

PART I
REPUBLICAN LEGAL
THEORY





1

Law and Liberty

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I. Introduction

Do laws always restrict the liberty of the people who live under them? Or, if some laws are thought to be non-coercive—for example, laws that make voting possible—is this at least true of coercive laws? Does the coercion involved in threatening to impose penalties mean that the subjects of the laws thereby suffer a loss of freedom?

The answer that appears to have a nearly universal hold on the minds of legal theorists and philosophers today is that yes, coercive law does always reduce people's freedom. The canonical text is from Jeremy Bentham: 'As against the coercion applicable by individual to individual, no liberty can be given to one man but in proportion as it is taken from another. All coercive laws, therefore . . . and in particular all laws creative of liberty, are, as far as they go, abrogative of liberty.'¹ There are two recognized, if not often endorsed, ways of avoiding Bentham's stricture. But one does not offer a real alternative and the other is decidedly unattractive.

The approach that fails to offer a real alternative would say that it is only the prevention of choice—not just the threat of a penalty—that takes away someone's freedom, thus suggesting that only the imposition of a penalty will affect freedom.² But this is an implausibly narrow conception of interference and, as a number of authors have noticed, it will not turn the required trick. A coercive law against X-ing may not prevent someone from X-ing, only make it more hazardous, but it will prevent agents from X-ing and avoiding the prospect of hazard; it will deny them access to that more complex alternative.³ The second

* I am grateful to Samantha Besson and José Luis Martí for useful comments on an earlier draft.

¹ Bentham, J., 'Anarchical Fallacies', *The Works of Jeremy Bentham: Published under the Superintendence of His Executor, John Bowring*, Vol. 2 (Edinburgh: William Tait, 1843), 503.

² Steiner, H., 'Individual Liberty', in Miller, D. (ed.), *Liberty* (Oxford: Oxford University Press, 1993).

³ Carter, I., *A Measure of Freedom* (Oxford: Oxford University Press, 1999); Kramer, M. H., *The Quality of Freedom* (Oxford: Oxford University Press, 2003).



approach offers a real alternative but not an attractive one. It would say that it is only illegitimate or unjust penalties that take away someone's freedom and that if a coercive law is legitimate or just, it need not satisfy Bentham's stricture. This approach moralizes the notion of freedom, however, in a way that makes it less useful in normative theory and not many will give the approach their support. Suppose that we want to assess a law on the basis of its impact on the freedom of subjects. If we cannot know whether the law reduces people's freedom until we know whether it is legitimate or just, we won't be able to invoke considerations of freedom to determine how far it is indeed legitimate or just. And that means that we will be very restricted in the use that we can make of the notion of freedom within normative theory.

Are we stuck with Bentham's stricture, then? Does every coercive law reduce people's freedom, so that no matter what compensating benefits it brings in its wake—even the benefit of protecting liberty on other fronts—it always imposes this initial cost? I want to argue for a negative answer, on the grounds that there is a third, much more plausible way of responding to Bentham. This becomes available, once we reject the classical liberal assumptions that he endorsed and adopt a viewpoint with roots in the neo-Roman republicanism that such assumptions displaced.⁴

Why is the issue between these approaches important? If law need not be itself an infringement on liberty, as in the republican way of thinking, then there will be grounds in considerations of liberty alone for requiring a constitution to assume a certain form: a form under which law is indeed consistent with liberty. If law infringes liberty as a matter of necessity, however, then all that liberty clearly requires of law and of the constitutional framework as a whole is that it does better in preventing offences against liberty than in perpetrating them. But that means that liberty will be consistent with a variety of what we naturally regard as constitutional abuses, so that a case cannot be made against such abuses on the grounds of liberty alone. William Paley, one of Bentham's most clear-headed and influential followers, embraced the point when he noted as early as 1785 that the cause of classical liberal liberty might be as well served, in some circumstances, by 'the edicts of a despotic prince, as by the resolutions of popular assembly'; in such conditions 'would an absolute form of government be no less free than the purest democracy'.⁵

⁴ Pettit, P., *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); Skinner, Q., *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1998).

⁵ Paley, W., *The Principles of Moral and Political Philosophy, Vol. 4, Collected Works* (London: C. and J. Rivington, 1825). Notoriously, this point is admitted in Isaiah Berlin's (1958) defence of negative liberty: in effect, liberty as non-interference. Berlin, I., *Two Concepts of Liberty* (Oxford: Clarendon Press, 1958). For arguments to the effect that, under plausible empirical assumptions, negative liberty of this kind may make further constitutional demands, see Habermas, J., *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, trans. W. Rehg

The current chapter is divided into two main sections. First, I lay out the essential features of the republican way of thinking about freedom, setting it in contrast to Bentham's view. Then in the second section I show how coercive laws might not represent an assault—not at least the worst sort of assault—on freedom in that sense. I return in a brief conclusion to the issue of why the debate is important and why we should find the republican viewpoint appealing.

II. Liberty

1. Bentham on interference and freedom

The assumptions that Bentham and other members of his circle put in play suggested that the one and only danger for a person's social freedom is the interference of others: specifically, a form of interference that imposes obstacles or burdens intentionally or, perhaps, negligently.⁶ I do not intend to quarrel with the requirement of intentionality or, allowing for negligence, 'quasi-intentionality'. But I do find fault with the exclusive focus on interference. Bentham's circle made a dramatic break with more established ways of thinking—this was most clearly emphasized in the 1780s by William Paley⁷—when they insisted, first, that people were not deprived of freedom by anything other than interference and, second, that every instance of interference did indeed deprive people of their freedom.

What sorts of activities count as interference? Bentham appears to endorse a broad conception and we can go along with him in this. To be specific, let us agree that I interfere with you in a given choice between options x, y, and z, if I treat you in any of the following ways:

- I manipulate your capacity to choose deliberately, say by overloading you with information, subjecting you to powerful rhetoric, or resorting to hypnotism.
- With or without your awareness, I remove one of the options from the domain of your deliberative choice, putting a block in the way of its selection.
- With or without your awareness, I replace one of the options by a burdened counterpart, establishing a penalty that will attend its choice.
- I deceive you into thinking that you lack deliberative capacity or, more plausibly, that an option has been removed or replaced, whether by me or another agency.

