

Justice, Political Liberalism, and
Utilitarianism

Themes from Harsanyi and Rawls

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Republican Political Theory

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Republican political theory takes its starting point from a long-established tradition of thinking about politics (Pocock, 1975). The republican tradition is associated with Cicero at the time of the Roman republic; with a number of writers, preeminently Machiavelli – “the divine Machiavel” of the *Discourses* – in the Renaissance Italian republics; with James Harrington, Algernon Sydney, and a host of lesser figures in and after the period of the English civil war and commonwealth; and with the many theorists of republic or commonwealth in eighteenth-century England, America, and France. These theorists – the commonwealthmen (Robbins, 1959) – were greatly influenced by John Locke and, later, the Baron de Montesquieu; indeed, they claimed Locke and Montesquieu, with good reason, as their own. They are well represented in documents like *Cato’s Letters* (Trenchard and Gordon, 1971) and, on the American side of the Atlantic, the *Federalist Papers* (Madison, Hamilton, and Jay, 1987).

The commonwealthmen helped to shape habits of political reflex and thought that still survive today. Their distinctive refrain was that while the cause of freedom rests squarely with the law and the state – it is mainly thanks to the constitution under which they live that people enjoy freedom – still the authorities are also an inherent threat and people have to strive to “keep the bastards honest.” The price of liberty is civic virtue, then, where that includes both a willingness to participate in government and a determination to exercise eternal vigilance in regard to the governors. The commonwealthmen tended to advocate the removal of the monarchy in America but in England most were content to see the king constitutionally fettered. England was “a nation,” in Montesquieu’s (1989, p. 70) unmistakable reference, “where the republic hides under the form of monarchy” (Rahe, 1992, p. 524).

I find the republican tradition of thought a wonderful source of ideas and ideals, and in this essay, I hope to communicate why (see Pettit, 1997a).

I am not alone in finding this tradition inspirational. Historians like John Pocock (1975) and Quentin Skinner (1978, 1983, 1984) have not only made the republican way of thinking visible to us in the past couple of decades, they have also shown how it can give us a new perspective on contemporary politics. Skinner in particular has argued that it can give us a new understanding of freedom, and my own argument builds on this. Legal thinkers like Cass Sunstein (1990, 1993a, 1993b), however, have gone back to the republican tradition in its distinctively American incarnation in the late 1800s and have made a strong case for the claim that the tradition suggests a distinctive way of interpreting the U.S. Constitution and, more generally, that it gives us an insightful overview on the role of government. Criminologists and regulatory theorists like John Braithwaite, with whom I have actively collaborated (Braithwaite and Pettit, 1990), find in the republican tradition a set of compelling ideas for articulating both the demands that we should place on a regulatory system, say, the criminal justice system, and the expectations that we should hold out for how those demands can be best met (Ayres and Braithwaite, 1992). And these are just a few thinkers among many commentators who have begun to chart republican connections, and sometimes to draw actively on republican ideas, in recent years.¹

My own approach to republican political theory is to give center stage to the notion of freedom that was shared among republican thinkers generally and to derive other republican claims from the commitment to this ideal. In this chapter, I will present the republican ideal of freedom in the first section and then try to illustrate, in the second, the way in which that ideal has significance for contemporary political thought.

16.1 The Republican Ideal of Freedom

16.1.1 The Constant Connection

Early in the last century Benjamin Constant (1988) delivered a famous lecture entitled “The Liberty of the Ancients and the Liberty of the Moderns.” He depicted the liberty of the moderns, in the familiar negative or liberal fashion, as the absence of interference. I am free in this sense “to the degree to which no human being interferes with my activity” (Berlin, 1958, p. 7). He depicted the liberty of the ancients, however, as the liberty associated, ideally, with being a direct participant in a self-governing democracy. I am

¹ For example, Michelman (1986), Elkin (1987), Pagden (1987), Taylor (1989), Oldfield (1990), Fontana (1994), Hutton (1995), Blom (1995), Spitz (1995), Viroli (1995).

free in this sense, not through being uncontrolled by others, but through sharing with others the power to control all. The liberty of the ancients is the most prominent form of what Isaiah Berlin (1958) later called *positive freedom*.

The most important observation in introducing the republican conception of freedom is to recognize Constant’s image of the liberty of the ancients as a caricature that served to hide the true republican way of thinking, only recently so prominent, from his contemporaries’ eyes. Constant may not have been consciously propagandizing but what he achieved was to mesmerize later generations into thinking that the only feasible, perhaps the only sensible, notion of freedom was the liberal idea of freedom as noninterference. The liberty of the ancients is no match for freedom as noninterference – even if it is thought desirable, it must be judged to be unattainable – and the effect of setting up the two as the only relevant alternatives was to give victory, inevitably, to the liberal ideal.

The republican way of thinking about freedom, effectively suppressed by Constant, represents it as nondomination, not as direct democratic standing. And the difference between freedom as noninterference and freedom as nondomination is easily explained. Assume that one person dominates another to the extent that they have the capacity to interfere arbitrarily – to interfere on an arbitrary basis – in some or all of the other’s choices (Pettit, 1996, 1997a). Where freedom as noninterference makes the absence of interference sufficient for freedom, freedom as nondomination requires the absence of a capacity on the part of anyone else – any individual or corporate agent – to interfere arbitrarily in their life or affairs. The difference between the two ways of conceiving of liberty may seem slight, but a little reflection will reveal hidden dimensions to the contrast.

