Civil liberty and fundamental rights: a Neo-Roman approach

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I

This paper is part of a project, or rather two linked projects, on which I have recently begun to work, so I am particularly grateful for the chance to gain some comments on this preliminary draft. Both my projects are centred on what I call the neo-Roman understanding of civil liberty. This has been widely discussed in recent Anglophone political philosophy, but has generally been described as a 'republican' rather than a 'neo-Roman' line of argument. This preference is almost entirely due to the work of Philip Pettit, who has done more than anyone to clarify the concept at issue.[1] I still prefer to speak of neo-Romanism, if only because many of the leading exponents of the theory in its early-modern heyday – John Locke, for example – would have been horrified to find themselves described as republican in their political allegiances. But I hasten to add that nothing much hangs on these differences of terminology.

My main project is to write a history of the rise and fall of the neo-Roman understanding of rights and liberty in Anglophone political thought. This story is largely an early-modern one. The ideological uses of neo-Roman ideas reached their climax with the English revolution in the 1640s, and their nemesis with the loss of the American colonies in the 1770s. I have already written about the first half of this story in my book, *Liberty before liberalism*, so my new study will mainly focus on the Imperial crisis of the mid eighteenth century. Wish me luck. Meanwhile my more immediate project stems from the fact that my *Liberty before liberalism* book recently reached its 20th birthday. A conference was held to mark this event, and the Cambridge University has now agreed to publish the proceedings, which will include a Reply to Critics by myself. The remarks that follow are taken from the draft I recently completed of my contribution to this book, which is why I am especially anxious at this stage to receive comments on my argument.

II

I begin with an attempt to restate the neo-Roman concept of liberty in its canonical form. When I first began writing about the rise of neo-Roman thinking, I saw it largely as a product of the Renaissance rapprochement with classical political philosophy. I now feel that this element in the story, important though it is, has been somewhat

[1] See Pettit 1997, Pettit 2012 and Pettit 2014. My debt to Philip is great, and I am extremely grateful to him for commenting on this present draft.

exaggerated, especially in Italian scholarship.[2] For the canonical statement of the neo-Roman theory we need to turn back to ancient Roman sources, and especially to the jurists whose definitions and judgments were eventually codified in the *Corpus Iuris Civilis* under the Emperor Justinian in the early sixth century.[3] The passages on which we need to concentrate can be found in the chapter 'Of the status of men and women' in Book I of the *Digesta*[4] and the closely related chapter 'Of the right of persons' in Book I of the *Institutiones*.[5] I sometimes think these may be the most influential pages in the history of western political thought.

These ancient sources never ceased to be invoked, but it was not long before their claims began to be much more widely diffused. They were extensively cited and developed by the Bolognese school of Glossators, with one of the earliest and most influential restatements appearing in Azo of Bologna's *Summa Institutionum* at the end of the twelfth century. Still more important for my present purposes is the fact that, a generation later, the discussion of freedom and slavery in the *Digesta* was incorporated almost word-for-word into one of the earliest and most influential compilations of English common law, the massive treatise entitled *De Legibus et Consuetudinibus Angliae*. Far more than I initially realised, the story of neo-Roman liberty, at least in Anglophone political thought, is centred on civil and common law, and within that narrative the *De Legibus* occupies a place of incomparable significance.

The *De legibus* used to be attributed to Henry de Bracton (*c.*1210-1268) and dated to *c.*1260. But recent scholarship has suggested that the work may have been compiled a generation earlier, and that Bracton was at most a part-author and final reviser of the text.[6] Among early-modern English lawyers, however, there were never any doubts about Bracton's authorship, and after the *De legibus* was printed from a collation of the manuscripts in 1569 we find its authority increasingly cited, and with much reverence. The leading jurists of the age, including John Selden and Sir Edward Coke, frequently appeal to it,[7] while Sir John Doderidge in *The English Lawyer* of 1631 recommends the *De legibus* as an eloquent treatise from which 'great light may bee had, and a great helpe obtained for the better understanding and true interpretation' of the whole body of English common law.[8] (I shall therefore continue to refer to the work as if Bracton wrote it.)

Bracton opens his treatise by noting that 'the entire law we propose to examine is concerned either with persons or with things or with actions as they are handled in

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2 See, for example, Viroli 2002.

3 But see Nelson 2004. Although primarily concerned with Greek ideals of happiness and justice, Nelson shows how this tradition also made a distinctive contribution to republican arguments in early-modern Europe.

4 Justinian 1902b, V. I., pp. 7-8: *De statu hominum*. It is important to remember that the Latin word *homo* means, as the *Oxford Latin Dictionary* puts it, 'a human being (of either sex)'.

5 Justinian 1902a, I. III, p. 2: *De iure personarum*.

6 See Brand 2010; Sechler and Greenberg 2012, p. 4n.

7 See Selden 1614, pp. 263, 270, 281, 334, etc; Coke 1618, Sig. C, 7v; Sig. E, 7v; Sig. K, 2r; Sig. K, 6r-7r, etc. For uses of Bracton in early-modern England see Sechler and Greenberg 2012.

8 Doderidge 1631, p. 41.

English customs and laws.'[9] He then remarks that 'since persons are of greater importance, because all laws are established for them, we shall first consider persons and their status'.[10] With this opening flourish Bracton clears the way for what he describes, following the *Digesta*, as 'the principal and briefest division of persons', which is that 'all men and women are either *liberi*, free persons, or else are *servi*, slaves.'[11] To which he adds, quoting Azo, that we can equally well say -- 'thereby resolving the plural altogether into the singular' -- that 'every man or woman is either free or a slave'.[12]

Next Bracton follows Azo in raising a number of questions about the relationship between slaves, free persons and the intermediate figure of the *villanus*, who may be a free person but is nevertheless bound to perform villein services.[13] These feudal distinctions, however, had ceased to be of much relevance by the time Bracton's analysis captured the attention of English lawyers and parliamentarians in the generation after the publication of the *De legibus* in 1569.[14] It is true that Sir Thomas Smith continues to speak of villeins and bondsmen in his *De Republica Anglorum*, first published in 1583. But he already notes that 'this olde kinde of servile servitude' was initially converted into 'servitude of landes and tenures', and that eventually the law 'by litle and litle extinguished it'.[15] We are left, as in the *Digesta*, with the pivotal distinction between *liberi homines* and *servi*, free persons and slaves.