(Cambridge, MA: MIT Press, 1996); Holmes, S., *Passions and Constraint: On the Theory of Liberal Democracy* (Chicago: The University of Chicago Press, 1995).

⁶ Miller, D., 'Constraints on Freedom', *Ethics*, 94 (1983), 66.

⁷ Paley, *The Principles of Moral and Political Philosophy* (above, n. 5). It should be noted, however, that while Paley went along with Bentham in his emphasis on interference, he did suggest that it was only interference in a moralized sense—illegitimate interference—that was inimical to freedom. Paley, *The Principles of Moral and Political Philosophy* (above, n. 5), 23–4.

The complaint I make against Bentham is not that he misconceives interference, and not that he is wrong in thinking that interference may get in the way of freedom. What I reject is rather the claim that freedom is only removed by interference—the interference-alone thesis—and that freedom is always removed by interference—the interference-always thesis. Both claims passed almost without saying in his circle, though they were highly original; amongst earlier theorists, only Thomas Hobbes had come close to defending them.⁸ Take John Lind, a close follower of Bentham's who was well known for his pamphlets against the American case for independence. To him it seemed obvious, as he acknowledged learning from his master,⁹ that freedom requires 'nothing more or less than the absence of coercion',¹⁰ where coercion may be physical or moral: may involve physical restraint or constraint, or the restraint or constraint associated with 'the threat of some painful event'.¹¹

The republican opposition to Bentham is best charted, I think, by first introducing a claim that all sides are likely to find acceptable: that someone's freedom to choose between certain options is reduced by what I call the alien control of another over that choice that is, by imposition of an alien will. The republican claim is that once alien control is indicted as the antonym of freedom, it becomes clear that the interference-alone and the interference-always theses are just false. Others may impose alien control via interference but equally they may do so via the enjoyment of a power of interference, even unexercised interference, in relation to that choice.¹²

2. Freedom and alien control

One person, A, controls the choice of another person, B, when A does something that has the intentional or quasi-intentional effect of raising the probability that B will choose according to A's taste or judgment—raising it beyond the probability that this would have had in A's absence.¹³ Or A does something that has this effect, at any rate, so long as B is not defiant or otherwise counter-suggestible: so long as B is not willing to suffer extra costs just for the sake of thwarting A's wishes or advice.

Control of this kind may be alien or non-alien. It will be alien if it makes some assumptions presupposed by the choice untrue, or if it leads B to think that they

⁸ Pettit, P., *Made with Words: Hobbes on Language, Mind and Politics* (Princeton: Princeton University Press, 2008), ch. 8.

⁹ Pettit, *Republicanism* (above, n. 4), ch. 1.

¹⁰ Lind, J., *Three Letters to Dr Price* (London: T. Payne, 1776).

¹¹ *ibid.*, 18.

¹² Pettit, P., 'Republican Liberty: Three Axioms, Four Theorems', in Laborde, C. and Maynor, J. (eds.), *Republicanism and Political Theory* (Oxford: Wiley-Blackwell, 2008); Skinner, Q., 'Freedom as the Absence of Arbitrary Power', in Laborde, C. and Maynor, J. (eds.) *Republicanism and Political Theory* (Oxford: Wiley-Blackwell, 2008).

¹³ Pettit, 'Republican Liberty' (above, n. 12).

are untrue. In any choice between options *x*, *y*, and *z*, B has to be able to think, and think rightly, of each option: 'I can do that'. Any form of control will be alien if it makes such an assumption untrue—it may undermine the agent's capacity for choice, or remove or replace an option—or if it leads the agent to think such an assumption is untrue; it may lead the agent to think, for example, that an option has been removed or replaced when this is not in fact so.

The primary example of non-alien control is provided by the case where A sincerely deliberates with B and leaves it up to B to act on or against any advice given. In this case, B retains the capacity to deliberately choose; none of the options facing B is removed or replaced; and B is not intentionally misled by A. That will be so even if A provides B with the information that apart from *x*, *y*, and *z* there is the option of seeking a reward from C for doing *x*, which C would like A to do, and then choosing *x* in the assurance of being able to claim a reward. In this case, B will retain the options *x*, *y*, and *z* and also enjoy the option *x+*: the option of doing *x* and claiming the reward. A may exercise a degree of control over B's choice in each of these cases, raising the probability that B will choose according to A's taste or judgment. But A will not control B in an alien way, undermining B's choice. A will not do this indeed, even if it is A who is in the position of C and the information provided amounts to an offer to reward the choice of *x*. If the offer is not mesmerizing and manipulative, then it will not undermine B's choice between *x*, *y*, and *z*; it will merely add the extra option, *x+*.¹⁴

With the conception of alien control in hand, it seems plausible to say that A will reduce B's freedom to choose between *x*, *y*, and *z* to the extent that A exercises alien control over that choice. Someone who thinks with Bentham that freedom just is the absence of interference may agree with this linkage, on the grounds that the idea of alien control and the idea of interference naturally go together. A may exercise alien control over B's choice by interfering with B, as indeed my characterization of interference makes clear. A may actively manipulate B so as to undermine B's capacity for choice, A may actively remove or replace one of B's options, or A may actively deceive B about the choice situation.

If it is accepted that the antonym of freedom is alien control, however, then there is a plausible case to be made against both the interference-alone and the interference-always thesis. This, as I reconstruct it, is a case that would have made perfect sense to the republican tradition that Bentham spurned.

¹⁴ What if the offer is exploitative, in the sense that it overtly exploits the relative weakness of B and represents an intuitively unfair bargain? If the exploitative offer has no other effects, and is voluntarily accepted by B, then it is better than the refusal to make such an offer. But usually an offer of this kind—say, the offer of a harsh employment contract—will set up a relationship between A and B that is objectionable insofar as it allows the domination that I go on to discuss in the present text.