16.1.2 Interference and Arbitrary Interference

The two conceptions of freedom both invoke the notion of interference, and we may begin our exploration of the contrast between the two ways of conceiving liberty with a comment on this. On almost all accounts, the intrusions that count as interference have to be intentional acts or at least acts for which the agent can be held responsible (Miller, 1990, p. 35). They have to be intentional or quasi-intentional. The reason for this stipulation is that freedom under most accounts is a condition defined in relation to other intentional agents, not a condition defined by reference to favors bestowed by nature, not a condition defined by how far a person escapes various brute, nonintentionally imposed limitations (see Spitz, 1995, pp. 382–383).

But the intrusions that constitute interference may be restricted to acts that make certain options impossible for the agent, or they may be extended to include acts that coerce or manipulate the agent in choosing between options. I shall assume that for both conceptions of freedom interference is to be understood in the broader fashion. Acts of interference will include any acts that worsen the agent's situation, or least worsen it significantly, either by reducing the alternatives available in choice or by raising the costs associated with some of the alternatives or by misleading the subject as to the options or costs in question, for example, through making a threat that one does not mean to carry out.

Freedom as nondomination differs from freedom as noninterference in invoking the notion, not just of interference, but of interference on an arbitrary basis. An act is perpetrated on an arbitrary basis, we can say, if it is subject just to the *arbitrium*, the decision, or judgment, of the agent; the agent was in a position to choose it or not choose it, at their pleasure. When we say that an act of interference is perpetrated on an arbitrary basis, then, we imply that like any arbitrary act it is chosen or not chosen at the agent's pleasure, and, in particular, because interference with others is involved, we imply that it is chosen or rejected without reference to the interests or the opinions of those affected. The choice is not forced to track what the interests of those others require according to their own judgments.²

Under this conception of arbitrariness, then, an act of interference will be nonarbitrary to the extent that it is the contrary of the arbitrary act, to the extent that it stands at the opposite extreme. The nonarbitrary act of interference is not subject, as the arbitrary act is subject, to the *arbitrium* of the interferer. On the contrary, it is subject, as we might put it, to the *arbitrium* of the interferee. The nonarbitrary act is forced to track the interests and ideas of the person suffering the interference.

Or if it is not forced to track all of the interests and ideas of the person involved, it is at least forced to track the relevant ones. I may have an interest in the state's imposing certain taxes or in punishing certain offenders, for example, and the state may pursue these ends according to procedures

² Notice that an act of interference can be arbitrary in the procedural sense intended here – it may occur on an arbitrary basis – without being arbitrary in the substantive sense of actually going against the interests or judgments of the persons affected. An act is arbitrary, in this usage, by virtue of the controls – specifically, the lack of controls – under which it materializes, not by virtue of the particular consequences to which it gives rise. The usage I follow means that there is no equivocation involved in speaking, as I do speak, either of a power of arbitrary interference or of an arbitrary power of interference. What is in question in each case is a power of interfering on an arbitrary, unchecked basis.

that conform to my ideas about appropriate means. But I may still not want the state to impose taxes on me – I may want to be an exception – or I may think that I ought not to be punished in the appropriate manner, even though I have been convicted of an offense. In such a case, my relevant interests and ideas will be those that are shared in common with others, not those that treat me as exceptional because the state is meant to serve others as well as me. They will be interests that I can avow and assert politically, consistently with wanting to live under a shared political arrangement with others. So in these cases, the interference of the state in taxing or punishing me will not be conducted arbitrarily and will not represent domination.

The republican tradition of thinking took a distinctive view of what is required for an act of interference, in particular, an act of legal or government interference, to be nonarbitrary, and I follow that tradition in giving this account of nonarbitrariness. Consider Tom Paine's (1989, p. 168) complaint against monarchy. "It means arbitrary power in an individual person; in the exercise of which, *himself*, and not the *res-publica*, is the object" (cf. Sydney, 1996, pp. 199–200). What is required for nonarbitrary state power, as this comment makes clear, is that the power be exercised in a way that tracks, not the power-holder's personal welfare or worldview but rather the welfare and worldview of the public. The acts of interference perpetrated by the state must be triggered by the shared interests of those affected under an interpretation of what those interests require that is shared, at least at the procedural level, by those affected.

Where freedom as noninterference opposes freedom directly to interference – freedom just is noninterference – the second varies this opposition in two ways. The antonym of freedom no longer involves interference as such, only interference on an arbitrary basis. The antonym of freedom does not require actual arbitrary interference, only vulnerability to someone with the capacity for such interference.

The first variation has the effect of making it harder for people to lose their freedom or to have their freedom reduced. For it means that, if an agent interferes nonarbitrarily in their choices, that does not offend as such against their freedom; whatever damage is done by the interference, the nonarbitrariness is enough to ensure that their freedom is not compromised. But the second variation has the contrary effect of making it easier, not harder, for someone to suffer a loss of freedom. For it means that, if an agent has the capacity to interfere in any of their choices, then that in itself compromises their freedom; they suffer a loss of freedom even if the other person does not actually exercise their capacity for interference.

