# Why a Serf is Not a Slave: Humans and Land in the Medieval Scholastic Imagination.

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## JAMES WHITMAN, THE LEGAL IMAGINATION AND ITS HISTORICAL CONTEXTS.

James Whitman observed more than once that historians of law should boldly set out to formulate 'grand theories,' long-term interpretive hypotheses that draw together the infinite number of details into an overall picture, rather than merely proposing detailed studies of individual sources or particular legal institutions.

While specialists in legal history dwell on the details, these overviews are offered by others: economists, anthropologists, and now even social psychologists, who attribute a key role in the interpretation of the world to the transformations of legal institutions.[1]

Some of us acknowledge these and other shortcomings in our own fields, yet we tend to advise others how to go about addressing these issues rather than personally engaging in the work. For more than three decades, however, Whitman has been offering 'grand theories,' i.e., interpretations of major historical and social phenomena, demonstrating that the contribution of legal history can still be fundamental to understanding social transformations: on dignity, on the status of persons, on the responsibility of the judge, on the ambiguous relationship between libertarian and capitalist ideologies in twentieth-century America. Now he addresses the immense problem of property rights in Western legal consciousness in his latest book, which is being published as I write this article.

Whitman offers these broad general interpretations as a legal historian: that is, as a specialist who knows the sources, reads them critically, places

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1. James Q. Whitman, *The World Historical Significance of European Legal History: An Interim Report, in* THE OXFORD HANDBOOK OF EUROPEAN LEGAL HISTORY 3-22 (Heikki Pihlajamäkie et al., eds., 2009).

them in their historical contexts, and considers legal-historical research with unparalleled competence.

Like his previous monographs, the new book *From Masters of Slaves to Lords of Lands* is destined to provoke discussion. In the footsteps of Marx and Weber (who were also trained in legal history), it addresses the great subject of the structuring of property law in the West, from its archaic origins related to tribal ritual, through the formulations of Rome's *ius civile*, to the intersections of law with religion.

This relationship of social context to law is a tricky thing, at least for those who study the history of Europe and the global history of European cultures. Indeed, legal systems in Europe have had to confront what Late Antiquity handed down of the literature produced by Roman jurists and lawmakers. The European cultures that Jim Whitman boldly traverses to reveal shift in perspectives on property have all had to come to terms with these texts. For centuries they were known only in small part, then reconsidered from the reconstruction of the Digest, then gradually supplemented by other ancient sources that clarified their meaning. Known and interpreted in different ways through the centuries, those sources all referred back to an ancient creation, typical of the Roman world, which had constructed law as "another world," a world of artificial objects animated by a separate logic.[2] And so the operations of law take place in this "world," which corresponds more or less to what Whitman calls "legal imagination," that is, the construction of rational categories acting on abstract "objects" that we call "legal institutions" because they are, precisely, "instituted" by the force of norms.

The second invaluable lesson offered to legal historians by Jim concerns the interconnections between the legal imagination and its socio-economic context. To understand a legal principle, you need to situate it within its historical milieu. In turn, Jim Whitman has often shown that legal theories influence their very historical context, shaping the social, political, and economic realities of their time. In his vision, the legal imagination is an influential creative force capable of permeating mentalities, religious beliefs, social practices and economics. Therefore, understanding legal doctrines requires an examination of their historical context, but conversely, understanding the context itself requires an examination of the doctrines formulated by lawyers to impose order on the world.

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2. The expression "un autre monde" is taken from the title of an article by Marie Angèle Hermitte, *Le Droit est un Autre Monde*, 7 ENQUÊTE 17, 17-37(1999). The description of law in these terms is mainly due to the work of Yan Thomas, whose very short Présentation to the same issue of the journal Enquête can be seen. *See* Yan Thomas, *Présentation,* 7 ENQUÊTE 13, 13-15. Recently the view of Roman law proposed by Yan Thomas has been taken up by Alain Pottage, and by Caroline Humfress. *See* Alain Pottage, *Law After Anthropology: Object and Technique in Roman Law*, 31 THEORY, CULTURE & SOC'Y 147, 147-66 (2014); Caroline Humfress, *Telling Stories About (Roman) Law: Rules and Concepts in Legal Discourse*, *in* LEGALISM: RULES AND CATEGORIES, 79, 79-104 (Paul Dresch & Judith Scheele eds., 2015).

