

Disability and Domination: Lessons from Civic Republicanism

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Forthcoming in
JOURNAL OF APPLIED PHILOSOPHY

Abstract: *The republican ideal of non-domination identifies the capacity for arbitrary interference as a fundamental threat to liberty that can generate fearful uncertainty and servility in the dominated. I argue that republican accounts of domination can provide a powerful analysis of the nature of legal and institutional power that is encountered by persons with mental disorders or cognitive disabilities. In doing so, I demonstrate that non-domination is an ideal which is pertinent, distinctive, and desirable in thinking through psychological disability. Finally, I evaluate republican strategies for contesting domination, with a focus on the limits of contestatory democracy, which I claim is insufficiently participatory and exacerbates deficits of political agency in the mentally disordered and cognitively disabled.*

I

It has become commonplace to think that disability is political and not merely a medical or personal matter. The influence of ‘social models’ of disability has encouraged us to recognise that socio-political factors are often prominent in the aetiology of disabilities and in the very construction of the categories of impairment and disablement.¹ But disability is also political in a more familiar sense: it can dramatically affect the extent to which someone is subject to the power of others. This is especially pronounced for those deemed to have a mental disorder or cognitive disability. States claim the authority to detain, treat without consent, and decide on behalf of many such people, and they can be particularly vulnerable to informal institutional and interpersonal power. How then should we think about the ethical and political standing of persons with mental disorders and cognitive disabilities?²

Consider some examples from the past few years. After feeling suffocated by an institution where she cannot escape the attention of staff, a young woman with physical, cognitive, and developmental disabilities later reflects on “the damage that is done right down to your soul, by living under the power of other human beings.”³ A man who has congenital brain damage gets into significant debt, and his family takes his bank to court

¹ For an overview of social models and their limitations, see Tom Shakespeare, *Disability Rights and Wrongs* (Oxford: Routledge, 2006), chs. 2-4.

² For a more general discussion of cognitive disability and moral status, see Eva Feder Kittay and Licia Carlson (eds.), *Cognitive Disability and Its Challenge to Moral Philosophy* (Oxford: Wiley-Blackwell, 2010).

³ Mel Baggs, ‘What Makes Institutions Bad’, *Ballastexistenz*, January 23, 2012, <https://ballastexistenz.wordpress.com/2012/01/23/what-makes-institutions-bad/>.

claiming that he should not have been given a loan and credit card.⁴ When a woman with early onset dementia is nearly run over after walking out of her nursing home, its staff seek authorisation to stop her from leaving again.⁵ While doctors want to treat the cancerous lump in the throat of a prisoner who they claim has paranoid schizophrenia, he refuses physical treatment and denies he is mentally unwell.⁶ It is easy to feel torn between two conflicting ethical impulses in many such cases: to countenance interventions that would seek to safeguard these individuals' health and wellbeing, and to respect their wishes by letting them be.

Of course, these ethical issues do not unfold in a vacuum, but within a juridical context. In common law jurisdictions, the relevant laws typically take two forms: mental health legislation permits those suspected of being mentally disordered to be assessed, detained, or treated for that disorder without consent, if they are deemed to be a danger to themselves or others; whereas, mental capacity legislation permits certain decisions to be made in the best interests of those who as a result of a mental impairment are deemed unable to make the decisions for themselves.⁷ But the important ethical and political

⁴ 'Banks Sell Loans to Vulnerable', *BBC News*, August 1, 2005, http://news.bbc.co.uk/1/hi/programmes/real_story/4728741.stm.

⁵ Jo Liveston, 'What Social Workers Should Know About the Mental Capacity Act', *The Guardian*, March 14, 2014, <http://www.theguardian.com/social-care-network/social-life-blog/2014/mar/14/social-workers-mental-capacity-act>.

⁶ 'Mentally Ill and Refusing Surgery', *Inside the Ethics Committee*, BBC Radio 4, <http://www.bbc.co.uk/programmes/b00t1xsx>.

⁷ For discussion of the current state of the legal debate on these issues, see Genevra Richardson, 'Mental Disabilities and the Law: From Substitute to Supported Decision-Making?', *Current Legal Problems* 65:1 (2012), pp. 333-54.

questions here encompass not only whether such laws are legitimate, but what the implications of legal and sublegal power alike are for the freedom, agency, and civic status of persons with cognitive or psychosocial disabilities.