Bracton describes the condition of slaves that of *servitus* or servitude. Quoting the *Digesta*, he goes on to define this condition as 'that in which someone is, contrary to nature, but by a convention of the law of nations, subject to the power of someone else'.[16] Here the jurists explicitly repudiate the Aristotelian category of the natural slave, while conceding that, under the *ius gentium* or law of nations, the institution of slavery is recognised by law. You can either be born a slave, or else made a slave by capture in war, but in either case the form of power to which you are subject is *dominium*, which in Roman law was often understood to include the right to regard something as one's property.[17] The condition of natural and equal freedom is thus obliterated in practice by

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[9] Bracton 1569, 6. 1, fo. 4v: 'omne ius de quo tractare proposuimus, pertinet vel ad personas, vel ad res, vel ad actiones secundum leges & consuetudines anglicanas'. Cf. Justinian 1902b, I. V. 1, p. 7, citing Gaius.

[10] Bracton 1569, 6. 1, fo. 4v: 'cum digniores sint personae quarum causa statuta sunt omnia iura: Ideo de personis primo videamus & earum statu'. Cf. Justinian 1902b, I. V. 2, p. 7, citing Hermogenianus.

[11] Bracton 1569, 6. 1, p. 4v: 'Est autem prima divisio personarum haec & brevissima, quod omnes homines aut liberi sunt, aut servi'. Cf. Justinian 1902b, I. V. 3, p. 7, citing Gaius.

[12] Bracton 1569, 6. 1, p. 4v: 'ut ita resolvatur pluralis omnino in singularem ...omnis homo sit liber, aut servus'. Cf. Azo 1557, *De iure personarum* 1, fo. 269v.

[13] See Bracton 1569, 6. 1, p. 4v. Cf. Azo 1557, *De iure personarum* 1, fo. 269v.

[14] On this development see Skinner 2002b, pp. 309-12.

[15] Smith 1982, III. 8, p. 137.

[16] Bracton 1569, 6. 3, fo. 4v: 'Est quidem servitus constitucio [sic] iuris gentium qua quis dominio alieno contra naturam subiicitur'. Cf. Justinian 1902b, I. V. 4. 1, p. 7, citing Florentinus. See also Azo 1557, *De iure personarum* 4, fo. 270r.

[17] To have someone under one's *dominium* is to have them *in potestate*, in one's power, but not necessarily to have them in ownership. Children are in the power of their fathers according to Roman law, but not in their ownership. Although *dominium* was often used in Roman Law to

a set of norms and institutions allowing some persons to hold others wholly under their control with legal impunity. This explains why -- as Bracton adds, again quoting the *Digesta* -- 'when slaves are granted their freedom, they are said to be manumitted, that is, released from living under the hand of someone else.'[18]

The contrasting condition of *liberi homines* or free persons stands in no need of separate definition, since it has already been laid down that what it means to be a free person is not to be a slave, and that a slave is someone living subject to the power and hence the mere will of someone else. It follows that a free person must be someone who is *not* subject to the power and hence the mere will of anyone else. The jurists do, however, offer a definition of the *libertas* enjoyed by such *liberi homines*. Here the authority of the jurist Florentinus is invoked both in the *Digesta* and later by Azo as well as by Bracton. Given that free persons are those not subject to the will of anyone else, their freedom must take the form of being able, as Florentinus puts it, to exercise 'their natural faculty of being able *vivere libet*, to live according to their own will and do whatever they want.'[19]

To be a free person, in other words, is to enjoy freedom of choice. There is thus a modal quality and a phenomenological content to the status of being free. Free persons possess a distinctive form of power, that of being able to pursue their chosen pathway through life, secure from the possibility of interference.[20] The only systematic limitation on their liberty arises from the fact that -- as Bracton adds, once more quoting Florentinus in the *Digesta* -- 'they are able to do what they want provided that their actions are not prohibited by law or prevented by force'.[21] Beyond these confines they are free to choose whatever courses of action they like, and are thus free to govern themselves and go their own way.[22]

The distinction between free persons and slaves is accordingly marked by the contrasting role played by the will in their actions. Slaves are never free to act

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refer to exclusive and unlimited ownership, this was never offered as a definition of the term – and indeed no definition was ever offered, as noted in Rodger 1972, pp. 1-2.

[18] Bracton 1569, 6. 3, fo. 4v: 'ideo cum postmodum libertati donantur, dicuntur manumissi, quasi a manu dimissi.' Cf. Justinian 1902b, I. I. 4, p. 1 and 1.V. 4. 2, p. 7.

[19] See Bracton 1569, 6. 2, fo. 4v on the 'naturalis facultas eius quod cuique facere libet'. Cf. Justinian 1902b, I. V. 4, p. 7, where the dictum is attributed to Florentinus. See also Azo 1557, *De iure personarum* 3, fo. 270r. Nor do the legal writers ever take the view that it is necessary, if you are fully to enjoy your freedom, that you should act only in accordance with your considered desires. Freedom for them consists in being able to do as you please *simpliciter*. I stress this point in Skinner 1984 and Skinner 2002a. Pettit 2012, p. 48 notes the contrasting view, defended in Frankfurt 1988, in which the example is given of the gambler who is free not to gamble in the sense that no one is forcing him to gamble, but is claimed not to be positively free until he becomes capable of acting on his desire not to desire to gamble.