Frankly, the interaction between legal doctrines and social needs is one that should be self-evident: there is no need to claim for it. But for complex historiographical reasons, the legal history of the twentieth century experienced a progressive siloization: legal historians treated legal institutions as pure outcomes of intellectual evolution, and conversely social historians did not include legal thought among their sources.

On the contrary, for the intellectuals of the *ancien regime*, it was simple and clear that jurisprudence was part of a wider culture.[3] This was bound to change in the nineteenth century, that is the 'German romantic era' of Jim.[4] While in Germany the separation of legal history from general history was proposed, French historians' view of the past remained closely tied to the approach of the eighteenth century Enlightenment. For much of the nineteenth century, French liberal historians continued to maintain that any portrait of past societies had to include the law and the legal doctrines. Lawyers play a central role in the historical writings of intellectuals such as François Guizot, Augustin Thierry and Edgar Quinet, who explored the history of medieval cities in search of the roots of the emerging bourgeois social model.

Let us take the case of Thierry,[5] one of the main actors of the new liberal historiography wanted and financed by the French government, and particularly by François Guizot in his capacity as minister of public education during the reign of Louis Philippe. Thierry was given the task of writing a history of the Third Estate, with the aim of completely renewing the historical narrative established during the Ancien Régime. From the point of view of the liberal government of the July Monarchy, the French nation coincided with the Third State, and its history was the history of its struggle against the privileges of the clergy and the nobility. This struggle had already won its first victories in the late Middle Ages, when the proud and courageous citizens of the first free communes dared to break the chains of their legal boundaries. Deliberately using an anachronism, Thierry used the word *révolution* to refer to certain passages in this medieval history; and in the revolutionary year of 1848, Edgar Quinet used the same word for the title of his book on medieval Italian communes, which were seen as the luminous precursors of the overthrow of the Ancien Régime in 1789.[6]

Shortly after its publication, Thierry's book was carefully read by Karl

3. For example: in the *Storia della letteratura italiana* composed by Girolamo Tiraboschi and published twice in the eighteenth century (1772-1782 and 1787-1794), legal writings are clearly considered as part of the literature. The same for the huge *Histoire littéraire de la France*, published by the congregation of Saint-Maur starting in 1733 and progressively continued until the 20th century.

4. Reference is to JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA: HISTORICAL VISION AND LEGAL CHANGE (1990).

5. AUGUSTIN THIERRY: L'HISTOIRE POUR MEMOIRE 1(A. Déruelle & Y. Potin eds., 2018)

6. EDGAR QUINET, LES REVOLUTIONS D'ITALIE, (1851-1852). In the *Avertissement de la première édition*, dated July 16, 1848, Quinet writes that the book was almost finished before the revolution that took place in February 1848.

Marx, who wrote about it in one of his letters to Friedrich Engels. In his opinion, Thierry was the "père des 'Klassenkampfes' in der französischen Geschichtsschreibung."[7] Marx did not entirely share Thierry's views, mainly because Thierry did not see any rupture in the social body he called the tiers état, whereas for Marx the struggle between the bourgeoisie and the proletariat was clear from the beginning. But precisely because he saw the society of the medieval towns struggling for its autonomy, Thierry insists that the social body of the medieval free communes found its very soul in the thought of the medieval jurists, whom he poetically calls "the head and soul of the bourgeoisie". The jurists and their learning were not, therefore, regarded as the dry exegetes of the ancient books of Justinian. On the contrary, they were portrayed as deeply involved in the social life of their time, committed to promoting a new constitution based on the principles of justice that they were able to extrapolate from the sources of ancient wisdom.

This vision of scholastic jurists as catalysts of social transformation, championed by French liberal historians, eventually faded with the rise of the German historical school and of the Marxist historiography. For different reasons, both the new legal historians of Savigny's school, and the followers of the Marxist philosophy of history separated legal history from broader social history and diminished the importance of the imaginative contributions of jurists to social change. While the German Historical School considered medieval legal literature to be primarily concerned with describing ancient institutions, with little attention to contemporary social issues, Marxist economic and social history saw legal doctrines as superstructures essentially alien to historical reality.