The civic republican tradition remains an almost-entirely untapped resource for addressing such questions.⁸ I will demonstrate how the republican ideal of non-domination enables the identification of significant threats to liberty, agency, and equal status that are routinely faced by persons with psychological disabilities. Republicanism will also be seen to suggest remedies to domination – particularly through contestatory mechanisms, which can be tailored to the context of mental health and cognitive disability. However, in this respect, I also argue that the dominant republican framework of contestatory democracy is flawed, and suggest that a more participatory republicanism may be better suited to combatting the domination encountered by people with psychological impairments.

I shall begin by outlining the concept of domination and showing how it can illuminate legal (§II) and sublegal regulation of disability (§III). This will allow us to consider and rebut three key objections to republican accounts of domination in the context of psychological disability, which concern whether the ideal of non-domination is redundant when dealing with mental impairment (§IV), not sufficiently distinct from negative liberty (§V), or overvalues independence (§VI). Finally, I articulate a republican

⁸ Promising preliminary discussions in law and disability studies include Lucy Series, *The Mental Capacity Act 2005 and the Institutional Domination of People with Learning Disabilities* (Exeter: University of Exeter, 2013), ch. 2; David Hewitt, 'A Different Way of Thinking About Liberty', *Elder Law Journal* 2 (2013), pp. 186-93; Jurgen De Wispelaere and David Casassas, 'A Life of One's Own: Republican Freedom and Disability', *Disability & Society* 29:3 (2014), pp. 402-16.

strategy for combatting domination, with a focus on contestatory democracy (§VII). I claim it is insufficiently participatory and exacerbates deficits of political agency in the mentally disordered and cognitively disabled, and that this should provide the impetus to reevaluate more participatory forms of republicanism (§VIII).

II

Domination is a key concept in republican political philosophy.⁹ At its simplest, it consists in arbitrary power. On the most influential account, an agent dominates another to the extent that:

1. they have the capacity to interfere
2. on an arbitrary basis
3. in certain choices that the other is in a position to make.¹⁰

Two features of this republican ideal of non-domination are especially noteworthy.

Domination has a *modal* articulation: even in the absence of actual interference, the ability to interfere arbitrarily can subject people to domination. The classic example is that of slaves who have avoided interference because their masters are sufficiently kindly or amenable to flattery. That the masters *could* at any point have the slaves dragged kicking and screaming to be beaten bloody, if they should so decide, leads republicans to conclude that political liberty is absent nonetheless. Republicanism captures this plausible

⁹ Quentin Skinner, 'Freedom as the Absence of Arbitrary Power', *Republicanism and Political Theory*, Cécile Laborde and John Maynor (eds.) (Oxford: Blackwell, 2008), pp. 83-101; Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Frank Lovett, *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010).

¹⁰ Pettit, *Republicanism*, p. 52.

intuition while also identifying two related harms that the sheer capacity for arbitrary interference can bring in its wake: a fearful uncertainty as to whether one will continue to evade intrusion, and a servility towards the powerful that the attempt to do so can engender.

Furthermore, domination only stems from a capacity for *arbitrary* interference. Neoroman republicans most often understand the arbitrariness of power as the extent to which it fails to be controlled to ensure that it respects the politically avowable interests of those over whom it is exercisable.¹¹ For an interest to be politically avowable, it must be consistent with living under a shared scheme of governance that does not privilege particular groups or individuals.¹² Thus, most republicans claim that to the extent that power can be reliably kept in check, such that it respects these interests, then it will be non-arbitrary, and so neither dominating nor thereby a fundamental threat to people's equal status as citizens.

Domination has not been a significant category in philosophical, political, or legal discussion of disability.¹³ In this respect, republican liberty is overshadowed by negative liberty. To take one of countless examples, Lord Kerr succinctly asserts the orthodox negative liberty position in a recent landmark legal judgement on disability: "Liberty

¹¹ The main republican alternative to this 'substantive' account takes non-arbitrariness to consist in the 'procedural' constraints on power imposed by measures such as the rule of law. See Frank Lovett, 'What Counts as Arbitrary Power?', *Journal of Political Power* 5 (2012), pp. 137-152.