3. The interference-alone thesis

From the earliest Roman days, the republican tradition insisted that being under the power of a master—*in potestate domini*—meant being un-free, even if that master was quite benevolent and allowed you a great deal of leeway. The kindly master might give you free rein, as a rider might give a horse free rein. But the very fact that there was a rider in the saddle meant that you were not free. Everything you did within the domain of the master's power you did by his leave and under his control; you might make this or that choice and enact it successfully but you could do so only *cum permissu*: only by his leave, only with his permission. The theme is well summarized by the eighteenth century thinker, Richard Price: 'Individuals in private life, while held under the power of masters, cannot be denominated free however equitably and kindly they may be treated.'¹⁵

This republican rejection of the interference-alone thesis becomes intelligible once it is granted that alien control is hostile to freedom. For A may exercise alien control over B's choice even in a case where A does not practice interference. There are two cases where this happens. One involves what I call invigilation, the other inhibition or intimidation.

A will invigilate B's choice between x, y, and z, as I use that term, if A has a power of interfering in the choice, if A intentionally monitors what B is doing or shows signs of doing, and if A is disposed to interfere in the event that B decides to act in an uncongenial way and only in that event. Take the case, then, where invigilation occurs: B decides on a pattern that is congenial to A, and A does not actually interfere. It turns out that even in this case A exercises a form of alien control over B's choice. A exercises alien control over the choice, in other words, without actually interfering in the choice. Invigilation without interference represents a form of control because it makes it more probable, absent defiance, that B will choose according to A's taste or judgment; it guards against the possibility, un-actualized but not impossible, that B's disposition will change. And invigilation without interference represents an alien form of control because it means that at least one of the options of which B had thought 'I can do that' has been replaced by a proviso-ed counterpart; one of the original options, say x, has been replaced by x-provided-A-allows-it.

This shows that for any form of interference that involves alien control—more in a moment on interference that does not involve alien control—there is a sort of invigilation that involves alien control even when it does not lead to such interference. But just as invigilation can instantiate alien control, so can something that I describe as intimidation. Suppose that B becomes aware of A's power of interfering in B's choice between x, y, and z and, more specifically, of A's invigilation of that choice. And now imagine that B does not want to trigger A's interference and

¹⁵ Price, R., *Political Writings*, ed. Thomas, D. O., (Cambridge: Cambridge University Press, 1991), 77.



believes—we may assume, correctly¹⁶—that A will interfere only in the event of B's choosing x. Then B may respond in one of at least two ways, each of which reinforces A's alien control. B may self-censor or self-ingratiate. In self-censorship B takes a self-denying decision to avoid x, thereby ensuring that B acts according to A's taste or judgment. In self-ingratiation B fawns and toadies in a manner that is designed to change A's taste or judgment; while B may thereby manage to choose x, B does so in a manner that makes it certain that the choice will accord with A's (changed) taste or judgment.

As invigilation may occur without interference, so intimidation may occur without invigilation. For suppose that A does not have the invigilatory power to interfere in B's choice but successfully pretends to such power. In that case A may still succeed in raising the probability that B will choose according to A's taste or judgment—at least absent defiance—and A will do so in an alien manner that deceives B. If the option that B takes A to find uncongenial is x, then B will be deceived into believing that it has been replaced by the option x-provided-A-allows-it.

These observations show that the interference-alone thesis is false. For any form of interference that perpetrates alien control, there will be two corresponding ways of exercising alien control without actually practicing interference. One will involve invigilation, the other intimidation.

4. The interference-always thesis

If the republican opposition to the interference-alone thesis is associated with the idea that the kindly master is still a master or *dominus*, the opposition to the interference-always thesis comes out in a common refrain to the effect that the empire of law, unlike the empire of men, is not a dominating regime. Law may impose taxation on all, coerce all with the threat of punishment for disobedience, and impose penalties on those who actually disobey. But still, so the idea goes, such interference may not be arbitrary, and on that account it may not reduce the freedom of those on whom it is imposed.

Blackstone's *Commentaries on the Laws of England*, published in 1765, sums up this long tradition—soon to be challenged by Bentham—in the remark: 'laws, when prudently framed, are by no means subversive but rather introductive of liberty'.¹⁷ The tradition had recognized that natural liberty, sometimes described as license, might be reduced by laws. But the liberty that mattered, civil liberty,

¹⁶ Let this assumption be incorrect and what is ensured is that B will choose, not according to A's taste or judgment, but according to the taste or judgment imputed by B to A. In order to cater for this case, we would strictly need to extend the notion of alien control so that what is made more likely is that B will choose according to A's real or imputed taste or judgment. In order to keep things manageable, I have not introduced this complexity in the text.

¹⁷ Blackstone, W., *Commentaries on the Laws of England* (New York: Garland, 1978), 126.

was established by the laws, and not put in jeopardy by them.¹⁸ Or at least this was taken to be so when the law is not driven by the private passion or interest of particular factions or tyrants: that is, when it does not represent what Locke and others routinely described as an ‘arbitrary power’.¹⁹ Thus Locke himself can comment that ‘the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom’.²⁰

There were many strands of thought bound up in the received, republican idea that good laws do not reduce the freedom of those who live under them, and it had many antecedents, reaching back to Aristotle and Livy. But I think we can make very good sense of the idea, and stay broadly faithful to the tradition, if we start from the equation between freedom and the absence of alien control. Let B’s freedom to choose between x, y, and z require that no one, in particular not A, have alien control over that choice. A may interfere in B’s choice and yet not enjoy such alien control, for A’s interference may be subject to B’s permission. And in that case A’s actual interference with B will not detract from B’s freedom. It will not impose A’s will on B’s behaviour, being ultimately an expression of B’s own will.