## SCHOLASTIC IMAGINATION AND THE DEFINITION OF SERFS.

This disregard for the active role played by the doctrine of the medieval jurists in the actual social change that took place in the very same years of the flourishing of jurisprudence is evident if we consider the legal definition of medieval unfree peasants as *servi glebae*, which first appears in a gloss bearing the siglum "y", traditionally considered as the signature of Irnerius, the earliest glossator of the Roman law.[8] Marc Bloch's conclusion on this point is famous and emblematic: for him, to apply the expression "serf de la glèbe" (*servus glebae*) to medieval serfs "is to condemn oneself to error",

7. KARL MARX & FRIEDRICH ENGELS, GESAMTAUSGABE (September 1853-März 1856) 129-32 (1989).

8. Anders Winroth has recently raised doubts about the meaning of the siglum. *See* Anders Winroth, *Law Schools and Legal Education, in* THE CAMBRIDGE HISTORY OF MEDIEVAL CANON LAW 262, 262-65 (A. Winroth & J.C. Wei eds., 2022), referring of some doubts about the historical role played by Irnerius.: "scholars differ in how to interpret the existing evidence about Irnerius." *See also* ANDERS WINROTH, THE MAKING OF GRATIAN'S DECRETUM 162-68 (2000)

because this expression had been created by medieval jurists to describe the Roman colonate and could not conceivably refer to medieval serfs, an expression of a feudal mentality that Roman law could not imagine. I quote Bloch: "It would be hard to imagine two institutions more profoundly different than the condition of the coloni and serfdom—by which I mean serfdom during the classical period of feudalism. One was created by an absolute Empire, in order to satisfy the most implacable affairs of finance, and which perished along with the state that thought itself strong enough to attach a man to the soil. The other was born in the very dissolution of the state itself, in the bosom of a society where practically nothing counted more than the most strictly personal ties of dependence. Let us not call serfs de la glèbe those whom the people of the Middle Ages admirably called hommes de corps."[9]

Writing 70 years after Thierry and Quinet, Bloch was Marxist enough to reject the idea that medieval jurists were the organic intellectuals of the urban society in which they lived. And he was probably also influenced by the triumph of the German historical school, for which legal doctrines were the expression of a *Professorenrecht* mainly concerned with an exegetical approach to the books of Justinian, and far removed from reality and practice.

However, it is time for a re-evaluation of French liberal historians and their global understanding of medieval society as a whole, in which legal theories were a constant part of the dynamic interplay between opposing social and political actors. If we carefully consider the writings of the glossators, we cannot help but agree with Thierry and Quinet. The social change that took place in the cities of the late Middle Ages was in fact helped by the legal imagination of the lawyers of the scholastic era, whom we can call, perhaps a little emphatically, "head and soul of the bourgeoisie".

But to understand this social role of the legal imagination, one has to read medieval legal literature for what it is: scholastic writings. When dealing with law, these writings dialectically bring together the principles found in norms to define concepts capable of qualifying reality in legal terms. Depending on the legal qualification given to a thing, a person or a relationship between persons or between persons and things, the legal consequences can be very different. For this reason, the work of academic doctrine is directed towards the practice of the courts. In legal disputes, it is primarily the legal qualification of the matter in dispute (in Latin, *res litigiosa*) that is at stake.

To begin with, we must separate the scholastic treatment of the Roman

9. MARC BLOCH, SLAVERY AND SERFDOM IN THE MIDDLE AGES 194-95 (W.R. Breer trans., 1975).

colonate[10] from the expression "*servi glebae*": the two pertains to two separate sectors of the scholastic legal mind. Both were available as different legal qualifications for the same factual reality: a dependent peasant could be legally framed as a *colonus*, as described in the Justinian Code, or as a free person whose body was burdened by a peculiar right belonging to the owner of the land.

Working on the rules governing the Roman colonate collected in the Justinian's Code[11] the first generations of glossators ended up assembling strong arguments to rule out the possibility that a medieval dependent peasant could be legally qualified as a *colonus*. So, paradoxically, medieval lawyers would have agreed with Marc Bloch when he argued that the Roman colonate and the medieval serfdom were so far from each other. But unlike Bloch, medieval jurists proceeded by the methods of dialectics: they tried to bring order to the Roman rules in order to derive general rules that would apply to all types of *coloni.*