[20] As noted in Pettit 1997, p. 69. See also Pettit 1997, p. 72 quoting Priestley 1993, p. 36 on how a man's freedom from subjection 'gives him a constant feeling of his own power and importance'.

[21] Bracton 1569, 6. 2, fo. 4v: 'facere libet, nisi quod iure aut vi prohibetur'. To avoid gendered vocabulary, I have changed the singular into the plural. Cf. Justinian 1902b, I. V. 4, p. 7.

[22] As Pettit 2008a pp. 104-6 emphasises, this must be the first axiom in any theory of political liberty.

exclusively according to their own will. They are always obliged to act subject to the will -- and hence subject to the permission and goodwill -- of the master under whose hand they live. Free persons are their own masters and are subject only to their own will. They are consequently able to exercise their liberties independently of any power on the part of anyone else to limit their range of choice.[23] The basic capacity that slaves lack and free persons possess is precisely this autonomy of choice.[24]

The fundamental -- and immensely influential -- claim about the concept of civil liberty bequeathed by the jurists is thus that freedom is the antonym of slavery: freedom consists in not being subject to the mere will of anyone else.[25] Following the *Digesta*, however, the Medieval glossators, including Azo and Bracton, next turn to examine a second and complicating distinction in the law of persons, which hinges on whether or not a man or woman is able to act *sui iuris*, in their own right.[26] Bracton at once lays it down that 'all persons are *sui iuris* who are not *in aliena potestate*, in the power of someone else'.[27] We accordingly need to begin by identifying those who live *in aliena potestate*. As Bracton assures us -- returning to the *Digesta* -- 'once these persons are known, it will be possible in consequence for everyone else to be recognised as *sui iuris*, capable of acting in their own right.'[28]

The jurists proceed to single out two classes of person who are legally judged to live under the power of others. As Bracton explains, quoting the *Digesta*, 'those who are slaves are in the power of someone else, because the power of *domini* or masters over

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[23] As Pettit 2007, p. 718 notes, according to this account we need to add a fourth element to the triadic analysis classically proposed in MacCallum 1972 to the effect that (1) an agent is free to do or become something if (2) he or she is free from constraints (3) to pursue an activity or goal. We need to add (4) *in the manner of a free person* (that is, without being subject to possible interference). Cf De Bruin 2009, p. 421, mistakenly claiming that MacCallum's analysis applies equally to republican and liberal conceptions of freedom.

[24] It might be argued that this is where a Greek background to the Roman and neo-Roman understanding of liberty perhaps comes into view. The best word in Latin for *eleutheria* (*ἐλευθερία*) would be *libertas*. But according to the Roman jurists, the *libertas* of the *liber homo* consists in absence of subjection to the mere will of anyone else and consequent freedom of choice. The *liber homo* is consequently someone able to act entirely according to their own will. But one way of understanding the concept of *autonomia* (*αὐτονομία*) would be to say that it names the condition of someone able to speak and act with exactly this kind of independence. So on this account *ἐλευθερία* and *αὐτονομία* are effectively synonymous terms. For further discussion see Hoekstra and Skinner 2018.

[25] Ando 2010, p. 190 asserts that this 'binarism of slave and free' was '*not* intellectually productive'. (Italics in original). This is a judgment likely to astonish any historian of early-modern Europe.

[26] Ando 2010, pp. 193-4 rightly complains that I ought to have placed more emphasis in Skinner 1997 on how the basic bond/free dichotomy was extended and qualified in these later sources.

[27] Bracton 1569, 9. 2, fo. 6r: 'Sui iuris autem sunt omnes, qui non sunt in aliena potestate'. Cf. Azo 1557, *De his qui sui, vel alieni iuris sunt* 3, fo. 270v.

[28] Bracton 1569, 9. 2, fo. 6r: 'Cognitis autem personis ... per consequens sciri poterit omnes alios esse sui iuris.' Cf. Justinian 1902b, I. VI. 1, p. 8, citing Gaius.

their slaves is recognised by the *ius gentium*.'[29] The other class consists of 'sons who have been born to parents living in a lawful and legitimate marriage'.[30] (Here the *Digesta* had spoken more generally of children.)[31] They too are incapable of acting wholly *sui iuris*, because the law grants extensive rights to fathers over their children.[32] To be the son of a lawful union is consequently to be under *patria potestas*, patriarchal power, and all sons remain in that condition until their father's death.[33]

Given that freedom is the antonym of slavery, it might appear to follow that all free persons must be capable of acting *sui iuris*, provided they are not living under paternal power. But at this stage Bracton proceeds -- echoing Azo but departing from the *Digesta* -- to introduce a third category into the law of persons. He refers to a variety of people who are not *in potestate* in the manner of children or slaves, but are nevertheless to some degree incapable of acting *sui iuris*, entirely in their own right.

Bracton may be said to place three classes of person into this final category. First he notes that 'not everyone who serves someone else is a slave.'[34] As he explains, 'some people perform servile works while nevertheless remaining free',[35] so that we can speak of 'free persons who live under the power of masters' in the manner of servants rather than slaves.[36] He next observes that under the civil law 'women differ from men in numerous ways, because their condition is more deleterious than that of men'.[37] He focuses in particular on the legal position of wives. Although they are free, they are subject to their husbands and are consequently among those who are obliged 'to live under the rod'.[38] Finally he considers the case of 'persons who are either under the protection or guardianship of masters, or else under the care of parents and friends'.[39] As his terminology makes clear, he takes these forms of subjection to be inherently beneficent, because they are designed to ensure the safety and well-being of those concerned. Such persons are far from being slaves, and are able to act according to their own wills in at least some domains of their life. They cannot, however, be counted as *liberi homines* in the fullest sense. This is because they are *iure tenentur*, kept under the

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29 Bracton 1569, 9. 3, fo. 6r: 'In potestate aliena sunt servi, quae quidem potestas dominorum in servos a iure gentium est'. Cf. Justinian 1902b, I. VI. 1. 1, p. 8, citing Gaius. See also Azo 1557, *De his qui sui, vel alieni iuris sunt* 4, fo. 270v.