16.1.3 The Harder-to-Lose-Freedom Effect

The harder-to-lose-freedom effect makes for a difference in how law bears on liberty under the two conceptions. Under freedom as noninterference, a regime of law, being necessarily coercive, systematically compromises people's freedom, even if the consequence of putting the regime into operation is that less interference takes place overall. Subjection to the law, in and of itself, represents a loss of liberty. Under the second conception, however, subjection to the law need not represent a loss of liberty for anyone who lives under it, provided – and of course it is a big proviso – that the making, interpretation, and implementation of the law is not arbitrary: provided that the legal coercion involved is constrained to track the interests and ideas of those affected. The proviso, intuitively expressed, is that the legal regime represents a fair rule of law.

Consistently with not itself constituting a compromise of liberty, of course, a regime of legal coercion and restraint may have the same effect as a natural obstacle in limiting the choices available to people or in making them more costly: in defining the range over which people enjoy undominated choice. Proponents of freedom as noninterference do not count natural obstacles as factors that compromise liberty – this, because they are in no way intentional – but they do admit that such obstacles affect the range of choice over which freedom as noninterference may be exercised; the obstacles condition freedom, as we might put the distinction, but they do not compromise it.³ Proponents of freedom as nondomination move the locus of this boundary between compromising and conditioning factors so that the interference associated with a fair rule of law, like the natural obstacle, conditions people's liberty but does not compromise it: does not in itself count as infringing, violating, reducing, or offending against people's liberty.⁴

³ When proponents of this ideal speak of making freedom as noninterference effective, not just leaving it as a formal freedom, I assume that they often have in mind removing or reducing the obstacles that condition the exercise of freedom as nondomination: extending the range of choice available to people. See Van Parijs (1995) on “real” or “effective” freedom.

⁴ The extreme case of legal interference is punishment for an offence. Such punishment will always condition people's freedom as nondomination, removing the capacity for undominated choice (capital punishment), restricting the range over which such choice may be exercised (prison), or raising the costs of making certain undominated choices (fines). But it need not involve the person punished having their liberty compromised through subjection to the arbitrary will of another. This remark is not meant to make legal punishment seem any more tolerable, only to articulate a perhaps surprising corollary of the conception of freedom as nondomination.

Hobbes and Bentham are the great advocates of the idea that law represents a compromise of liberty. “As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken away from another. All coercive laws, therefore, and in particular all laws creative of liberty, are as far as they go abrogative of liberty” (Bentham, 1843). Or as Hobbes had put it: “The Liberty of a Subject, lyeth therefore only in those things, which in regulating their actions, the Sovereign hath praetermitted” (Hobbes, 1968, p. 264).

But Hobbes and Bentham were consciously breaking with a longer tradition of thought – the republican or commonwealthman tradition – in taking this line (Skinner, 1983). That tradition was defended in the first instance by James Harrington (1992, p. 20), who argued that Hobbes was confusing freedom from the law with freedom proper: freedom by the law. John Locke took Harrington's side, embracing “freedom from Absolute, Arbitrary Power” as the essential thing (Locke, 1965, p. 325) and presenting law as essentially on liberty's side: “that ill deserves the Name of Confinement which serves to hedge us in only from Bogs and Precipices . . . the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom” (Locke, 1965, p. 348). William Blackstone (1978, p. 126) represents the eighteenth-century orthodoxy when he follows the same line: “laws, when prudently framed, are by no means subversive but rather introductive of liberty; for (as Mr Locke has well observed) where there is no law there is no freedom.”

The difference between the two conceptions of liberty in their attitude to the law was significant from the point of view of Hobbes and Bentham. The view that all law compromises people's liberty enabled Hobbes to withstand the criticism that he anticipated from republicans, that his Leviathan was utterly inimical to freedom, constituting an arbitrary rule as distinct from a rule of law: an arbitrary rule as distinct from the republican vision of an “empire of laws, and not of men” (Harrington, 1992, p. 8). And the same view enabled Bentham and those friends of his who opposed the American cause in the 1770s to argue against the complaint that since the British parliament was not constrained in the laws that it passed for the governance of the American colonies – because it was not constrained in the same way that it was constrained in Britain itself – those laws represented an arbitrary interference with Americans and compromised their liberty (Lind, 1776). Hobbes could argue that Leviathan did no worse than commonwealths in respect of the liberty of its subjects because all law compromises liberty. And Bentham and his friends could argue on the same grounds that in regard to liberty Americans fared no worse under the law imposed by the British parliament than those in Britain.

So much for the harder-to-lose-freedom effect of opposing freedom to nondomination, not noninterference. But what of the easier-to-lose-freedom effect of shifting the antonym?

16.1.4 The Easier-to-Lose-Freedom Effect

This effect occurs because someone loses freedom, not just to the extent that another person interferes on an arbitrary basis in their choices, but to the extent that another agent has the capacity to do this. With freedom as nondomination, someone loses freedom to the extent that they live under the thumb of another, even if that thumb is never used against them. Suppose that under the existing laws and mores a wife may be abused on an arbitrary basis by her husband, at least in certain areas and in a certain measure. Even if her husband is a loving and caring individual, such a wife cannot count as fully free under the construal of freedom as nondomination. And neither can the employee who lives under the thumb of an employer, nor the member of a minority who lives under the thumb of a majority coalition, nor the debtor who lives under the thumb of a creditor, nor anyone in such a subservient position.