This point is very clear if we look at a small treatise written by Azo[12], the most influential professor of Roman law in Bologna at the beginning of the thirteenth century. An excellent scholastic jurist, Azo extracted from the Roman imperial norms on the colonate a general principle that was indeed very useful for practical use in the courts. The principle is that in order to acquire and/or to prove the personal condition of colonus, the law requires not only one, but two expressions of will on the part of the person condemning himself and his family to a permanent restriction of freedom. Alternatively, the double expression of will can be formed by combining a single explicit declaration with a lapse of time of thirty years spent in the de facto condition of serfdom. Thus, if a landlord asked a court to determine the status of one of his dependent peasants as a *colonus*, he would have to provide evidence of the two expressions of will required by the doctrine[13]. Claims based on the lapse of time alone should be rejected if the lord was

10. Most recent and reliable literature on the controversial late Roman institution of colonate. *See* BOUDEWIJN SIRKS, THE COLONATE IN THE ROMAN EMPIRE (2024); Noel Lenski, *The Late Roman Colonate: A New Status between Slave and Free*, *in* THE OXFORD HANDBOOK OF GREEK AND ROMAN SLAVERIES (Stephen Hodkinson et al. eds., 2016), https://academic.oup.com/edited-volume/40302/chapter/378479435 *;* W. Goffart, *Salvian of Marseille, De gubernatione dei 5.38-45 and the "colonate" problem*, *in* 17 ANTIQUITÉ TARDIVE 269, 269-88 (2010).

11. CODE JUST. 11.48. It should be noted that the title *de agricolis et censitis* is found in Book 11 of the *Codex*, and thus was not part of the part that bore the title *Codex* in the Middle Ages. In fact, for reasons I cannot summarize here, the medieval Codex comprised only the first nine books, while the last three were considered separate and were called *Tres Libri*.

12. This little *summula* escaped the attention of early modern editors, and remained unpublished until my critical edition published in Emanuele Conte, SERVI MEDIEVALI. DINAMICHE DEL DIRITTO COMUNE 272-81 (1996).

13. A relatively analytic description of the content of the *Summula* by Azo and of the most striking witness of its practical use in Emanuele Conte,'*L'utilisation de la législation justinienne concernant le colonat aux xii^e^ et xiii^e^ siècles*, *in* AUX SOURCES DE LA GESTION PUBLIQUE, VOL. III, HOMMES DE POUVOIR; RESSOURCES ET LIEUX DU POUVOIR: VE-XIIIE SIECLES 129, 129-42 (Elisabeth Magnou-Nortier ed., 1997). *See also* EMANUELE CONTE, DIRITTO COMUNE. STORIA E STORIOGRAFIA DI UN SISTEMA DINAMICO 132-42 (2009).

not also able to produce evidence of a written or witnessed solemn declaration of his will to become a serf.[14]

THE SCHOLASTIC IMAGINATION AFFECTS SOCIAL RELATIONS.

In everyday life, the Italian courts quickly became sensitive to these scholastic arguments. Landlords often had no proof that peasants had declared their intention to become *coloni*, and judges began to reject landowners' claims for restitution. But the influence of the professors on local practice went further. Both Azo and his colleague Hugolinus criticised the municipal statute of Bologna, which in their time (around 1230) stipulated that if a peasant behaved like a serf for thirty years, he acquired the status of *manens*, being bound to the land for life with his descendants. This was in fact an ancient Lombard rule, issued by King Grimoaldus in 668 A.D., and was applied in many Italian regions.

Here is the excerpt from Azo's *Summula* translated into English:[15]

> <42.> Now, as regards the so-called "conditional colons", it is necessary to consider how they acquire this condition. Some say that colons acquire their condition merely by being in another man's country for thirty years without controversy, as is argued in the law of "Cum satis" (Digest 11.48.23.1), and this custom is observed in Bologna.
>
> <43.> This follows the example of other things: that if they are possessed for such a long time without controversy, the possessor will be secure thereafter.
>
> <44.> But this seems to me to be false, because of the general principle stated in the law of "Cum scimus" (Digest 11.48.22.1), where it is said that free individuals are to be brought into a worse condition not by a single act, but by several acts.
>
> <45.> Therefore it is necessary that a promise be made, in writing or without writing, by which the persons promise to be colons by perpetual right and to remain in the land, and - after that - to remain in the land for thirty years.

Azo and his contemporaries called for a change in municipal legislation. In particular, it was unacceptable that the passage of time should have the same effect on the things, that can be acquired by usucapion by the simple lapse of time, and on the freedom of human beings.