30 Bracton 1569, 9. 4, fo. 6r: 'filii qui nascuntur ex iusto et legittimo [sic] matrimonio.'

31 Justinian 1902b, I. VI. 3, p. 8, citing Gaius on 'liberi nostri'.

32 For the chief elements of paternal *potestas* under Roman Law see Buckland 1932, pp. 103-4.

33 Bracton 1569, 9. 4, fo. 6r: 'In potestate autem patrum sunt filii'. On their emancipation from this condition by the death of their father see Bracton 1569, 10. 1, fo. 6v. See also Azo 1557, *De patria potestas* 1, fo. 271r.

34 Bracton 1569, 6. 3, fo. 4v: 'non enim omnis qui servit est servus'.

35 Bracton 1569, 11. 1, fo. 7r: 'nihilominus liberi ... faciant opera servilia'.

36 Bracton 1569, 11. 3, fo. 7v: 'sub potestate dominorum sunt liberi homines'.

37 Bracton 1569, 7. 1, fo. 5r: 'Et differunt feminae a masculis in multis, quia earum deterior est condicio quam masculorum'.

38 See Bracton 1569, 10. 3, fo. 6v on 'uxores &c.' as instances of those who live 'sub virga'. Buckland 1932, p. 103n. notes that this was not the case under Imperial law.

39 Bracton 1569, 10. 2, fo. 6v: 'quaedam sunt in custodia seu tutela dominorum, quaedam in curatione parentum & amicorum'. Cf. Azo 1557, *De tutelis* 1, fo. 271r.

jurisdiction or authority of others,[40] and to that extent are incapable of acting in their own right.

The introduction of this further category gives rise to a drastic curtailment in the range of those who are agreed to be in full possession of their civil liberty. The use of the term *liber homo* in the *Digesta*, where *homo* had been understood to mean 'man or woman', had explicitly extended to both genders, and in a separate judgment Ulpian had included persons of indeterminate gender as well.[41] But it is now said that the category of those who live to some degree in subjection to others, and are consequently not in full possession of their liberty, encompasses wives, children, servants and all those who depend on the protection of guardians or friends.

By the time we reach the early-modern era, we find this third category of persons deeply embedded in English common law. During this period, the fullest attempt to provide a social anatomy of England was made by Sir Thomas Smith in his *De Republica Anglorum*, which was reprinted several times in the opening decades of the seventeenth century after its first publication in 1583.[42] Book III includes a complete survey of those who fall into the category of being free persons while not being fully *sui iuris*. Smith first considers the case of young men held in wardship 'by knightes service'. Anyone in this position will be 'a Freeman and Gentleman', but will nevertheless be subject, until the age of twenty-five, to the government of guardians who act 'as masters and lordes'.[43] Next he turns to the case of wives, who are not only free from servitude but 'have for the most part all the charge of the house and houshoulde'. They are nevertheless obliged to live at all times '*in potestate maritorum*', under the power of their husbands, and 'whatsoever they have before mariage' becomes their husband's property.[44] Finally Smith discusses the status of servants, and especially the particularly rigorous institution of apprenticeship. An apprentice is not a slave, because he is bound only 'by covenaunt, and for a time'. But he can be required to perform 'servile offices', and must 'be obedient to all his masters commaundementes', so that he may be said temporarily to suffer a 'kinde of servitude'.[45] There is no gainsaying the fact that, throughout the period of the rise and decline of the neo-Roman theory of liberty, the list of those who were agreed to be wholly free of justifiable subjection, and who could therefore count as *liberi homines* in the fullest sense, was limited to a small and almost entirely male elite.

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[40] See Bracton 1569, 10. 2, fo 6v, contrasting the case of such persons with those who are neither *in custodia* nor *in curatione*, and are thus *neutro iure tenentur*, 'not held under either of these forms of jurisdiction or authority'.
[41] Justinian 1902b, I. V. 10, p. 7, citing Ulpian.
[42] There were republications in 1601, 1609 and 1635.
[43] Smith 1982, III. 5, p. 128.
[44] Smith 1982, III. 6, p. 130. On the enduring subjection of women in early-modern England see Sommerville 1995.
[45] Smith 1982, III. 8, p. 140.

III

Armed with this exposition of the neo-Roman theory, I hope it may now be possible to clear up some confusions and misunderstandings that have arisen since it again began to be widely discussed. One confusion has emanated from the claim that -- as we have seen Florentinus arguing -- there are two distinct routes by which *liberi homines* may suffer deprivation of liberty. They may either become subject to the will of someone else, or else impeded from performing some action because it is 'prohibited by law or prevented by force'.[46] What then is the relationship between -- and the relative importance of -- losing one's freedom through subjection and losing it through legal or coercive interference?

Some contemporary exponents of the neo-Roman theory have denied that the question need be asked. This was the position originally adopted by Philip Pettit. Declaring that freedom must be 'equated with non-domination', that is, with 'non-dependency on the good will of another', Pettit treated acts of interference as nothing more than one of the factors that 'condition' rather than compromise or take away liberty.[47] Reacting to this argument, I contended in *Liberty before liberalism* that we ought instead to recognise that liberty of action can equally well be forfeited either by falling into subjection or else by suffering acts of interference. [48] More recently, Pettit has been criticised for arguing that 'interference is never sufficient for a loss of freedom' when it seems an obvious deprivation of freedom to restrict someone's movements without their consent by, for example, handcuffing them while they are asleep. [49] One outcome of these criticisms has been the suggestion that, for a satisfactory account of freedom, the concepts of domination and non-interference will somehow have to be combined.[50]

All these arguments now strike me as missing the point, failing as they do to register the crucial importance of the neo-Roman distinction between those restrictions which have the effect of taking away our standing as free persons, and those restrictions which, although limiting our liberty of action, leave our standing as free persons untouched. Free persons who are legally coerced, or who suffer some act of physical interference, undoubtedly forfeit some liberty of action, but the type of constraint they

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[46] Bracton 1569, VI, 2, fo. 4v: 'facere libet, nisi quod iure aut vi prohibetur'. Cf. Justinian 1902b, I. V. 4, p. 7, citing Florentinus.