Where the first effect of shifting antonym shows up particularly in the assessment of law and liberty, the second relates to the association between law and slavery. As it became a matter of common assumption after Bentham that law represents a compromise of liberty, albeit a compromise that may be for the good overall, so it became impossible to maintain that to be unfree is always, in some measure, to be enslaved (Patterson, 1991); no one was prepared to say that the law makes slaves of those who live under it. But before Bentham, when freedom was opposed first and foremost to domination, the association between unfreedom and slavery was complete. To be unfree was to live at the mercy of another, to live under a condition of enslavement to them.

Thus, Algernon Sydney (1990, p. 17) could write in the 1680s: "Liberty solely consists in an independency upon the will of another, and by the name of slave we understand a man, who can neither dispose of his person nor goods, but enjoys all at the will of his master." And in the following century, the authors of *Cato's Letters* could give a characteristically forceful statement to the theme. "Liberty is, to live upon one's own Terms; Slavery is, to live at the mere Mercy of another; and a Life of Slavery is, to those who can bear it, a continual State of Uncertainty and Wretchedness, often an Apprehension of Violence, often the lingering Dread of a violent Death" (Trenchard and Gordon, vol. 2, pp. 249–250).

The easier-to-lose-freedom effect of opposing liberty to domination connects with the slavery theme because one of the striking things about slaves is that they remain slaves even if their master is entirely benign and never interferes with them. As Algernon Sydney (1990, p. 441) put it, "He is a slave who serves the best and gentlest man in the world, as well as he who serves the worst." Or as it was put by Richard Price (1991, pp. 77–78) in the eighteenth century: "Individuals in private life, while held under the power of masters, cannot be denominated free, however equitably and kindly they may be treated. This is strictly true of communities as well as of individuals." There is domination, and there is unfreedom, even if no actual interference occurs.

I mentioned that the first effect of opposing freedom to domination helped the defenders of the American cause to argue that while those in Britain were not made unfree by the law, given that the law could not be arbitrarily imposed there, those in America did not enjoy a similar status under the law. I should add that the second effect enabled them to sheet this argument home. They were in a position to argue that even though the British parliament did not interfere much in American affairs – even though it only levied a small tax – still the fact that it could levy whatever tax it wished, without any serious restraint on its will, meant that it related to the American colonists as master to slave.

Joseph Priestly (1993, p. 140) offers a nice example of this line of argument.

Q. What is the great grievance that those people complain of? A. It is their being taxed by the parliament of Great Britain, the members of which are so far from taxing themselves, that they ease themselves at the same time. If this measure takes place, the colonists will be reduced to a state of as complete servitude, as any people of which there is an account in history. For by the same power, by which the people of England can compel them to pay *one penny*, they may compel them to pay the *last penny* they have. There will be nothing but arbitrary imposition on the one side, and humble petition on the other.

16.1.5 Three Further Remarks

My comments on the two main differences associated with treating freedom as nondomination rather than noninterference should serve to make the notion intelligible. I want to add three further remarks, however, to underline some points that are important for understanding it fully.

First, while freedom as nondomination is constituted by one agent's having the capacity to interfere on an arbitrary basis in the affairs of another, some plausible empirical assumptions entail that it is going to be systematically associated with a shared awareness on the part of the individuals or

groups involved that this capacity exists. The question of whether you are undominated is bound to be of interest to anyone, and the facts that make you undominated, if indeed you are such – the facts about your comparative resources, for example, and about the degree to which you are protected by legal and other means – are bound to be salient to all involved. Under standard assumptions as to people's inductive and inferential abilities, it follows that the fact of nondomination is going to be a matter of common recognition among the individuals in question (Lewis, 1969, p. 56). And that is something of the greatest significance. For it means that under standard ways of achieving it, freedom as nondomination is going to be intimately linked with the ability to look others in the eye, without having to defer to them or fear them. Montesquieu (1989, p. 157) emphasizes this theme when he writes: "Political liberty in a citizen is that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen."

Second, if someone is to enjoy freedom as nondomination, then it is not enough that the other people are very unlikely to exercise arbitrary interference; those other people must lack the capacity to interfere arbitrarily in that person's life, not just be unlikely to interfere. Suppose that you are subject to interference on an arbitrary basis from someone who, as it happens, really likes you and is extremely unlikely to want to interfere. If it still remains the case that, by the ordinary standards of free-will attribution, they have a capacity to interfere or not to interfere, and this on a more or less arbitrary basis, then you are dominated in some measure by them and are thus unfree. This is not a very hard line to take because you clearly suffer an evil to the extent that the person has the capacity to interfere arbitrarily with you: to the extent that such interference is accessible to them as an agent, however improbable it is that they will exercise it. Their capacity for arbitrary interference means, for example, that you lack grounds for the subjective state of mind that goes with freedom as nondomination; you have reason to defer to the person in question and to look for their continued favor.

My last point is the most important. When Bentham and his associates came to reject the notion of freedom as nondomination, freedom as non-slavery, one theme in their reflections was that this sort of freedom did not come in degrees and so, unlike the rival conception, lent itself to "panegyric and careless declamation" (Paley, 1825, pp. 359–360; Long, 1977, ch. 4). John Lind (1776, p. 25) expressed the criticism strongly in his attack on Richard Price's talk of the American colonists as slaves. "Things must be always at the maximum or minimum; there are no intermediate gradations: what is not

white must be black." The third point I want to make is that this perception is mistaken. Freedom as nondomination is not an all-or-nothing matter.