The new mentality introduced by philosophical and legal scholasticism

14. E. Conte, *Lapse of Time in Medieval Laws: Procedure, Prescription, Presumptions, Custom*, in LIMITATION AND PRESCRIPTION. A COMPARATIVE LEGAL HISTORY 69, 69 (H. Dondorp et al., eds. 2019)..

15. Latin original text in Conte, *supra* note 12 at 274. The numbers 42. to 45. correspond to those adopted in the Latin edition.

did not accept this homogeneity, because scholasticism was based on the fundamental operation of distinction: one could acquire ownership of a material thing through the effect of time, but if the object of power was a human person, the procedure for acquiring dominion over him, or even the right to compel him to work on one's land, was different from that provided for things.

Roman law, as rethought by scholasticism, was made up of distinctions, general rules and exceptions. It constructed categories by reordering the force of thousands of legal rules that were considered to be in force. One fundamental category was the distinction between free persons and slaves: for Roman law, slaves were objects of property and could not be subjects of rights, exercise property and possession, or marry. *Coloni* could have rights, marry, and even become priests. So they were free, but they had acquired a condition that limited some elements of their freedom: in particular, work and mobility. This restriction was very serious because it was permanent and was passed on to their children. Therefore, to impose the condition of *colonus* on a free person, two written documents or a written or public promise and the passage of thirty years were required.

Around 1200, the jurists presented these categories as a "truth" imposed by the law: this is why Azo can write that the Statute of Bologna is "falsum": it equates persons with things and thus contradicts the "true" categories constructed by the doctrine, mobilizing the force of the text.

In this sense, we can recover Thierry's expression: the jurists who conditioned the legislation of the cities in which they lived, starting with Bologna, imposed a precision of legal concepts that induced respect for individual freedom and protected against the arrogance of landowners and lords of serfs. To call them '*tête et âme de la bourgeoisie*' may be an expression of nineteenth-century rhetoric, but it recognizes the performative function of the scholastic imagination, capable of influencing social structures. And indeed, Bologna changed its law, introducing more protection for the peasants and finally preparing the famous mass liberation of the rural serfs, published in 1257 as *Liber Paradisus*.

In order to uncover the technical legal construction of these famous measures, we need to quit the scholastic treatment of colonate, to turn quickly to the very expression *servi glebae.*

## PERSONAL DEPENDENCE WITH NO STATUS DEFINITION: THE POWER OF THE LORD AS A LIMITED REAL RIGHT OVER THE SERFS.

Seven centuries ahead of Marc Bloch's remarks, Azo showed that it was not appropriate to use the Justinian discipline of the colonate to provide a legal framework for medieval serfs, since medieval serfs never followed the cautios procedure to become *coloni* provided for by Roman law. However, given the dialectical nature of medieval knowledge, lawyers provided other

possible legal frameworks to deal with the same issues, ultimately proposing a quite different legal qualification of personal subjection.

Since a Theodosian constitution (C. 11.52.1.1) referred to the Roman *coloni* using the expression '*servi terrae*'—serfs of the land—medieval scholars suggested that it should be understood as referring not to personal status but to the relationship between things, which in Roman law took the name '*servitus*', meaning real servitude, easement.

This is clear if we read the French Summa *Iustiniani est in hoc opere*, a very early work, written shortly after the gloss quoted by Bloch. The *summa* mentions the "servi glebae" only once, but not where it deals with *status personae*, but in the part dealing with the real servitudes.[16]

The *summa* offers a very scholastic scheme based on *res* and *personae*: there are servitudes of a *res* over a *res*, a piece of land over another piece of land, as in the passage. Or there are servitudes of a person over a piece of land belonging to another, as in usufruct. And there are servitudes of a piece of land over a free person, as in the case of *servi glebae*.

Servitudes therefore consist of obligations imposed on the bodies of the peasants, as if they were "fundi servientes" of "dominant" lands. Each servitude therefore has its own economic content. The enfranchisement of individual serfs or groups of serfs may consist in the abolition of one or more of these servitudes. This is why the documents speak in the plural of *libertates*, and why in some cases the enfranchisements do not result in the complete independence of the enfranchised peasant.

