophy still echoes: external freedom (i.e., not being a slave) seems to be a reflex of internal freedom. Yet, several points remain unclear. Specifically, one might ask, if a person sells himself, does he lose the *dominium* over himself, and is he, therefore, no longer responsible for his actions? There seemed to be only two ways out of this dilemma: either one ruled out life-long enslavement altogether,[109] or one looked for a separation of *dominium proprietatis* and *dominium actionis,* i.e., a conceptual separation between ownership of property and ownership of action.[110]

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107 Cfr. Repgen, "Die gleiche Menschennatur": 49 (concerning Wycliff).

108 De Vitoria, *De iure belli*: 428–29: 'Item in hoc differunt liberi à servis [. . .], quòd domini utuntur servis ad propriam utilitatem non servorum: liberi autem non sunt propter alios, sed propter se.' Transl. by John Pawley Bate: 170. On this aspect of the discourse, see Merio Scattola, "Das Ganze und die Teile. Menschheit und Völker in der naturrechtlichen Kriegslehre von Francisco de Vitoria," in *Francisco de Vitorias 'de indis' in interdisziplinärer Perspektive*, eds. Norbert Brieskorn and Gideon Stiening (Stuttgart: Frommann-Holzboog, 2011): 100.

109 So did the Dominican de Soto, *De iustitia et iure*: 296, lib. 4, quaest. 2, art. 2.

110 This was the solution of the Jesuit Ludovicus de Molina, *De iustitia et iure opera omnia*, vol. 1 (Geneva: Marcus Michael Bousquet, 1733): 111–12, sect. 38, esp. n. 5; on that Danaë Simmermacher, *Eigen-*

Only de Las Casas turns *libertas* outwards and thus returns to a distinction according to *status*, which was also present in Stoic philosophy and late-classical Roman law. With him, freedom is no longer freedom of will and a consequence of the *dominium in se ipsum*. Rather, it is a freedom founded in creation, which belongs to everyone from birth.

5 Some Conclusions

This marks the end of our short journey through the medieval history of ideas. The goal of our trek was not to explore the concept of freedom in general but to grapple with the differences between the way the concept of freedom was constructed in late antique and medieval philosophy. Both pre-Christian and Christian philosophy used the concept of *dominium in se ipsum* to figurate human freedom. But only Christian theology founded such *dominium* on the concept of free will as defined by the Church Fathers, especially St Augustine. Therefore, we can conclude that "freedom" in the high and late middle ages was grounded primarily in the inner freedom of men as freedom of will. In the early modern period, with the Late Scholastics, freedom once again became an innate right – just as pre-Christian philosophy, especially ancient Stoicism, and even some Church Fathers had advocated. Thus, some representatives of Late Scholastic theology can be seen as ancestors of Enlightenment thought. As we can see in Locke, modern philosophers did not abandon the concept of *dominium in se ipsum*, but they no longer used it as a signum for freedom from domination. They referred back to two distinct concepts of freedom: the freedom to act as distinguished from freedom from domination. The former is an innate right, the latter a prerequisite of moral imputation.

Despite this evolution in thought, the construction of freedom as *dominium in se ipsum* had a lasting impact on modern discourses. On the one hand, it gave rise to the formulation of personal rights, especially the right to self-determination. On the other hand, it changed the terminologies of freedom and slavery. From the concept of *dominium*, which was based on the theory of will, it was concluded that slaves were mere objects of their master's will and that their owners could deal with them arbitrarily. Compared to Roman law, this represents a dramatic tightening of the legal situation of slaves: they are not only property of their owners but totally subjected to their will. Conversely, it was argued that Europe did not know slavery because all Christians had a *dominium in se ipsum*. The "secular turn" initiated by de Las Casas and Vitoria did not abrogate such terms and arguments. Instead, it opened the discourse to an argument which had taken a back seat since the times of the Church Fathers: liberty

tum als ein subjektives Recht bei Luis de Molina (1535–1600). Dominium und Sklaverei in De Iustitia et Iure (Berlin: De Gruyter 2018): 205–10.

is an innate right. Until then, moral theology did not emphasize this argument. Though God's creation knew neither individual property nor slavery, *ius gentium* conceded the existence of both institutions after the Fall. Therefore, slavery was not condemned at all but remained a provisional facility.

In modern literature, de Las Casas is famous for having been an advocate for the freedom of the Amerindians. Little attention is paid to the way his arguments partly diverged from contemporary philosophy and theology, thus laying the groundwork for modern discourses on human rights. Nevertheless, we should not overlook the fact that de Las Casas did not apply his arguments universally. Indeed, in his early works, he was among those who proposed the enslavement of African natives to alleviate the labour shortage in the New World, which was presumably exacerbated by his proposals about the freedom of the indigenous peoples.[111] This mixture of ideas could have contributed to the catastrophe of the transatlantic slave trade. Europeans, on the other hand, for another three hundred years lulled themselves into a complacent peace of mind because they themselves knew no slavery.

If we now return our attention to John Locke, we will see that although he adopted a secular concept of natural law similar to that found in Late Scholasticism, he otherwise stood on the firm foundation of the *dominium in se ipsum*. The only novelty: he wrote in English.

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111 More sophisticated is Lawrence Clayton, "Bartolomé de Las Casas and the African Slave Trade," *History Compass* 7 (2009): 1526–41.

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