The point should be obvious on a little reflection. Agents may have a more or less ready capacity to interfere. And the interference for which they have a capacity may be more or less serious and may be available more or less without cost, say, without risk of retaliation. Thus, the freedom as nondomination of those they are in a position to affect may be more or less intense; the weaker the agents, the greater the freedom of those they may affect.

Intensity, I should add, is only one dimension in which freedom as nondomination may vary. As it is more or less intense, so freedom as nondomination may also be of one or another extent. It may be available for a smaller or larger number of choices, for choices that are more or less costly, and for choices of intuitively lesser or greater significance. Even if we have attained the highest possible intensity of nondomination for people in a society, there may be room for improving the range of undominated choice that is available to them: we may make the range of choice larger or less costly or intuitively more significant. Even if we remove all compromising influences on freedom as nondomination, there may still be room for how far we can remove conditioning influences as well.

That freedom as nondomination may be increased in either of two broad dimensions makes for a problem in deciding how those dimensions are to be weighed against one another (Pettit, 1997a, ch. 3). Indeed, a similar problem arises with freedom as noninterference because this will be increased in intensity as far as interference is blocked and increased in extent as far as the range of unobstructed choice is expanded, say, by providing people with extra resources. But I can overlook such problems of weighting here, as I shall be concerned with the promotion of these values only in the dimension of intensity. The question I address in the next section bears only on what is required for maximizing equal nondomination in the dimension of intensity.

16.2 The Significance of the Republican Ideal

16.2.1 The Paley Connection

Perhaps the most important figure in the demise of the republican ideal – someone more important even than Constant – is William Paley. Paley may have been the only writer in his time to recognize clearly the shift that was taking place, the shift indeed for which he argued, from the received notion of freedom as nondomination, freedom as security against interference on an arbitrary basis, to freedom as noninterference. He sets out his view with

admirable clarity in *The Principles of Moral and Political Philosophy*, which was first published in 1785 and was continually reprinted throughout the nineteenth century (Paley, 1825).

Paley recognizes in this work that the usual notion of civil liberty, the one that agrees with “the usage of common discourse, as well as the example of many respectable writers” (p. 357), is that of freedom as nondomination. “This idea places liberty in security; making it to consist not merely in an actual exemption from the constraint of useless and noxious laws and acts of dominion, but in being free from the *danger* of having such hereafter imposed or exercised” (p. 357; original emphasis). But Paley argues against this received notion and in favor of a Benthamite version of freedom as non-interference on an extraordinary basis. He argues that the ideal in question, however well established, is excessively demanding on the state:

Those definitions of liberty ought to be rejected, which, by making that essential to civil freedom which is unattainable in experience, inflame expectations that can never be gratified, and disturb the public content with complaints, which no wisdom or benevolence of government can remove. (Paley, 1825, p. 359)

How could Paley have thought that freedom as nondomination was the received ideal of freedom and yet that it was too demanding on the state? My hunch is that for Paley, as for most progressive thinkers of the late eighteenth century, it was no longer possible to think that the political citizenship and consideration could be restricted, as traditional republicans had taken it to be restricted, to propertied males: women and servants could not be systematically and permanently excluded from concern. “Everybody to count for one, nobody for more than one,” is the slogan ascribed to Bentham by John Stuart Mill (1969, p. 257). Thus, whereas traditional republicans could think that everyone relevant to the state’s concern – every propertied male – might aspire to be free in the sense of not being subject to anyone’s domination, egalitarians like Paley could not say this without seeming to embrace a wholly revolutionary doctrine: a doctrine that would require the upturning of relations between men and women, masters and servants. Their response was to deflate the ideal of freedom – to reduce it from nondomination to noninterference – at the same time that they argued that the constituency of political concern should be expanded. What they gave with the one hand, they took away with the other.

Why is the republican conception of liberty politically significant for the modern state? In a word, because it would recall the state to performing in relation to citizens generally the service that a republic – even a republic hidden under the form of a monarchy – was expected to perform for

traditional elites. It may indeed have been impossible for someone like Paley or Bentham or Constant to envisage a state that would liberate servants as well as masters, women as well as men. But this is no longer an obviously infeasible ideal, even if it is obviously unattained. For the limits on what we can envisage the state doing, and the limits on what we can imagine civil society allowing the state to do, have shifted dramatically over the last couple of centuries or so. Republicanism went underground at the time when the state began to become inclusivist, thereby permitting the state to become simultaneously more or less minimalist. It is high time that the doctrine was restored to prominence, allowing us to consider the direction that an inclusive republic – a republic dedicated to the general promotion of freedom as nondomination – would have to take.

I have tried to display the significance of the republican perspective elsewhere, examining the impact of the republican ideal on our notions of equality and community; on the policy commitments that we prescribe for the modern state; on the way we conceive of constitutional and democratic values and institutions; on the approach that we take to issues of regulation and control; and on the image we have of how the state should relate to civil society (Pettit, 1997a). Together with John Braithwaite, I have also looked at the significance of republicanism for thinking about criminal justice (Braithwaite and Pettit, 1990; Pettit, 1997b). To illustrate the way in which the republican perspective can affect our thinking, I will concentrate here on its significance for how we think of issues of redistribution. This theme is particularly relevant because it is at the center of contemporary political discussions, and it also connects up with the hostile reaction of Paley and others like him to the republican ideal.