[47] Pettit 1999, pp. 301-2. See also Pettit 1997, arguing that 'interference can occur without any loss of liberty' (p. 35) and that obedience to coercive laws can be 'entirely consistent with freedom' (p. 66). Pettit 2002, p. 342 continues to insist that 'freedom means nondomination, period'. See also Lovett 2010, p.156, arguing that 'policy interventions' can leave the freedom of citizens 'relatively untouched'. The accounts given in Pettit 1997, 1999 and 2002 operate without the distinction between *being free to act* and *being a free person*. But the account Pettit gives of this distinction in Pettit 2007 and in Pettit 2012 pp. 82-92 yields an analysis of the relationship between domination and interference that seems to me fully in line with the views of the legal writers I am considering here.

[48] Skinner 1997, pp. 82-3.

[49] Talisse 2014, pp. 121, 128.

[50] See, for example, Wall 2001; Hirschmann 2002, esp. pp. 26-8.

experience does nothing to take away their standing as free persons. [51] Free persons who become subject to the will of someone else lose any liberty to act exclusively according to their own wills, thereby forfeiting their standing as free persons and falling into the condition of slaves.

The neo-Roman theorists are here advancing two distinct arguments. One is that there are undoubtedly two separate routes by which freedom of action can be lost. But the other is that, in order to be able to choose and act freely, it is necessary to be a free person. This is why it is incomparably a greater evil to lose freedom of action through enslavement than to lose it through individual acts of interference. To be restricted in the range of one's choices may be deeply frustrating, and it would undoubtedly be annoying to wake up and find oneself handcuffed. But to forfeit all autonomy of choice is to be deprived of an essential attribute of one's humanity. The freedom of a free person is what matters above all.

A second confusion has been introduced into recent discussions with the repeated allegation that, when neo-Roman theorists speak about the paramount value of not becoming subject to the will of anyone else, they are not espousing an 'analytically distinctive' concept of liberty.[52] More specifically, it is claimed, they are not arguing that liberty means something other than absence of interference; they are merely referring in an unnecessarily convoluted style to the best means of gaining security from interference.[53] As will by now be evident, however, it would be the worst possible misunderstanding of the neo-Roman theory to suppose that its basic concern is with acts of interference and how to minimise them. The clearest distinguishing feature of the theory lies in the contention that there can be lack of freedom in the absence of any interference or even any threat or inclination to interfere.[54] Anyone who lives in subjection to the will of a *dominus* is bereft at all times of freedom to act according to their own will, and this remains the case even in the absence of any actual interference on the part of the *dominus* to whom they are subject.[55]

It is true that, because all *domini* have almost unlimited discretion in the treatment of their slaves, it is always open to them to limit the use of their power to interfere, in which case their slaves will gain a corresponding measure of *de facto* freedom of action. A *dominus* may even decide to promote the interests of his slaves, in which case they may come to enjoy more benefits than many free persons burdened by such misfortunes as poverty or ill-health. But what leaves even fortunate slaves wholly unfree

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[51] But this is not because I am arguing for a 'moralised' view of constraint according to which I am not constrained if the interference is for my own good. For my reply to this objection, put forward in Carter 2008, see Skinner 2008, p. 88.

[52] Goodin 2003, pp. 60-1; cf. Patten 1996, p. 223. Podoksik 2010 goes even further, arguing that liberty consists in nothing other than 'absence of significant constraint'. See Podoksik 2010, esp. pp. 225-7, 240.

[53] Carter 1999, pp. 237-9; Ferejohn 2001, pp. 85-6; Maddox 2002, p. 420; Goodin 2003, pp. 60-1; Carter 2008; Kramer 2003; Kramer 2008.

[54] As emphasised in Pettit 1997, pp. 22-3, 35-6, 63-4 and Pettit 2008a pp. 111-14.

[55] On the lack of logical equivalence between neo-Roman and liberal concepts of liberty see De Bruin 2009, pp. 421-2.

is the fact that their *dominus* retains at all times the power to change his mind and interfere in their lives in any way he may choose, and to do so without warning and with more or less complete impunity.

It is thus a further mistake to conclude, as some critics have done, that the neo-Roman theorists can only be arguing that freedom is impaired 'in proportion to the probability of someone interfering with your actions and choices'.[56] This objection stems from the same failure to grasp the structure of the neo-Roman argument. To say that there is *any* probability of someone's interfering with my choices and actions is to admit that they have power to do so. But to say that someone possesses this kind of power is equivalent to saying that I am subject to their will. The fact that there may be little probability of their exercising the power in question does nothing to lessen their continuing ability to do so should they choose.[57] But to be subject in this way to the will of someone else is what it means, according to neo-Roman theory, to live as a slave. It is the fact that a master is always in a position to interfere that affects the slave's freedom of choice. Due to this controlling form of power, all the choices and actions of slaves are the outcome not merely of their own wills but at the same time of the silently expressed permission and approval of their master. What leaves slaves wholly bereft of liberty is not any specific acts of surveillance, nor any individual acts of oppression or interference, but the mere presence of this silent form of power.

It would be a yet further mistake to retort that the power in question can only be counterfactual in character. The form of control involved is dispositional, and is thus a real form of power even if it is never exercised. Those who live at the mercy of another person are never free, because they are never free of that person's will. When they act, they only ever do so by their master's leave.[58] It is the significance of this form of power that is ignored by those who maintain that freedom simply consists in non-interference.