We are confronted with an "operation of the law"[17] that characterized the late Middle Ages and the modern age until codification: the legal qualification of a social relationship under the species of real right. For centuries, in Europe and in the American territories governed by European law, many situations that had nothing to do with things at all were qualified as real rights. The most obvious example, recently and effectively proposed by Marta Madero, is the right of spouses to have access to each other's bodies to perform sexual acts.[18]

Madero has also shown how the same legal framework has been largely

16. LA SUMMA INSTITUTIONUM 'IUSTINIANI EST IN HOC OPERE' (Pierre Legendre ed., 1973). For its editor it is a French work written around 1200. For André Gouron, however, it was certainly written around 1127 in Provence. *Cf.* ANDRE GOURON, LA SCIENCE JURIDIQUE FRANÇAISE AUX XIE ET XIIE SIECLES: DIFFUSION DU DROIT DE JUSTINIEN ET INFLUENCES CANONIQUES JUSQU'A GRATIEN (1978). *See also* ANDRE GOURON, ETUDES SUR LA DIFFUSION DES DOCTRINES JURIDIQUES MEDIEVALES 32-33 (1987); A. GOURON, DIE ENTSTEHUNG DER FRANZÖSISCHEN RECHTSCHULE: SUMMA IUSTINIANI EST IN HOC OPERE UND TÜBINGER RECHTSBUCH, ZRG KAN 93 (1976), reprinted in, ANDRE GOURON, LA SCIENCE DU DROIT DANS LE MIDI DE LA FRANCE AU MOYEN AGE 138-60 (1984).

17. The reference is to the title of the collection of articles by Yan Thomas, published after his death: Yan Thomas, LES OPÉRATION DU DROIT (Marie-Angègle Hermitte & Poalo Napoli eds., 2011).

18. MARTA MADERO, LA LOI DE LA CHAIR: LE DROIT AU CORPS DU CONJOINT DANS L'ŒVRE DES CANONISTES (XII$^{E}$ – XV$^{E}$ SIECLE) (2015). For an English account of the same, see Marta Madero, *The Servitude of the Flesh from the Twelfth to the Fourteenth Century*, 3 CRITICAL ANALYSIS L. 133 (2016).

used for the legal framing of the right of jurisdiction.[19] If we look at power of the landowner as a real right, like an easement, then this right could be possessed and protected by means of possessory interdicts in Roman procedure. It could also be acquired by prescription.

Created at the very beginning of the scholastic treatment of Roman texts, this highly imaginative legal construction had an incredibly long history. In his masterful 1990 book on *The Legacy of Roman law in the German Romantic era*, Jim noted that this extension of servitude was the most common pattern of legal qualification of feudal obligations: "The lord's rights, in this analysis, were 'rights of way', 'easements' attached to the peasant's property. Conversely, the peasant's rights of pasturage and the collection of necessaries in forests and commons were equally 'easements'."[20]

Jim was right: indeed, for centuries, the model of servitude has served several legal constructions involving public or private powers over the bodies of individuals. This was true in marriage, for jurisdictional powers, and for ecclesiastical rights and powers.

## THE LIBERATIONS OF SERFS AND THE RISE OF ALLODIAL PROPERTY.

The construction of serfdom as a form of irregular real servitude could be used to protect the position of lay and ecclesiastical landlords. Since it was virtually impossible to produce the evidence required by Roman law (as interpreted by medieval jurists) to prove that their servants had acquired the status of *coloni* by the double proof, the lords could nevertheless claim to regain possession of their services without raising any question about their personal status. Just as a spouse could claim reunion with her husband or his wife in court by declaring that his departure had dispossessed her of a particular use of his body, so lords could use possessory actions to claim the return of fugitive serfs to their lands. On the contrary, fugitive serfs who enjoyed freedom for a certain period could protect themselves against the claims of their former lords by invoking the limitation of actions, as was the case with all real rights. Varying with time and place, this basic legal scheme continued for centuries, until Jim Whitman's Germany of the nineteenth century.

The same legal construction is fundamental to understanding the legal functioning of the *Liber Paradisus* of 1257, along with a series of municipal and royal measures adopted in the thirteenth century to promote the emancipation of rural serfs[21]. None of them had the aim of abolishing

19. Marta Madero, *Penser la Physique du Pouvoir: La Possession de la Juridiction Dans les Commentaires d'Innocent IV et d'Antonio de Budrio à la Décrétale Dilectus*, 11 CLIO & THEMIS (2016), https://doi.org/10.35562/cliothemis.1116 (last visited [insert date])

20. *See* Whitman, *supra* note 4 at 166-72.