16.2.2 Redistribution and Freedom as Noninterference

How far is the maximal equal distribution of freedom as noninterference consistent with inequalities in other dimensions? How far is it consistent, for example, with different levels of provision in basic goods like food and shelter, modes of transport, and media of reliable information; in basic services like medical care, legal counsel, and accident insurance; in human capital of the kind associated with training and education; in social capital of the sort that consists in being able to call with confidence on others; in political capital such as office and authority confer; and in the material capital that is necessary for production? How far is it likely to require putting inequalities in these matters right or at least alleviating their effects: in particular, coercively putting them right or coercively alleviating their effects

under state initiatives? How far is it likely to require what I shall describe, in a word, as redistribution?

The common wisdom on this question is that the maximal equal distribution of freedom as noninterference would leave a lot to be desired in regard to redistribution: it would fall short, under most conceptions, of achieving distributive justice (Rawls, 1971). That wisdom is well placed, and I wish to argue that in this respect freedom as nondomination represents a sharply contrasted ideal: the maximal equal distribution of such freedom requires a much more substantial commitment to redistribution.

Before coming to that argument, however, it will be useful to see why the connection between freedom as noninterference and distributive justice is so loose. Two questions arise from the viewpoint of freedom as noninterference when any such issue of redistribution is considered. First, how far will redistribution entail interference in people's lives by the state? Second, how far will redistribution lower the probability of interference by other agents?

The answer to the first question is that redistribution will always entail a degree of interference by the state. For even the most basic form of redistribution involves taxing some to give to others and that constitutes interference; it deprives those who are taxed of a choice in how to use their money. That taxing issue aside, most forms of redistribution also require setting up inspectors and other officials to oversee the operation in question. Thus, the redistributive measures involve the creation of new possibilities of interference in people's lives.

The answer to the first question means that the onus of proof always lies, from the perspective of freedom as noninterference, with those who would counsel redistribution. Whether redistribution in any area is to be supported, then, depends on whether the answer to the second question shows clearly that the margin whereby redistribution will reduce interference in a society is greater than the margin whereby it introduces interference itself. The margin of projected improvement will have to be large enough to ensure that even when we discount for the less-than-certain nature of the projection, the argument squarely favors redistribution.

Finding grounds to defend the required answer to the second question is never going to be easy. The reason is that it is always going to be possible for the opponent to argue that as long as we do not think of the relatively advantaged as downright malicious, we must expect them not to be generally disposed to harm the disadvantaged and not to be generally in need of curtailment by the redistributive state. Perhaps employers are in a position under the status quo to interfere in various ways with their employees. But why expect them to interfere rather than striving for good and productive

relationships? Perhaps husbands are able, given their greater strength and greater cultural backing, to abuse their wives. But why expect them to practice such abuse rather than remaining faithful to their affections and commitments? Perhaps those who lack medical care and legal counsel are prey to the unscrupulous. But why expect doctors and lawyers to be unwilling to provide essential services pro bono, especially when they can make good publicity of providing such services?

I sympathize with the drift of these rhetorical questions, believing that it is a mistake to demonize the relatively advantaged and see them always as potential offenders (Pettit, 1995). But the effect of the questions in the context of endorsing an ideal of freedom as noninterference is what concerns me now, not the propriety of raising them. The effect is to lead those who take the ideal as the only relevant yardstick of social performance not to require much in the way of redistribution: not to require much in the way of what we intuitively describe as distributive justice. It is quite possible to believe that the regime under which freedom as noninterference is equally distributed at maximal levels is a regime that allows great inequalities in other regards.

It is because of the looseness of the connection between freedom as noninterference and redistribution that thinkers in the broad liberal tradition tend to divide, roughly, into left and right. What unites those thinkers is the belief that freedom consists in noninterference and that equal freedom for all is the primary political value; this belief lies behind Rawls's (1971) first principle of justice, for example, according to which society should look for an equal system of maximal liberties. But what divides such liberals is that, whereas those on the right – libertarians, in particular – think that this is all that the state should try to achieve, those on the left shrink from such a minimalist vision. They argue that the state should concern itself with something over and beyond liberty proper: with the relief of poverty, for example – this may be held to make liberty effective (Van Parijs, 1995) – or with the achievement of something close to equality. Rawls's second principle of justice represents the ideal of something that is close to equality in this sense; the principle tolerates inequality but only to the extent that the worst-off person in the society benefits indirectly from the existence of that inequality.

16.2.3 Redistribution and Freedom as Nondomination

We can begin to recognize the significance of the republican ideal of freedom when we notice the difference between how it connects with redistribution and how freedom as noninterference does so. We have seen that the project

of equalizing freedom as noninterference at the maximal possible level is hostile to redistribution in two ways. First, it introduces a presumption against redistribution; it casts the onus on the side of anyone who wants to argue for redistribution. And second, it ensures that any argument for redistribution will have to be probabilistic in a manner that is bound to make it easy to resist. I wish to argue that the ideal of maximizing freedom as nondomination at the maximal level possible differs from the associated ideal of freedom as noninterference in both these respects.

Freedom as noninterference introduces a presumption against redistribution because redistribution is itself a species of the evil of interference. But no corresponding argument is available with freedom as nondomination. If the redistributive measures adopted can be pursued and are pursued under what I described intuitively as a fair rule of law, then they do not themselves introduce any form of domination.