I can best summarise my position by insisting that I am definitely attempting to articulate a distinct concept of liberty.[59] I am not attempting, that is, to offer an account of the conditions under which freedom in its generally accepted sense of absence of interference can best be realised, but a rival account of how the concept should be understood. I am claiming that those who focus on absence of interference are asking the wrong question about civil liberty. The central question is not 'what options are available to me?' but rather 'who is in control?' If and only if I am subject to my own will, so that I retain control over my choices, can I be said to count as a free person. Freedom, in other words, is the name of a status, not a mere predicate of choices and actions. It is important to add that it is not my *awareness* of the fact that I lack this status

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[56] Goodin and Jackson 2007, p. 250. See also Kramer 2008, esp. pp. 41-50. I have already responded to this claim in Skinner 2008, pp. 94-7. See also Pettit 2008b, pp. 213-220.
[57] As argued in Pettit 2008, p. 216. See also Pettit 2014, pp. 41-6.
[58] As emphasised in Pettit 2012, p. 61.
[59] As I try to make clear in Skinner 2002a, pp. 261-2.

that turns me into a slave, but the mere fact that I lack it, a fact of which I may or may not be aware.[60]

By way of rounding off this defence of the neo-Roman theory against its contemporary detractors, I need to add – or rather, to concede -- that one further criticism has often been advanced which seems to me justified. As we have seen, the central contention of the neo-Roman writers is that, to count as a free person, it is not sufficient that you should be able to exercise *de facto* freedom of choice; it is also necessary that you should be secured from the possibility of arbitrary interference with your freedom to act as you choose. Some recent critics have rightly objected that no citizen can realistically expect to be granted such complete security. As Brennan and Lomasky express the point, 'to live among other people is to be vulnerable to arbitrary encroachment', and no government can hope 'to render citizens immune'.[61]

It is important to recognise, however, that this was a criticism of which the exponents of the neo-Roman theory in its early-modern heyday were acutely aware. Accepting that no state can hope to secure all its citizens from all possible assaults on their liberty at all possible times, they argued that what requires to be absolutely protected by law against encroachment or loss can only be a charter of our most 'fundamental' rights. The list of these basic liberties was not taken to be a catalogue of allegedly natural rights.[62] The list is avowedly a social construction, a reflection of what the members of a specific political association regard as essential to the fulfilment of their most salient interests.[63] A crucial connection thus came to be forged between the neo-Roman theory of liberty and the concept of 'fundamental' rights: the status of being a free person came to be equated with the capacity to exercise untrammelled freedom of choice in relation to these basic liberties.[64]

We can already discern the outlines of what became the canonical list of such liberties if we turn to the Petition of Right of 1628, the first systematic attempt in the period immediately preceding the English civil war to secure the fundamental rights of subjects. As several Members of Parliament insisted in the debate about the Petition, any failure on the part of the crown to acknowledge the specific liberties being affirmed would have the effect of reducing the kingdom to a nation of slaves. Sir John

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[60] Goodin and Jackson 2007, p. 256 think it unlikely that one could be 'unfree without knowing it'. But there are cases in which it could be certain. For example, anyone born a slave is unfree without knowing it.

[61] Brennan and Lomasky 2006, p. 243.

[62] Here I correct my formulation in Skinner 1997, pp. 19-20. On the place of basic rights in republican theory see Pettit 2008c, Hamel 2016.

[63] These interests will include the overcoming of domination and subjection in civil society as well as in the relations between citizens and the state. On this further dimension of 'republican' liberty see Coffey 2015 and Thompson 2018.

[64] For this argument see Skinner 1997, pp. 17-18; Goldsmith 2000, pp. 543-50. See also Pettit 2014, pp. 55-73 on 'freedom with breadth', the freedom conferred by the securing of co-exercisable basic liberties.

Strangeways concluded his speech by proclaiming that 'the great work of this day, you know, is to free the subject'.[65]

Before the Petition was drawn up, Sir Edward Coke had proposed 'An Act for the better securing of every freeman touching the propriety of his goods and liberty of his person'.[66] The Petition is concerned with securing the same basic rights in the face of the fact that the king was beginning to show an increasing disposition to act by 'special command' and mere 'command or direction', so that the people were increasingly living subject to his mere will.[67] The first specific complaint in the Petition is that the right to property is in consequence becoming insecure. Contrary to a number of statutes, the people are being deprived of their property without consent through being 'required to lend certain sums of money' to the king.[68] The second complaint is that, contrary to the provisions of Magna Carta, the right of personal liberty has also ceased to be secure. Many freemen 'have of late been imprisoned without any cause shown' and refused writs of *habeus corpus*.[69] The final complaint is that many subjects have been 'forejudged of life and limb' and summarily executed under martial law, contrary to 'the form of the Great Charter, and the law of the land'.[70] We can already hear, echoing below the surface of these accusations, the litany voiced everywhere by the supporters of Parliament after the outbreak of war in 1642: that there are some rights so fundamental that they must be placed beyond the power of any government to challenge them; and that the most basic of these rights are life, liberty and estates. These are the rights that must be absolutely protected if we are to retain our status as *liberi homines* or 'freemen' and avoid falling into a condition of servitude.