21. Among the many overviews offered by the specialized historiography on the collective

slavery or serfdom. The aim of these provisions was to oblige the lords to sell their real rights over the bodies of their peasants. In many cases, the burden of compensation for the loss of these rights was borne by the public finances. We can therefore call these measures expropriations with compensation.

About a century ago, the Italian legal and economic historians Giuseppe Salvioli (1917) and Pietro Torelli (1930) highlighted this process, which favored the emergence of an urban class of lay bourgeoisie over feudal and ecclesiastical powers. Salvioli explicitly pointed out that in the thirteenth century the measures favoring the creation of a "perfect property" in the hands of the former tenants paralleled the contemporary communal measures to free the rural serfs. However, Salvioli and Torelli worked only on the documents of the practice, paying no attention to the contemporary scholastic debate among lawyers.

On the contrary, from a doctrinal point of view, both established the same mechanism: feudal power over land or over persons is legally qualified as a real right and, as such, can be converted into a monetary value. The city takes on the burden of compensating the holders of these rights, in order to reconstitute a perfect property of the owner over his land, and of the former serf no longer burdened by the rights of a lord over his body.

Also, in this evolution of property the legal scholars played an important role: in my opinion, the very invention of the term "*dominium utile*" reflects the efforts of jurisprudence to promote the tenants to the role of "owners", acknowledging them all the powers of the *dominus* over their lands. The division of property into *dominium utile* and *dominium directum* was an indispensable step towards the developments of the modern age when the *dominium* of the vassal became increasingly visible and prominent in relation to the distant *dominium directum* of the lord. In the sixteenth century, Charles du Moulin changed the terms of the relationship. He called this *dominium utile* "propriété" and qualified the right to levy, which belonged to the lord, as a burden in rem on the tenant's property. The right of the lord was reduced to a real burden on the vassal's property, justified by the feudal relationship[22]. When the Assemblée Nationale of Paris

liberations of the serfs between the end of the twelfth century and the thirteenth century, see ANDREA CASTAGNETTI, LE COMUNITÀ RURALI DALLA SOGGEZIONE SIGNORILE ALLA GIURISDIZIONE DEL COMUNE CITTADINO (1983). This work was also published in STORIA DELLA SOCIETÀ ITALIANA. VOL. 6: LA SOCIETÁ COMUNALE E IL POLICENTRISMO 315-48 (Giovanni Cherubini ed., 1986).The Author has revised and updated his text in 2013 and made it freely available on the internet.

22. Paolo Grossi, *Ideologia e Tecnica di una Definizione Giuridica* (1990), *in* PAOLO GROSSI, IL DOMINIO E LE COSE: PERCEZIONI MEDIEVALI E MODERNE DEI DIRITTI REALI 229 (1992) ("... il vecchio concessionario dell'uti-frui aveva visto aumentare a tal punto la gamma dei suoi poteri da non essere soltanto un partecipe dell'appartenenza del bene, ma il sostanziale *propriétaire* a fronte di un *dominus directus* ormai simile al titolare di uno *ius in re aliena* ... "). The famous statement by Dumoulin is originally in his *Commentarii in Consuetudines Parisienses*, *in* Caroli Molinaei, *Omnia Quae Extant Opera*, vol. 1, p. 603 (online in Gallica: https://gallica.bnf.fr/ark:/12148/bpt6k61262j/f2.item): "Sed apud nos est econverso, quia dominus

abolished all feudal rights without compensation, the long journey towards what was called 'perfect property' was complete. It certainly began with an invention of the legal imagination of medieval jurists.

We must therefore depart from Hermann Kantorowicz's assumption that in the late Middle Ages "das Leben ging seinen Weg, und die Wissenschaft ihren": "life went its way and science its way". On the contrary: the legal doctrines of the scholastic era belonged to life in every respect.

directus non dicitur proprietarius, nec habere proprietatem soli, sed solum dominium suum superius. Vasallus autem, censuarius vel emphyteuta dicitur habere verum dominium et proprietatem ipsius; et tunc solum proprietarium vocamus". *Cf* Robert Feenstra, *Dominium and Ius in re Aliena: The Origins of a Civil Law Distinction* (1989), now in ROBERT FEENSTRA., LEGAL SCHOLARSHIP AND DOCTRINES OF PRIVATE LAW, 13TH-18TH CENTURIES (1996), III.