¹² Pettit, 'Republican Freedom and Contestatory Democratization', p. 176.

¹³ For one prominent example of domination in the context of disability and republican thought, see Amartya Sen, *The Idea of Justice* (Cambridge, MA: Harvard University Press, 2009), p. 306-7. For non-republican discussion of domination and disability, see Eva Feder Kittay, *Love's Labor: Essays on Women, Equality, and Dependency* (New York: Routledge, 1999), p. 34f.

means the state or condition of being free from external constraint.”¹⁴ Republican liberty, in contrast, is not narrowly focused on the absence of constraint: its proponents emphasise the additional threat to freedom posed by non-actualised arbitrary power, as well as the relative innocuousness of actualised non-arbitrary power.

The arbitrary power encountered by persons with disabilities arises from both legally authorised authority and less formal regulation of behaviour by institutions, families, and carers. The inclusion of legal authority here may seem amiss since the fact authority is legal can suggest there is no arbitrariness: that the rule of law is operative and not the unchecked will of an individual agent. Indeed, the opposition between law and domination has been a mainstay of republican thought, whereby the law is the foremost guardian against the kind of intrusion of private interest or unconstrained personal judgement into political affairs that can make for a state of domination. This is seen most clearly in James Harrington’s famous characterisation of proper government as “the empire of laws and not of men”.¹⁵ Similarly, some contemporary republicans advocate procedural accounts of non-domination – which take it to consist of no more than the reliable constraint of social power by means of rules or other procedures that are common knowledge – thereby strongly associating the rule of law with non-domination.¹⁶ The rule of law is said to enable citizens to “know exactly where they stand” with respect to social power, and so “develop plans of life based on reliable

¹⁴ *P v Cheshire West & Chester Council; P & Q v Surrey County Council* [2014] UKSC 19, §76.

¹⁵ James Harrington. *The Commonwealth of Oceana and A System of Politics*, J. G. A. Pocock (ed.) (Cambridge: Cambridge University Press, 1992 [1656]), p. 8.

¹⁶ Lovett, ‘What Counts as Arbitrary Power?’, pp. 139-40.

expectations” about its exercise.¹⁷ When the law speaks clearly and is enforced consistently, this undermines the motivation for servility, since gaining the favour of the powerful would grant no influence over a legally circumscribed matter.

Yet, even presupposing a minimal procedural account of domination – without the substantive requirement that power track the avowable interests of those subject to it – there are grounds to doubt whether the authority established by mental health and capacity legislation is necessarily non-dominating. The first such reason is that this authority typically takes the form of legal powers rather than duties, which means that those able to act under this authority can decide not to do so. Thus, when there are capacious powers to detain, treat without consent, or make other decisions for people, then many individuals can come to rely on the discretionary forbearance of healthcare and social workers. This can breed relationships of dependence and domination, irrespective of whether these powers are legal and common knowledge.

The second reason is that key provisions in mental health and capacity law are ambiguous or uncodified. For example, legal scholars have decried the “considerable flexibility in the interpretation of mental capacity” which courts exploit to “enable them to reach their preferred outcome”.¹⁸ Similarly, empirical research has found that judges often substantially disagree about what the proper legal threshold is for a mental health

¹⁷ Lovett, ‘What Counts as Arbitrary Power?’. p. 147. For further discussion of rule of law as integral to republican liberty, see Christian List, ‘Republican Freedom and the Rule of Law’, *Politics, Philosophy & Economics* 5 (2006), pp. 201-20.

¹⁸ Genevra Richardson, ‘Mental Capacity in the Shadow of Suicide: What Can the Law Do?’, *International Journal of Law in Context* 9:1 (2013), pp. 87-105 at pp. 90-1.

patient to be posing a sufficient danger to others to warrant mandatory hospitalisation.¹⁹ This suggests that legal constraints on social power in the context of psychological impairment do not necessarily generate reliable expectations about its exercise. Therefore, the lawfulness of authority over the psychologically impaired does not guarantee that it serves the ends of non-domination.