I assume that many of the redistributive measures contemplated in discussions of distributive justice can be pursued under a fair rule of law. I assume, that is, that the measures can be introduced under procedures designed to filter out discriminatory proposals – proposals that fail to reflect the politically avowable interests or ideas of some sector of the population – and to guarantee nonarbitrariness. If the assumption is sound, then the ideal of freedom as nondomination does not introduce any presumption against redistribution of the kind associated with freedom as noninterference. If redistributive measures are used in the promotion of nondomination, the good at which they are directed does not have to be balanced against a violation of that very good in the process of production; the process of production need not itself represent a form of domination.

Is the assumption about the nonarbitrariness of redistribution likely to be sound? Any redistribution is going to deprive the rich of resources they would otherwise have but it need not represent an arbitrary form of interference. The republican state is built upon the premise that freedom as nondomination is the primary goal of the state. And if it is a matter of general assumption that the state should do whatever is needed to ensure such freedom in the community, then a transfer of resources that is essential to that goal can be justified to the rich on the basis of an interest they share. Certainly, the rich have an interest in keeping their own resources but pressing that interest against the clear demand envisaged will constitute special pleading; it will be akin to looking for special treatment by the criminal law.

The process of redistribution will not be entirely innocent, of course. As we mentioned, any rule of law, and certainly any redistributive rule of law, is going to remove certain choices or raise the costs of pursuing them. But this

way of restricting choice, this way of conditioning people's freedom as non-domination, falls far short of compromising such freedom on their part. If it succeeds in reducing the extent to which the freedom of the poor or the sick or the needy have their freedom compromised, then this cost in the conditioning of the freedom of people generally is going to be well worth paying.

Here is another way of thinking about the point. Redistribution under a fair rule of law counts in the republican ledger as a form of conditioning of liberty on a par with the conditioning effected by natural factors like poverty, disability, or illness. Redistribution involves something akin to moving around the factors that serve as conditioning influences on freedom and this without dominating anyone or without compromising anyone's freedom as nondomination. If that reshuffling of freedom-relevant factors can itself increase the degree of equal freedom in the society, then there is little or no question to raise about it. There is no reason to have a presumption against it.

But we should not be complacent about the dangers of redistribution. Complacency will be justified only up to a certain level and only under a certain kind of redistribution by a state. Suppose that the redistribution allowed involves the exercise of unconstrained discretion by individual agents of the state; the discretion may arise in the way goods are taken from some, for example, or in the way goods are given to others. Or suppose that the redistribution is so extensive, or subject to such frequent adjustments, that people hardly know where they stand relative to the state. Under any such suppositions, the prospect of redistribution is going to look very unattractive from a republican point of view.

The republican tradition of thinking has always put the state under severe scrutiny, for fear that state authorities will ever become, or ever support, relatively arbitrary powers. In arguing that the ideal of freedom as nondomination is not hostile to redistribution, in particular not hostile in the manner of freedom as noninterference, I do not mean to reject that tradition. If we treasure freedom as nondomination, then we have to be vigilant about not allowing the state certain sorts of power; we have to be careful to see that it is subject to all sorts of constitutional and other constraints. My point has been only that provided a state can be sufficiently constrained – and that may be a very big proviso – there is nothing inherently objectionable about allowing it to use redistributive means for promoting freedom as nondomination.⁵

⁵ Libertarians often say that they are against big government. Republicans are also against big government, but in a different sense. They object, not necessarily to government's having redistributive rights and responsibilities, but rather to the government's being able to act arbitrarily in the pursuit of redistributive ends; the pursuit must always be governed by a fair rule of law.

The second point that we noticed about the redistributive significance of equalizing noninterference was that the question of whether any redistributive measure increased people's freedom as noninterference remained inevitably a probabilistic matter. Perhaps we can interfere with employers to ensure that they do not interfere in certain ways with their employees. Perhaps we can interfere with husbands to ensure that they do not interfere in certain ways with their wives. But before we think of practicing interference, we have to convince ourselves that a very shaky arithmetic comes out right. We have to convince ourselves that there is a suitably high probability of a suitably large reduction in the practice of interference by employers and husbands. That thought may well give pause to any projects of redistribution that the ideal of freedom as noninterference is otherwise likely to sponsor.

But as on the matter of the presumption against redistribution, the ideal of freedom as nondomination has quite a different impact here. Suppose that an employer has the capacity in some measure to interfere arbitrarily in the affairs of an employee. Employment is so scarce and the prospect of unemployment so repellent, that the employer can alter agreed conditions of work, make life much tougher for employees, or even practice some illegal interference in their affairs, with relative ease. And suppose now that we contemplate introducing a system of unemployment benefits, a set of health and safety regulations, or an arrangement for arbitrating workplace disputes that would improve the lot of employees. Do we have to do a range of probabilistic sums before we can be sure of the benefits of such a redistributive regime?

Assuming that the regime is consistent with a fair rule of law and does not introduce an independent source of domination – provided it does not have any dominational side effects – it should be clear that no such sums are necessary. For just the existence of reasonable unemployment benefits is bound to reduce the extent to which an employee is willing to tolerate arbitrary interference by an employer and is bound by the same token to reduce the capacity of the employer to interfere at will and with impunity in the lives of employees. There is no uncertainty plaguing the connection. Or at least there is no uncertainty of the kind that makes the connection with freedom as noninterference so problematic.