This scenario is classically portrayed in the story of Ulysses and the sirens, when Ulysses gives a power of interference to his sailors—they are allowed to keep him bound while the ship passes the island of the siren voices—and they exercise this power in accordance with his wishes. The interference practiced by the sailors is not arbitrary or uncontrolled. On the contrary it is a form of interference that is subject to the check or control of Ulysses himself. Thus the sailors are not his masters, and he does not operate under their power; rather they are his servants, the means by which he imposes his own will upon himself. The sailors operate as devices whereby B exercises self-control, enabling the reason with which he identifies to triumph over the unwelcome passions that he expects the sirens to excite. The sailors are the conduits of that self-control, not the channels whereby an alien will might be given control in his life.

The idea that the laws of a country might be the means whereby the citizens control themselves, and not a means whereby alien control is imposed upon them, recurs in a range of republican writers. James Harrington, the republican opponent of Hobbes, puts the thought as follows: ‘if the liberty of a man consists in the empire of his reason, the absence whereof would betray him to the bondage of his passions, then the liberty of a commonwealth consists in the empire of her laws, the absence whereof would betray her to the lusts of tyrants.’²¹ The empire of laws, in this image, relates to the empire of men—the empire of individuals

¹⁸ Reid, J. P., *The Concept of Liberty in the Age of the American Revolution* (Chicago: The University of Chicago Press, 1988).

¹⁹ Locke, J., *Two Treatises of Government* (New York: Mentor, 1965), 325.

²⁰ *ibid.*, 348.

²¹ Harrington, J., *The Political Works of James Harrington*, ed. Pocock, J. G. A. (Cambridge: Cambridge University Press, 1977), 170.

who pursue their personal advantage or judgment—in the way that the empire of reason relates to the empire of unwelcome passion. Thus the interference of law in the lives of citizens need be no more injurious to their freedom than the interference of his sailors in the life of Ulysses. As the sailors are ultimately controlled by Ulysses, so the laws may be ultimately controlled by the citizens. And as the controlled interference of the sailors does not impose an alien will or control on Ulysses, so the controlled interference of the laws need not impose an alien will or control on the citizens. The regime of laws may be the means whereby the citizens give control to their long-term will for how their affairs should be organized. It may be the means whereby they protect themselves as a body against the threat of personal and factional interests, as the interference of the sailors is the means whereby Ulysses protects himself against the voices of the sirens.

This move from the individual case of Ulysses to the collective case of the citizens is too swift and we return to it in the following section. But I hope that the equation between freedom and the absence of alien control will at least make sense of why the republican tradition should have rejected the interference-always thesis. Alien control will always reduce someone's freedom of choice. But to the extent that interference is subject to the ultimate control of the interferee—to the extent that interference is in that sense non-arbitrary—it will represent a form of self-control, not a form of alien control. And so interference will not always reduce someone's freedom; only arbitrary interference will have that effect.

5. The freedom of the person

We have been discussing freedom in particular choices and have argued for three distinctive theses: first, that freedom is a function of how far alien control is absent; second, that alien control may be present without the presence of interference, as in the case of invigilation or intimidation; and third, that interference may be present without the presence of alien control, as when the interferee is in ultimate control of the process. A given choice will be free just to the extent that it escapes alien control: just to the extent that the agent is not exposed to the exercised or unexercised power of arbitrary interference on the part of another; just to the extent that the agent is not dominated in that choice by that other.

In rounding out the republican view of freedom, we need to add one more element. The tradition did not focus, as I have focused so far, on the freedom of one or another choice but rather on the freedom of a person or a citizen as a whole: on freedom in the sense in which it is the status enjoyed by the 'freeman' of traditional terminology.²² How does the republican idea of the un-dominated person relate, then, to the idea of the un-dominated choice?

²² Skinner, Q., 'Rethinking Political Liberty', *History Workshop Journal*, 61 (2006), 156; Pettit, P., 'Free Persons and Free Choices', *History of Political Thought*, 28 (2007), 709.

There are three claims that enable us to build up a notion of the free person from that of the free choice. The first is that however freedom of the person is understood, it should be a status that is equally available to all citizens. In traditional republicanism, this would have meant a status that is available to all propertied, mainstream males; in neo-republicanism it is bound to mean a status that is available on a more inclusive basis. Take any status that can be made available, then, only to a proper subset of the citizenry. That status may define the privileged status of an elite but it cannot define what it means to be a free person. Freedom in a republic may not be perfectly provided for all members—the society may be less than perfect—but at least it should be a status that is capable in principle of being equally provided for all.

The first claim gives expression to the fact that republicanism is a theory of freedom for people in society—in traditional terms, a theory of civil rather than natural liberty—and that it conceptualizes freedom as something that can be equally enjoyed by all. The second and third claims spell out the implications of that first claim, on intuitively plausible lines. The second says that the free person must be protected in the same choices as others and the third that the free person must be protected on the same basis as others.

The second claim, more specifically, is that the freedom of the person has to involve a freedom to exercise choice over a domain where others can be simultaneously and equally free to exercise choice and, plausibly, over a domain that is not unnecessarily restricted. Assuming that the choices in this commonly protected domain are rich enough to provide the basis of a full life, they can be described, in a traditional phrase, as the basic liberties.²³ The specification of the basic liberties may vary somewhat from society to society, since local, variable conventions—for example, conventions governing titles to property and rights of ownership—may play a role in identifying choices that can be equally protected for all. But in any society that can claim to provide for the freedom of persons, there has to be an identified domain of choice, and one that is not unnecessarily restricted, in which each can expect to be equally protected with others.