This was also the historical juncture at which the act of violating these rights first began to be widely described as the exercise of 'arbitrary' power, the kind of power that stems from a sovereign's ability to impose his mere *arbitrium* or personal will in place of the law, without reference to the interests of those affected by it.[71] With the widespread adoption of this vocabulary at the outbreak of the English civil war, the neo-Roman view of liberty may be said to have become fully moralised. This explicitly normative tone had been absent from the classic formulation of the theory in the *Digesta* of Roman law, and Bracton had continued to speak in a similarly neutral style. But if we turn to the official Declarations issued by Parliament at the outbreak of war in 1642 we find them filled with outrage at the arbitrary powers the crown was claiming the right to exercise.[72] According to the *Declaration* of September 1642, published immediately after

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[65] On the debate see Skinner 2002b, pp. 321-2; Larkin 2014, pp. 221-5.
[66] Gardiner 1906, p. 65.
[67] Gardiner 1906, p. 67, 68.
[68] Gardiner 1906, p. 67.
[69] Gardiner 1906, p. 67.
[70] Gardiner 1906, p. 68.
[71] See Pettit 1997, p. 55, and cf. De Bruin 2009, p. 420. McCammon 2015 gives analytical reasons for agreeing that domination needs to be classifiable as arbitrary if it is to count as infringing liberty.
[72] Some contemporary critics have treated this explicitly normative tone as a weakness in the neo-Roman theory and have sought to neutralise it. See for example List and Valentini 2016.

the outbreak of war, the king has been persuaded to adopt a view of his authority 'contrary to the fundamentall lawes of the kingdome, and apt to introduce Tyranny, and an arbitrarie power over the lives, liberties and propriety of the subject', thereby instituting a state of 'bondage and slavery'.[73]

The culmination of this attack was reached with the removal of the king in 1649. Charles I was executed for treason on 30th January, and on 17th March the Rump Parliament passed an Act abolishing the office of king. The High Court of Justice had found Charles guilty on three main counts, two of which related directly to the freedom of his subjects.[74] One was that he had failed in his obligation 'to use the power committed to him for the good and benefit of the people, and for the preservation of their rights and liberties'.[75] But this misuse of his authority was not the basic accusation against the king. The other and principal charge was that he had pursued 'a wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his will'.[76] He was condemned, in other words, not merely for failing to respect the liberties of his subjects, but for seeking 'to take away and make void the foundations thereof' by subjecting them to his arbitrary will.[77] The summary of the Solicitor General's case was thus that, 'for the satisfying of a base lust' he had acted in such a way as to 'destroy and inslave the People'.[78]

The same distinction was yet more strongly drawn in the Act abolishing the office of king. One reason for abolition is said to be that 'usually and naturally any one person in such power makes it his interest to incroach upon the just freedom and liberty of the people'. But the underlying reason for being suspicious of 'regal power and prerogative' is that those exercising it have generally sought to 'promote the setting up of their own will and power above the laws'. They have aimed, in other words, not merely 'to oppress and impoverish' but also to 'enslave the subject'.[79] As these accusations make clear, it would be a mistake to argue, as some recent commentators have done, that the crown's critics were mainly concerned with unjustified governmental interference.[80] Their principal objection was to the very existence of the arbitrary powers that in turn allowed such interference to take place. Their principal aim in invoking the concept of 'fundamental' liberties was to propose that, in the case of our most important rights, such acts of arbitrary interference should be rendered legally impossible.

For defenders of the theory in its early modern heyday, however, the normative orientation of the theory mattered at least as much as its conceptual force.

[73] *A Declaration and Resolution* 1642, pp. 12-13.

[74] The other charge was that of levying war on his subjects.

[75] Gardiner 1906, p. 377.

[76] Gardiner 1906, p. 377.

[77] Gardiner 1906, p. 377.

[78] Cook 1649, Sig. A, 2v.

[79] Gardiner 1906, p. 385.

[80] See, for example, Ghosh 2008, esp. pp. 162-7.

IV

By way of conclusion I want to say something about the value and applicability of the neo-Roman theory in our present world. But in doing so I do not think of myself as casting off my mantle as an historian. Rather my aim is to make explicit some of the morals already implicit in my historical tale. Before setting off in this direction, however, I need to address two related objections to making this explicitly normative move. One criticism frequently levelled against Philip Pettit as well as myself has been that our invocations of ancient Roman legal and political theory are insensitive to the fact that Rome was never a self-governing republic with a free citizenry. As our critics patiently (sometimes impatiently) explain, the view of civil liberty put forward by such writers as Livy and Cicero was always taken to be compatible with the domination of the political scene by a senatorial oligarchy and the subjection of the plebeians to a paternalistic form of tutelage.[81] It is interesting (if unsurprising) to learn that the ideal of the *civitas libera* was so susceptible to being manipulated, neutralised and ignored. But I fail to understand how these considerations can be held to discredit the ideal itself, or to show that there is nothing of value to be learned from it.

A related but more general complaint has been that the neo-Roman theory has been so deeply implicated throughout its history with misogynist and hierarchical prejudices that we cannot nowadays hope to make any fruitful use of it.[82] The theory has undoubtedly been used to serve unjust ends, and this consideration should certainly give us pause. But it makes little sense to object that it is '*inherently* conservative and elitist'.[83] The theory simply affirms that individual liberty is best understood as the condition of not being subject to the will of anyone else. The normative question that remains to be addressed is whether there may be anything to be gained from reconsidering this line of thought.

My answer is that, in common with other philosophers and historians currently engaged in this work of intellectual excavation,[84] I have come to believe that the neo-Roman theory has a great deal to contribute to current debates about the improvement of our moral and political world. Perhaps the most important contribution is that the neo-Roman theory provides us with a way of thinking about human rights that is arguably much more illuminating than most contemporary accounts. Among recent political philosophers, these rights have generally been treated as universal moral demands that everyone can equally make upon everyone else. They are taken to be logically prior to all systems of law and to stand outside the political realm. One problem with this approach is that it becomes difficult to prevent the list of such alleged

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[81] See Maddox 2002, Kapust, esp. pp. 394-8; Ando 2010. See also Clarke 2014.

[82] For example, Goodin 2003, pp. 56-7, 61-2 emphasises what he calls the dark side of republicanism, especially its association with imperialist and militaristic values.

[83] Maddox 2002, p. 430. Italics added.