III

Law is far from the only source of domination over those with psychological impairments. Other social authority can also constitute arbitrary power, and the support needs of many people with mental disorders and cognitive disabilities can make them especially susceptible to less formal social pressures. This can be further compounded by finding oneself in an institutional environment or familial structure with a set of expectations and routines that solicit conformity and compliance.²⁰ The result is often a phenomenon I shall call ‘micro-domination’: the capacity for decisions to be arbitrarily imposed on someone, which, individually, are too minor to be contested in a court or a tribunal, but which cumulatively have a major impact on their life.²¹

¹⁹ John Monahan and Eric Silver, ‘Judicial Decision Thresholds for Violence Risk Management’, *International Journal of Forensic Mental Health* 2:1 (2003), pp. 1-6.

²⁰ For example, recent studies of hospital care for older patients with cognitive impairments have shown how “in long-stay settings, power relationships, limited resources, cultures of passivity and systems of group care may act to restrict individual choice and autonomy in day-to-day living.” Nick Stanley and Jill Manthorpe, ‘Small Acts of Care: Exploring the Potential Impact of the Mental Capacity Act 2005 on Day-to-Day Support’, *Social Policy & Society* 8:1, pp. 37-48 at p. 40.

²¹ For relevant empirical research, see the discussion of “concerns about the enduring use of institutionalised or blanket rules in services for people with specific needs relating to mental

Consider Darby Penney's experience as an intermittent psychiatric patient:

most of the interference with choice actually occurs in much more mundane, routine, noncrisis kinds of matters. Things like when we eat, when we're allowed to use the telephone, who we can associate with, and what we do with our time. [...] I really believe that that's where the most of us have felt the most intruded upon and where the lack of choice has really been a burden to us over the years.²²

Similarly, a recent thematic study of qualitative research on the experience of persons with cognitive disabilities and 'challenging behaviour' echoes the concern that there is an imbalance of power when it comes to everyday decisions:

Participants in residential care were dependent on staff for most of their daily needs, and sometimes reported being at the whim of staff moods, behavior, and attitudes [...] Support staff had control over every aspect of the lives of participants, and the casual denial of participants' requests is demonstrative of how little power and control participants sometimes had.²³

That residents report "being at the whim of staff moods, behavior, and attitudes" suggests a degree of arbitrariness in the power held over them. This arbitrariness would be a deeper problem than excessive interference with their decisions alone insofar as even decisions that are permitted are often not done so on a secure basis. In terms of

health or mental capacity" in Care Quality Commission, *Monitoring the Mental Health Act in 2011/12* (London: Care Quality Commission, 2013), p. 2.

²² Darby Penney, 'Choice, Common Sense, and Responsibility: The System's Obligation to Recipients', *Choice and Responsibility: Legal and Ethical Dilemmas in Services for Persons with Mental Disabilities*, C.J. Sundram (ed.) (New York: New York State Commission on Quality Care, 1994), pp. 29–32 at p. 29.

²³ Gemma Griffith, Lisa Hutchinson, and Richard Hastings, "I'm not a patient, I'm a person": The Experiences of Individuals With Intellectual Disabilities and Challenging Behavior—A Thematic Synthesis of Qualitative Studies', *Clinical Psychology: Science and Practice* 20:4 (2013), pp. 469–88 at p. 477.

Pettit's characterisation of non-domination, then subjection to the arbitrary power of staff, family members, or others, implies that you cannot be "confident in the shared knowledge that it is not by their leave that you pursue your innocent, non-interfering choices; [and that] you pursue those choices, as of publicly recognised right."²⁴ This is important not only because it creates the psychological conditions for fearful uncertainty and servility, but also because it represents a symbolic failure to publicly express a commitment to the equal political status of persons diagnosed with mental disorders or cognitive disabilities.

It could be objected that non-domination is being stretched too far here. Republicanism is a doctrine in political philosophy, so should its ideals really be governing matters like mealtimes and telephone use? It might be thought that these are pragmatic matters of institutional administration which it would be sententious to challenge on philosophical grounds. However, I think this would be a mistake. If the republican goal is a citizenry resiliently protected from arbitrary power, then the threat posed by a few major channels of domination is not necessarily greater than the contribution of countless smaller tributaries. The life that can be totally administered in its small details by nurses, social workers, or family members can be as oppressive as that in which an occasional major decision is vulnerable to arbitrary interference — particularly when the experience of totalising institutions can narrow a person's lifeworld in ways that can inflate the importance of everyday decisions.²⁵ As Darby Penney observes, routine choices "don't have the 'glamour' of the high-risk situations we hear about", but they are no less

²⁴ Pettit, *Republicanism*, p. 71.