The third claim that relates the notion of the free, un-dominated person to the free, un-dominated choice is that not only must the free person be protected in the same choices as others, he or she must also be protected on the same, robust basis. Did the basis of protection vary between individuals, then the equality that is built into the notion of the free person would be jeopardized. There might be equal protection provided at a given time but the equality of the protection would be highly contingent. The common basis of protection in the republican tradition is provided, of course, by the rule of law as exercised by an impartial government, operating under the control of the citizens. In Harrington's words, it is a law 'framed by every private man unto no other end (or they may thank themselves)

²³ Pettit, P., 'The Basic Liberties', in Kramer, M., Grant, C., and Hatzistavrou, A. (eds.), *The Legacy of H. L. A. Hart* (Oxford: Oxford University Press, 2008).



than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth'.²⁴

One final query. A choice will be free insofar as it is not subject to the alien control of another. A person will be free, I have just suggested, insofar as he or she is protected on the same basis and in the same choices as others. But what do we say, then, of the person who enjoys that same protection but is exposed, by sheer bad luck, to the alien control of another: say, the control of the criminal offender? The obvious response will be to say that while the victim may continue to count as a free person, even as the criminal imposes an alien will, still the freedom of that particular choice is certainly compromised. The victim will continue to count as a free person to the extent that it can seem like bad luck, not the result of poor protection, that the offence took place. The status of the victim as a free person may only be fully vindicated, of course, if the offender can be apprehended and exposed to measures that help to rectify the crime.²⁵

III. Law

1. The question

On a theory of liberty as non-interference, such as Bentham adopted and popularized, it is inevitable that law will detract from the liberty of citizens; it will interfere with them in coercing them to do or not to do certain things, in imposing levies and taxes, and in applying sanctions to offenders. The benefits it creates by these means may compensate for the fact that it itself represents a form of interference but they cannot cancel it out. On a theory of liberty as non-domination, however, there is a possibility that law may not assume this hostile profile. Law may help to secure for people the sort of protection that establishes them as free persons or citizens. And in doing this it may not detract from their freedom of choice. It will interfere and restrict people's freedom of choice, of course—most dramatically in the case of imprisonment. But it may do this without imposing an alien will; it may restrict choice on a controlled and non-arbitrary basis, and may not represent a form of domination.

Abstract possibilities are one thing, however, realistic prospects another. And the question that we must face in this section is whether there is a realistic possibility that law might not be arbitrary and dominating.

The discussion so far may seem to make this unlikely. Under republican theory laws are given the task, no doubt in combination with suitable norms, of

²⁴ Harrington, J., *The Commonwealth of Oceana and A System of Politics*, ed. and trans. Pocock, J. G. A. (Cambridge: Cambridge University Press, 1992), 8.

²⁵ Braithwaite, J. and Pettit, P., *Not Just Deserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990); Pettit, P., 'Republican Theory and Criminal Punishment', *Utilitas*, 9 (1997), 59.



providing for the freedom of the persons who live under it. They are meant to protect citizens on the same basis and in the same domain of choice and to protect them, not just against uncontrolled interference, but also against the corresponding forms of invigilatory and intimidatory control. But if laws are to achieve such an end, they have to be highly intrusive.

The protection that has to be provided will establish a dispensation of enforceable rights, like any legal system, but it is also likely to require a regime in which people are assured of certain powers and options that might otherwise be unavailable. The cause of protecting workers in the sort of labour market associated with industrial capitalism, for example, is likely to require not just the right not to be fired at will but also the power of organizing in unions and the option of leaving an abusive workplace and living on social security. The cause of protecting women in a masculinist culture is going to require not just the right to divorce a husband but also the power to call in the police against a violent partner and the option of living in a refuge for victims of abuse. The cause of protecting an ethnic minority is likely to require not just the right to lodge a case against discrimination but also the power of organizing as a group and, in some cases, the option of living under a special form of jurisdiction or government.

Given that the law is expected to achieve ends of these kinds, the question as to whether it can be expected to avoid domination becomes quite pressing. How might law adopt such an interventionist profile and yet not be arbitrary and dominating?

2. Two inadequate answers

One answer that may seem to be supported in the older republican literature is that law cannot be dominating because it is not the work of an intentional agent but the product of an impersonal process. The idea would be that whatever restrictions it imposes, therefore, are as non-intentional and so as un-dominating as the restrictions imposed by natural obstacles. That, it may be said, is the message of Harrington's insistence that the empire of laws is not an empire of men. And it may be taken to be the lesson underlined by the contrast that is often drawn, as for example in Mary Astell, between the 'standing rule' of the law and the 'inconstant, uncertain, unknown, arbitrary will of men'.²⁶

I do not think that this answer is ever seriously entertained in the republican literature. Although he makes much of the empire of law as distinct from the empire of men, for example, Harrington still insists, as we saw, that the law is framed by private men.²⁷ But in any case the answer will not work. The problem

²⁶ Hill, B. (ed.), *The First English Feminist: 'Reflections upon Marriage' and other writings by Mary Astell* (New York: St. Martin's Press, 1986), 76. The view, applied to common law, also surfaces in the writings of some libertarian authors. See for example Hayek, F. A., *The Fatal Conceit: The Errors of Socialism*, ed. Bartley, W. W. (III) (Chicago: The University of Chicago Press, 1988).

²⁷ Harrington, *The Commonwealth of Oceana and A System of Politics* (above, n. 24), 8.

is that while laws may emerge as a result of rivalry between houses of parliament, or as a precipitate of custom and court interpretation, still they are by all accounts the achievements of a State. And the State is an agent, albeit of a corporate kind. Thus it is held accountable to a discipline of reason, both internationally and by its own citizens, in a manner that will make no sense unless it is treated as having the status of a legal person and, *a fortiori*, an agent.²⁸ In particular, it is an agent that can be held accountable for the laws it maintains. If those laws are uncontrolled by those on whom they are imposed—if, in that sense, they are arbitrary—then they represent the domination of the State in the lives of its citizens.

The failure of this first answer, however, may suggest another. It may seem that if the citizenry or people as a whole control the laws that the State imposes, then those laws, being controlled by those on whom they are imposed, will not be arbitrary. Like the intrusions of the sailors that Ulysses licenses, they will be restrictions that the relevant interferences themselves authorize and welcome.

But this answer isn't satisfactory either. It supposes that the people is itself a corporate agent and that, as such, it controls the interference in the lives of individual members that the State perpetrates; it will do this, most obviously, if State and people are taken to be one and the same body. But even if the people are an incorporated agent, the fact that that body licenses the laws imposed on members does not necessarily protect members themselves against domination and does not ensure their individual liberty; at most it ensures the liberty of that corporate body as a whole. The challenge was to show why the laws imposed by a State need not count as uncontrolled and arbitrary from the point of view of the people, taken severally. It is no response to that challenge to argue that from the point of view of the people, taken collectively, they need not count as uncontrolled and arbitrary.