Similar points go through on a number of fronts. The fact that people are poor, illiterate, ignorant, unable to get legal counsel, uninsured against illness, or incapable of getting around – the fact that they lack basic capabilities in any of these regards (Sen, 1985) – makes them subject to a certain sort of exploitation and manipulation. Other things being equal, then, any improvement in their lot is bound to reduce the capacity of others to interfere

more or less arbitrarily in their lives. And that means that other things being equal – dominational side effects being absent – any such improvement is bound to increase their freedom as nondomination.

The crucial difference in this second respect between the ideals of freedom as noninterference and freedom as nondomination occurs because the first ideal is compromised only by actual interference and the second by the capacity for interference, in particular the capacity for arbitrary interference. It may be very unclear whether a given measure will actually reduce the overall level of interference practiced by the more advantaged, while it is absolutely certain that the measure will reduce their capacity for interference.

Suppose the employer in our earlier example is actually benign or committed to a smooth and productive workplace, and that this ensures a negligible probability of ever interfering in the affairs of employees. The introduction of employment benefits, health and safety regulations, or arbitration procedures will not significantly reduce the probability of interference in such a scenario; that probability is already negligible. Still the introduction of any such scheme will certainly reduce the employer's capacity for arbitrary interference. Whether the employer interferes will no longer be dependent on their good grace; it will be substantively determined by factors outside the employer's will.

Some will retort at this point that there is no reason we should want to reduce the capacity of an employer to interfere with employees, especially given the cost of doing so, when it is certain that no interference will actually occur. But that shifts the issue from what the ideal of freedom as nondomination would require – and, in particular, from the observation that it would require, other things being equal, that the employer is constrained – to whether it is an attractive ideal. My aim is not to argue that it is an attractive ideal (on this issue, see Pettit, 1997a), only that it is a redistributively demanding one.

Still, I cannot resist adding a few words to explain the republican point of view. The situation in which another person has the capacity to interfere on an arbitrary basis with me but is very unlikely to do so, perhaps because of a morbid desire to be liked, will leave me relatively happy as far as I can regard that individual as a probabilistic device. But it is of the essence of human relations that we do not regard one another in this way: that we take one another to be responsible and free agents for whom the most improbable, out-of-character options remain accessible to choice (Strawson, 1973; Pettit and Smith, 1996). Thus, in dealing with the imagined person, it will be a matter of common expectation between us that I will do nothing to alienate and as much as I can to placate them. If I choose to discount their

greater power, acting as if I know they will not strike against me, then that will constitute an act of defiance: an act that may very well transform their psychology and change them into a dangerous presence. In view of such considerations, it should be unsurprising that republicans denounce any situation where a person lives in the power of a lord – *in potestate domini* – even in the power of a lord who is judged unlikely to cause them any harm.

We saw earlier that freedom as noninterference may be maximized under the constraint of more or less equal allocation without any significant redistribution of resources being required. In this respect, as in so many others, freedom as nondomination is quite different. The republican ideal may be capable of encoding the redistributive measures that many of us would think it reasonable to require of the modern state. While remaining an ideal of liberty, this ideal may give adequate expression to the more demanding aspirations that the nonlibertarians among us find compelling.⁶

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⁶ This paper is reprinted, with some small changes, from my article with the same title in Andrew Vincent, ed., *Political Theory: Tradition and Diversity*, Cambridge University Press, Cambridge, 1997. Copyright © Cambridge University Press 1997. Reprinted with permission. For recent, somewhat reformulated statements of my point of view see Pettit (2006, 2007). I am most grateful to Geoffrey Brennan and Michael Smith for helpful discussions of the material and to Andrew Vincent and John Weymark, as well as to an anonymous referee, for suggestions on how to improve it. I was enormously helped by comments received when an earlier version of the paper was presented to a meeting in New Orleans organized by the Murphy Institute of Political Economy, Tulane University, and the International Society for Economics and Philosophy.

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Rule Utilitarianism and Liberal Priorities

Jonathan Riley

17.1 Introduction

Liberals typically claim that equal rights and liberties should have suitable moral priority over competing values. Rawls (1971, 1993), for example, argues that social justice properly limits permissible conceptions of the good life in a democratic culture and that, within justice as he conceives it, a first principle of equal basic liberties has absolute priority over a second two-part principle. Political rights are given a special place within his first principle, in that they (unlike other basic rights) must have roughly equal worth (or “fair value”) for all persons (1993, pp. 5–6, 324–331, 356–362). The rationale for this special treatment seems to be the allegedly essential role that exercise of the political liberties plays in “preserving the other liberties” (Rawls, 1993, p. 299). Thus, individuals must have a fair opportunity to exercise their basic political rights “because it is essential in order to establish just legislation and also to make sure that the fair political process specified by the constitution is open to everyone on a basis of rough equality” (Rawls, 1993, p. 330).

A major aim of Rawls in particular, and of liberal theorists more generally, has been to provide a more secure foundation than utilitarianism seems to provide for the suitable priority of equal basic rights.¹ As Rawls

¹ It should be noted that non-basic rights and liberties are distributed under Rawls's second principle of justice, more specifically, the first part of it known as the principle of fair equality of opportunity. Thus, the basic rights of his first principle take lexical priority over non-basic rights within his theory. In his view, the basic rights are essential to the latent democratic ideal of a citizen as a moral agent with the powers of rationality and reasonableness as he conceives them, whereas non-basic rights are not essential to that

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