²⁵ On the effects of institutional life, see Erving Goffman, *Asylums: Essays on the Social Situation of Mental Patients and Other Inmates* (New York: Anchor Books, 1961) and Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan (trans.) (New York: Pantheon, 1977).

important when taken as a whole.²⁶ What matters is the systematic effect of the relationships through which the lives of persons with disabilities are regulated, even when this concerns a host of seemingly smaller decisions that we might ordinarily think are pre-political.

IV

The republican ideal of non-domination requires opposition to arbitrary power. We have encountered several reasons to recommend this ideal: it is consonant with the intuition that liberty demands security from certain kinds of interference rather than their mere absence; it addresses the harms of not knowing where one stands in relation to authority, and the need to be servile in order to evade interference; and it publically recognises the equal status of citizens. The preceding analysis has also highlighted ways in which arbitrary power is to be found in the legal and sublegal regulation of the lives of people deemed mentally disordered or cognitively disabled. However, there remain powerful objections to republican approaches to disability. Three of the most serious criticisms are anticipated or recapitulated here alongside a rebuttal to each of them: two claiming the ideal of non-dominant is redundant, and one claiming it is undesirable.

If a person cannot be dominated, then it is pointless to call for their non-domination. Our first objection contends that those with mental disorders or cognitive disabilities fall into this group.²⁷ Recall that Pettit identifies domination with a capacity to interfere arbitrarily in choices that another is in a position to make. Yet, the assumption that mental disorder and cognitive disability regularly undermine decision-making capacities is

²⁶ Penney, 'Choice, Common Sense, and Responsibility', p. 29.

²⁷ I would like to thank [...] and [...] for independently raising versions of this objection.

already commonplace – serving as a major motivation for legal measures such as proxy decision-making and diminished criminal responsibility. In the absence of the capacity to make the choices which the republican wants to shield from domination, then the ideal of non-domination can appear irrelevant.

In refining this objection, it is important to recognise that not all mental disorders or cognitive disabilities significantly impair the ability to choose. Empirical studies suggest that even amongst those subject to formal or informal power in virtue of a psychological disorder or disability, there are many individuals whose mental capacity to make decisions will not be precipitously affected.²⁸ Thus, the ideal of non-domination will continue to be relevant to them. Nevertheless, the objector might still maintain that republican ideals will be immaterial for a significant population of the mentally disordered or cognitively disabled who are deemed to lack decision-making capacities. Furthermore, one might suspect that the disordered and disabled individuals subject to the most extensive and momentous external power over their lives will be precisely those least likely to possess the ability to choose which is needed to trigger the republican framework.

It helps in assessing this criticism to distinguish the inability to make a competent choice from the inability to make a choice *tout court*. While some individuals with the most profound cognitive disabilities may be literally unable to make a choice of any kind, what is typically impaired by disorder or disability are the psychological abilities necessary for competency. Which kind of choice figures in republican accounts of domination? There

²⁸ For example, see Gareth Owen, Genevra Richardson, Anthony David, George Szumukler, Peter Hayward, and Matthew Hotopf, 'Mental Capacity to Make Decisions on Treatment in People Admitted to Psychiatric Hospitals: Cross Sectional Study', *British Medical Journal* 337 (2008), pp. 40-42.

are good reasons to resist stringent competency requirements on the choices relevant within an account of domination, insofar as failure to meet them would deprive many psychologically disordered or disabled individuals of equal political status.²⁹ The primary danger is not that competent and non-competent choices could sometimes be treated differently. Instead, the concern is that both the choices and political liberty of those lacking the relative competencies will be invisible in discussions that invoke the cardinal value in republican political life.

Republican conceptions of domination are intended to ground fundamental civil protections, so we should err on the side of caution with respect to whose choices are taken seriously within them. Furthermore, the historic social exclusions and abuse faced by those with mental disorders and cognitive disabilities ought to make us especially wary of refusing to extend the same protections to them. In recommending that domination range over choices *tout court* rather than merely competent choices, this neither excludes the possibility that some choices are permissible to override, nor that individuals unable to make even non-competent choices cannot be dominated. But it does imply that non-domination will remain an ideal applicable to a substantial majority of persons with psychological disorders and disabilities.