3. Breaking down the question

In order to confront the challenge raised, it may be useful to break down the question into more specific issues. A first issue, then, is this: Does the very fact that people are born into a coercive State, without any question of choice on their part, mean that they are subject to domination, having to undergo a regime of coercion that they do not control? No, clearly, it does not. No one is forced to live under any form of dispensation just by virtue of not having chosen to enter it. All that will be required for membership to be voluntary is that people can choose to exit. Indeed the right of exit looks to be the crucial thing. A choice of

²⁸ McLean, J., 'Personality and Public Law Doctrine', *University of Toronto Law Journal*, 49 (1999), 123; McLean, J., 'Government to State: Globalization, Regulation, and Governments as Legal Persons', *Indiana Journal of Global Legal Studies*, 10 (2003), 173.

entry without a choice of exit, as in the slave contract, is consistent with a regime of unqualified domination. A choice of exit is necessary as well as sufficient (it seems) to establish membership as voluntary.

To turn to a second issue, then, can the members of a coercive State have the right of exit? To this question the answer is clearly, yes. The bulk of democratic States already give their members the choice of exit, as in allowing them to emigrate. And that might seem to establish that those who do not choose to emigrate choose instead to stay where they are.

But this, of course, is wrong. For while democratic States routinely give their members a right of exit, this right amounts to little in practice. Other States need not give those who want to leave one State a right to enter them. And, worse still, there is no possibility of emigrating to a State-less territory that is free of coercive law. The Earth's habitable surface has been divided up without remainder between States. Rousseau said that man is born free and is everywhere in chains—everywhere bound in the chains of law. The truth is that not only are people everywhere in chains, they are everywhere born in chains; there is no such thing as a State-less, uncoerced existence. Call this the fact of territorial scarcity.

Does this fact mean, to turn to a third issue, that people are dominated by other factors, even as their own State gives them the choice of exiting? Surely not. It is a brute fact or historical necessity—an obstacle created by nature—that there is no State-less territory available, and people cannot be dominated by such an obstacle; it is not one that is intentionally or quasi-intentionally imposed by any agent or agency. Nor are people dominated by the States that do not give them a right of entry. Entering another State is not a default option that is taken away from them by the State's boundary, at least not under realistic assumptions about people's baseline alternatives.

But now, to turn to a fourth issue, does the fact of territorial scarcity mean that more is required of the non-dominating State than just that it should provide a right of exit to its members? And the answer to this question is certainly, yes. For a coercive State might exploit the fact that other States are loathe to grant entry to its own citizens—or that other States are even less attractive destinations for emigrants—to impose laws that are intuitively arbitrary and dominating. So the non-dominating State must do something to establish its credentials over and beyond granting a right of exit.

What then, to raise the next issue, should the State do? I shall assume that it cannot feasibly exempt unwilling members from its laws, dealing in a different way with those in the territory who identify sufficiently to endorse membership, and those who do not. And I shall assume that, consistently with caring about freedom as non-domination, it cannot give special privileges to such unwilling members; this would mean that the privileged were well placed to dominate the underprivileged. So what can the State hope to do, then, in order to vindicate a claim not to dominate its citizens?

4. The abstract answer

Once the question is cast in this specific way, the answer becomes fairly clear. In order for the State's coercive laws not to be dominating, it must be the case that the people collectively control the formation of law; that is what gives appeal to the second inadequate answer that I mentioned earlier. But it must also be the case that this collective control of the law does not leave any members of the collectivity out. Assuming that membership is inclusive—by whatever intuitive criterion of inclusion is preferred—all members must share equally in this collective control. An equal share in collective control will give each member the highest possible level of control over the law, consistently with no one being given less than that level. Thus it will give members a level of control such that no one can complain of being treated in a way that neglects their will, as dominating overtures neglect their will. It will enable them each to think that in this less than perfect world—in this world of territorial scarcity—they have all the control over law that is required for them to regard the law as a form of interference that is non-arbitrary and un-dominating.

This way of developing republican thought fits quite well with the established points of emphasis in the tradition. It respects the emphasis on the role of the people as the source of political power and the unflagging disdain for colonial or dictatorial forms of government. And equally it respects the view that giving the people power does not mean opening up the gates to a tyranny of the majority, an elective despotism. But the abstract answer may prove unsatisfying in itself. It will mean nothing unless we can say something about how it might be institutionally realized.

5. Making the answer concrete: invoking the public interest

There are a number of conceivable ways in which the collective people might be given an equally shared power over the laws, and more generally the policies, its government implements. But one salient candidate, and one with a powerful republican pedigree, would be to identify a common good or public interest, avowed in common by all, and to establish a process whereby that interest would dictate the policies to be put in force. If there is a plausible conception of the public interest, and a feasible means of giving the public interest the required control over law-making, then there will be some hope of establishing a regime where the laws are not arbitrary and government does not represent a form of domination over individual citizens.

The notion of the public interest or the common good has not had a very good press in recent thought. But this is mainly because it is assumed that if there is such an interest, then it has to consist in an overlap between antecedent private interests. It has to consist in the X-interest shared amongst individuals who have different bundles of interests that they might want the State to satisfy, all of which

include an interest in X. No matter how we conceive of interests, there is no guarantee that there will be a substantive overlap between private interests amongst the members of a pluralistic society. And even if there is such an overlap at any moment, there is no guarantee that it will not oscillate over time, as individuals change their tastes or views, or as the collection of individuals who constitute the society alters with birth, death, and migration.

The overlap conception may seem to be supported by the fact that the public interest, on any plausible account, has to involve something that affects the concerns of individuals. There can't be a difference, intuitively, between the public interest of a society at two different moments without a difference in how members are likely to be affected at those two times. This observation applies a principle of normative individualism according to which something makes for an improvement in social and political life only if it makes for an improvement in the lives of individuals.²⁹ But normative individualism or personalism does not give exclusive support to the overlap conception of the public interest. There is an alternative family of conceptions that is equally satisfactory on this score. They represent a convergence as distinct from an overlap conception of the public interest.