[84] See, for example, Bellamy 2007; Honohan 2002; Maynor 2003; Maynor and Laborde 2008; Lovett 2010; Pettit 1997, 2012 and 2014; Viroli 2002.

rights from inflating into a description of everything we judge to be necessary for a good life. An understandable reaction has been to limit the ideal to that of furnishing a number of basic goods that could feasibly be provided within existing institutional frameworks. The outcome has been a kind of analytical stalemate.

By contrast with both these approaches, the neo-Roman theory of liberty offers a rival account of what human rights are for, and hence a more satisfactory account of their character. Among neo-Roman writers, such rights are in effect equated with the list of fundamental liberties that arise within political associations and require to be fully secured. These are in turn equated with the rights we need to possess if we are to be protected from becoming subject to the will of anyone else, and hence preserved in our standing as free persons. They are consequently the rights that all legitimate governments must make it their business to uphold against any possible acts of interference. The outcome is a theory of rights that is neither subject to unrestricted inflation nor confined to a minimal set of capabilities -- a conception that surely deserves to be further explored.

A second and closely related value of the neo-Roman theory is that it restores the connection between securing individual liberty and upholding democratic forms of government. One outcome of the triumph of the liberal view of freedom was the severing of any such links. As Isaiah Berlin explicitly proclaimed in *Two Concepts of Liberty*, 'there is no necessary connection between individual liberty and democratic rule'.[85] The reason, Berlin explains, is that liberty consists in 'not being interfered with by others', and is thus 'principally concerned with the area of control, not with its source'.[86] This being so, we might easily find ourselves suffering less interference, and thereby enjoying more freedom, under the regime of a benevolent despot than under any system of self-rule.[87] By contrast, the neo-Roman theory insists that we can never hope to enjoy our freedom except under a constitution in which two conditions are satisfied. One is that we must be fully secured in the enjoyment of our fundamental rights. The other is that, by a process of fair and equal representation, we must be able to make our voice heard equally with that of every other citizen in the creation of the laws under which we live. No democracy, no liberty.

A further value of the neo-Roman theory stems from its emphasis on the capacity of structural and silent forms of power to take away freedom of choice. Consider the extent to which de-unionised workforces increasingly live at the mercy of employers with power to dismiss them at will. Consider, similarly, how far the economic dependence of women continues to limit their freedom of choice, leaving a shocking number vulnerable to violent partners whom they lack the resources to escape.[88] The loss of liberty suffered in these circumstances need not stem from any overt acts of intimidation or interference; it already stems from the mere fact of living in

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[85] Berlin 2002, p. 177.
[86] Berlin 2002, pp. 170, 176.
[87] Berlin 2002, p. 176.
[88] For an emphasis on this point see Halldenius 2014.

subjection to the arbitrary will of others. As these examples suggest, some of the most troubling subversions of civil liberty currently stem from these sources. But the prevailing view of freedom as absence of interference too often seems incapable of noticing them. We are simply assured that 'the worker or wife is at liberty to dissolve a relationship that has become oppressive', as if there is nothing more to be said.[89]

The neo-Roman case could I believe be further strengthened if the individualistic and intentionalist assumptions underlying the current emphasis on arbitrary *control* by persons and groups were to be modified and supplemented.[90] Some of the most widespread deprivations of individual liberty in contemporary societies stem not from deliberate exercises of control but rather from unconscious prejudices on the part of persons and groups with high social status and extensive economic power.[91] These structural forms of domination give rise to much of the racism and gendered hierarchies that pervade contemporary social life, and have the effect of depriving many subordinate groups of the ability to shape their lives without being subject to social norms and economic arrangements that undermine their autonomy of choice. Something is definitely being denied to these disadvantaged groups, even though the denial need not arise from any act of overt coercion or even of underlying control. What is being denied is the basic neo-Roman claim that freedom consists in being able to choose and act in the manner of a free person not subject to the will of anyone else.[92]

A yet further value of adopting a neo-Roman perspective is that, by contrast with following prevailing liberal beliefs, we shall be less inclined to shrug off some rising threats to our liberty. One obvious and important threat arises from the growth of surveillance by corporations and states.[93] How should we react, for example, to the fact that powerful media companies now hold swathes of our personal data? Until recently this was generally construed as, at worst, an affront to our privacy. But the capacity of such companies to make use of our data for undisclosed purposes leaves us subject to a form of power over which we have no control. So far the response of the companies involved has been to assure us that none of this information will be used to our detriment. But this misses the neo-Roman point. It is the mere fact of being subject to such an arbitrary form of power, a power that could be used contrary to our interests, that constitutes an affront not merely to our privacy but our standing as free persons with autonomy of choice.

To end on a more positive note, it is worth stressing that many values accrue to us through the secure protection of our fundamental rights in the manner that, according to the neo-Roman theorists, it is the basic duty of legitimate governments to provide. The possession of the freedom celebrated by the jurist Florentinus -- the freedom to live as I choose in consequence of not being subject to the will of anyone else -- is obviously of great instrumental value. With security from interference I can

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89 Brennan and Lomasky 2006, p. 243.
90 On control as fundamental see, for example, Pettit 2012, esp. 153-60.
91 For an emphasis on this point see Krause 2013; Halldenius 2014.
92 As argued in Halldenius 2014, esp. pp. 95-8.
93 For a survey see Hoye and Monagham 2014.

pursue my own purposes, and with the acquisition of this power I am likely to gain a distinctive sense of efficacy and worth. As a result I can hope to shape my own life, within the bounds of the law, without feeling any obligation to anyone except myself. But the ability to determine my own ends is also intrinsically valuable. To possess this kind of power is a condition of being able to enlarge and explore possible ranges of choice as opposed to merely following one's existing preferences. The same power is likewise a condition of exercising many other important human capacities, including the ability to deliberate, to engage in moral evaluation, and to act with timeliness in making decisions and carrying them out. Once these considerations are duly weighted, it is hard not to conclude that one of the aims we should be setting ourselves is that of acquiring and holding fast to the status of being free persons as defined by the neo-Roman theory of liberty.

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