According to a convergence conception, there will be a public interest defined for any society under three plausible assumptions:

1. There are certain domains where everyone would prefer that a single policy be collectively and coercively implemented to nothing's being done by government.
2. There is a constraint such that, special interests aside, everyone would prefer that of the candidate policies in any domain, only one of those that satisfy it be implemented.
3. There is a procedure such that, special interests aside, everyone would prefer that of the policies still remaining in any domain, only the one that satisfies it be implemented.

There are many different potential areas of policy-making and law-making, and the idea here is that in at least a number of those domains, there will be grounds for why some will count as universally acceptable policies and laws. Or at least as policies and laws that are acceptable to everyone, special interests aside. I shall assume that special interests will be put aside amongst individuals who refuse to claim special exemptions and privileges under the laws to be established—amongst individuals, in effect, who are reasonable enough to be willing to deal with others on equal terms.³⁰ This qualification will not block some people from claiming that there is a reason why they should be treated differently in some

²⁹ Kukathas, C. and Pettit, P., *Rawls: 'A Theory of Justice' and its Critics* (Stanford: Stanford University Press, 1990).

³⁰ Rawls, J., *Political Liberalism* (New York: Columbia University Press, 1993).

respect, provided that that reason can be recognized by all, even those whom it does not favour, as having a certain relevance. But it will block them from making a claim to special treatment on grounds that others cannot be expected to countenance.

All convergence conceptions of the public interest have to agree in assuming, as in the first clause, that in certain domains, everyone prefers that there be a collectively, coercively enforced policy than that nothing is centrally done. This assumption posits the reality of what, altering standard usage, I shall call public goods: specifically, goods that the market cannot be expected to generate on a decentralized basis and—this is where I introduce an alteration—goods that can be produced at a satisfactory level by government. Plausibly, these will include goods like external protection, internal order, and a property dispensation: goods, as we can see them, that are required for ensuring the enjoyment of freedom as non-domination amongst the populace.

Different convergence conceptions of the public interest may differ in their vision of public goods and in their version of the first, public-goods assumption. But, more likely, they will differ in the versions of the second and third assumptions that they defend. Here I shall sketch and support a convergence conception of the public interest that we might describe as deliberative, since it draws on a core idea in theories of deliberative democracy.

6. The deliberative conception of the public interest

The core idea, endorsed amongst a wide range of contemporary thinkers, is that there are certain considerations bearing on matters of public policy that all can recognize as relevant to the question of which policy should be implemented, even if the considerations are given different weightings in different circles.³¹ According to Gutmann and Thompson ‘we can define deliberative democracy as a form of government in which free and equal citizens (and their representatives), justify decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of reaching conclusions that are binding in the present on all citizens but open to challenge in the future.’³² The idea that I borrow from this approach is that there are mutually acceptable reasons—reasons that prove in deliberative practice to be mutual acceptable—that can be invoked on all sides in the democratic discussion of government policy.

The deliberative idea is not outlandish, since the existence of mutually acceptable reasons for policy-making is evident in the fact that even as we build

³¹ Bohman, J. and Rehg, W. (eds.), *Deliberative Democracy: Essays on Reason and Politics* (Cambridge, MA: MIT Press, 1997); Elster, J. (ed.), *Deliberative Democracy* (Cambridge: Cambridge University Press, 1998).

³² Gutmann, A. and Thompson, D., *Why Deliberative Democracy?* (Princeton: Princeton University Press, 2004), 7.

dissensus in democratic societies, we do not come to blows or just resign ourselves to difference.³³ We continue to find considerations that we put before our opponents, confident that even if those reasons do not carry the day, they will not be laughed out of court as simply irrelevant. Those reasons will have much in common across democratic societies, since democracy requires inclusive and equal membership, but they may still vary significantly from one democratic culture to another; they may reflect differences in historical traditions and tastes, say in respect of the rights associated with ownership, or the titles on which ownership may be claimed.

I apply the deliberative idea in developing a version of the convergence approach to the public interest that casts the assumptions as follows:

1. There are public-goods policies in any domain such that everyone would prefer that one of them be collectively and coercively implemented to nothing's being done by government.
2. Only a proper subset of public-goods policies will satisfy the constraint of mutually acceptable reasons in any domain and, special interests aside, everyone would prefer that one of those policies should be implemented there rather than one of the policies that fail it.
3. Only a certain number of procedures for choosing between remaining policies will satisfy the constraint of mutually acceptable reasons and, special interests aside, everyone would prefer that one such procedure be established—on a similarly acceptable basis—and that a policy that is selected by that procedure should be implemented rather than any alternative.

Is this a plausible conception of the public interest? The question divides into two. First, are the individual assumptions it incorporates likely to be true? And second, is the conception of the public interest they define one that fits naturally with our intuitions?

To the first sub-question, I think that the answer is, yes, though I cannot argue for it in full. The first public-goods assumption is almost universally endorsed in

³³ Rawls, J. *The Law of Peoples* (Cambridge, MA: Harvard University Press, 1999) may often have such reasons in mind when he speaks of public reasons and my ideas have clearly been influenced by his discussion. See too Cohen, J., 'Deliberation and Democratic Legitimacy', in Hamlin, A. and Pettit, P. (eds.), *The Good Polity: Normative Analysis of the State* (New York: Basil Blackwell, 1989), 17. I prefer to speak of commonly accepted reasons, emphasizing points that are not made in Rawls and might even be rejected by him: first, that they are generated as a by-product of ongoing debate; second, that they are relevant to such debate, no matter at what site it occurs, private or public, informal or formal; and third that in principle common reasons that operate in a society, or even in the international public world, may not be reasons that carry independent moral force: we may disapprove of their having the role they are given in debate. The language of common reasons, as used here, may be more in the spirit of Habermas than Rawls. See Habermas, J., *A Theory of Communicative Action*, Vol. 1 (Cambridge: Polity Press, 1984); Habermas, J., *A Theory of Communicative Action*, Vol. 2 (Cambridge: Polity Press, 1989); and Moon, J. D., 'Rawls and Habermas on Public Reason', *Annual Review of Political Science*, 6 (2003), 257. I am grateful to Tim Scanlon for discussion on this point.

contemporary political thought. And among those who endorse that assumption no one is likely to lodge a complaint about the idea embodied in the other two: that is, about the proposal to implement all and only those public-goods policies that are consistent with mutually acceptable reasons and that are selected from among other such policies by a procedure that is itself consistent with mutually acceptable reasons. Since mutually acceptable reasons are the very reasons that people must and do invoke in complaints about government policy—or at least in complaints that they may expect command a hearing—it is hard to imagine that they might not prefer, special interests aside, that policy-making be directly or indirectly shaped by such reasons.

What to do, it may be asked, when there are a number of procedures that might be used to select the winning policy in a given domain, when all are consistent with mutually acceptable reasons, but when one suits one faction, one another? Here too there is a fairly compelling answer, encoded in the assumption about ‘a similarly acceptable basis’. This is that there will be a further procedure available for choosing between those procedures—at the limit, this may be a lottery³⁴—which is itself consistent with mutually acceptable reasons.

To turn now to the second sub-question, do the three assumptions give us an intuitive conception of the public interest? I believe they do, though once again I cannot argue for that answer in full. Disagreement is inherently associated with pluralistic democracy, so that there is little or no hope of finding a stable overlap between people’s private interests. Nevertheless, people do continue to argue with one another about what they ought to do together—they do not just come to blows or resign themselves to their differences—finding considerations that they equally recognize as relevant. And yet people do not themselves manage to generate consensus out of that argument, since they may weight those considerations differently or apply them on the basis of different empirical assumptions. In these circumstances—the circumstances of democratic politics³⁵—the only possible basis on which to identify public-interest policies is as those policies that are not ruled out by mutually acceptable, commonly accepted reasons and that are selected for implementation by procedures that are not ruled out by such mutually acceptable, commonly accepted reasons.

7. The answer in public-interest terms

I have said absolutely nothing about the institutional means—the democratic and constitutional means—whereby the public interest, deliberatively understood, might be given a significant degree of control over public policy-making.

³⁴ A more plausible alternative might derive from the pre-established understanding that it is reasonable to have a parliamentary majority decide which procedure to use, thereby privileging the party or parties in power. Other alternatives include referral to an independent committee, or to a statistically representative body assembled for the purpose, or to a popular referendum.

³⁵ Waldron, J., *Law and Disagreement* (Oxford: Oxford University Press, 1999).

All that I have assumed is something built into the way the deliberative conception is developed: that the public interest has to be defined on the basis of an active enterprise of democratic discussion and contestation amongst the citizenry and so that it requires institutions that make room for such deliberative processes. On this conception, there is no question as to whether people are likely to stand behind the public interest and seek to have it imposed on government. The public interest is identified with those policies that are supported by criteria of selection—the commonly accepted reasons—that are implicitly ratified in the basis on which people question and assess the doings of government.

But though I have said nothing substantive on how to institutionalize the public interest, deliberatively understood, it does not seem outlandishly utopian to assume that things might be organized so that a polity does quite well in this regard. And the final issue, then, is this: Does the fact that a polity empowers the public interest in this way mean that the laws and other measures it imposes on the citizenry are controlled by them on an equally shared basis? Assuming that our abstract answer to the question about law is correct, does it mean that those laws and measures are non-arbitrary and non-dominating?

I claim that it does. Let the public interest rule, and we let an interest rule in which each member of an equally inclusive, contestatory democracy is invested; it is an interest implicit, after all, in the way that discussion and contestation is conducted amongst such members. Let the public interest rule, then, and we let the public rule. More specifically, we let a public rule in which each can claim an equal part, being equally party to the acceptance of the reasons by which that interest is defined. If the public rules in this sense, then members of the public can see the laws imposed as the laws selected by criteria in the ratification of which they are fully and equally complicit. They can see the laws, not as affronts to their freedom as non-domination, but rather as constraints that are sourced, like the actions of Ulysses' sailors, in their own will. They will be positioned, in the words quoted earlier from Harrington, to see the laws as 'framed by every private man unto no other end (or they may thank themselves) than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth'.³⁶

IV. Conclusion

Suppose that the classical liberal view that Bentham put in place is sound. In that case, we may find reasons for thinking that the constitution that operates in a society should be constrained in one or another manner: that it should establish electoral democracy, for example, or entrench certain personal rights. But we may well have to look for such reasons in considerations that derive from other sources

³⁶ Harrington, *The Commonwealth of Oceana and A System of Politics* (above, n. 24), 8.

than a concern for freedom. All that freedom as non-interference may clearly require of the constitution, and in particular of coercive law, is that it prevent more infringements against freedom as non-interference than the infringements that it itself imposes. It is for this reason that Paley acknowledges that the best constitution for the promotion of liberty as non-interference may be one that establishes a benevolent despot in power.

If the republican view is sound, however, then things look very different. Considerations of liberty will provide a case for a constitutional and legal regime that enables people to claim the status of free persons in relation to one another. And though the regime required will license quite a rich form of intervention in civic life, providing for the protection of people against all forms of alien control, considerations of liberty will also argue for constraining the regime in important ways. They will make a case for embodying constraints within the regime that help to make its imposition on citizens assume the profile of a controlled, non-arbitrary form of interference in their lives.

Considered in this light, republican theory can be cast as a research program for constitutional and legal design. It holds out the ideal of a regime that protects people from domination without itself being a dominating force in their lives. It offers an account of the desiderata and constraints that such a regime must satisfy. And it does all of this, without requiring us to endorse anything richer than a well-established conception of what freedom involves. These benefits surely argue for rethinking the Benthamite view of law and liberty. It has prevailed too long.