²⁹ In contrast, consider Pettit's assumption that to be a free person requires "a satisfactory degree of rational control", which suggests he would subject the relevant choices to rational competency conditions. Philip Pettit, *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001), p. 47.

V

A second major objection begins by identifying a further reason to think republican accounts of psychological disorder and disability are redundant. The powerful criticisms of republican liberty advanced by Matthew Kramer and Ian Carter claim that domination is “inadequate as a basis for a *distinctively* republican understanding of freedom and unfreedom”, and that revised theories of negative liberty can better account for the same phenomena.³⁰ For Kramer, the main determinant of a person’s freedom is neither the extent to which their actions are interfered with nor subject to arbitrary power, but rather the range of opportunities which they can exercise conjunctively.³¹ This enables him to offer a non-republican explanation of restrictions upon liberty that arise even in the absence of actual interference. For example, Kramer need not appeal to domination to account for the restriction of liberty experienced by a person with dementia who avoids interference with their everyday activities only as a result of being deferential to their care staff. Instead, he can maintain that their liberty is diminished by the absence of conjunctively exercisable opportunities to both avoid deference and to go about their business as usual.

Negative liberty remains conceptually distinct from republican liberty even for Kramer and Carter, since they claim that a person’s freedom is relative to the probability that others *would* interfere to restrict their opportunities. In contrast, the republican believes that it is not the likelihood but the sheer possibility of interference which matters.

³⁰ Matthew Kramer, ‘Liberty and Domination’, *Republicanism and Political Theory*, Cécile Laborde and John Maynor (eds.) (Oxford: Blackwell, 2008), pp. 31-57, p. 56. In the same volume, see Ian Carter, ‘How are Power and Unfreedom Related?’, pp. 58-82.

³¹ For a full account, see Matthew Kramer, *The Quality of Freedom* (Oxford: Oxford University Press, 2003), ch. 5.

However, insisting on this distinctiveness leaves the republican vulnerable to Kramer's objection that it is implausible to think that freedom is imperilled when an agent *could* interfere arbitrarily but is extremely unlikely to do so.³² In order to illustrate this, he asks us to conceive of relations of domination which seem intuitively compatible with the freedom of the dominated: for instance, Kramer imagines a gentle giant whose ability to tyrannise a community means that, in principle, he dominates them, but who is so averse to interfering with others that he simply secludes himself in a nearby cave.³³

While I do not propose to definitively resolve these wider theoretical disputes about the nature of liberty, the revised negative liberty position can be shown to face significant difficulties in the context of psychological disorder and disability. Its first problem is an epistemic one, which stems from the possibility that relationships between individuals with psychological impairments and those who hold formal or informal power over them are characterised by uncertainty or mistrustfulness about the motivations of the latter. If a cognitively disabled individual has a kindly and non-interventionist care worker who would never interfere to reduce their conjunctively exercisable opportunities, then there are still liberty-based grounds for being concerned that the care worker has unconstrained power. Even when the actual chance of interference is close to zero, it will often be difficult to ensure that the disabled individual knows this with confidence, and so they can still be cowed as a result. Consequently, when it is not common knowledge whether arbitrary power might be exercised, there are still good grounds for thinking that the harms of fearful uncertainty and servility that republicans associate with diminished

³² On this issue, see Philip Pettit, 'Freedom and Probability: A Comment on Goodin and Jackson', *Philosophy & Public Affairs* 36: 2 (2008), pp. 206-20.

³³ Kramer, 'Liberty and Domination', p.47.

liberty can be present, without conjunctively exercisable opportunities for action being restricted.

The second reason for resisting a revisionary negative liberty approach to psychological impairment also arises from its excessive focus on opportunities to act, which leads to a neglect of freedom as a social status. If we again stipulate that the likelihood of interference that restricts conjunctively exercisable opportunities is close to zero, these opportunities may still only exist *cum permissu superiorum* – by the implicit and discretionary leave of family members, or health and social care workers, who require no such permission to act themselves. The requirement for an additional *de facto* or *de jure* imprimatur from others creates a differential social status between superiors and subordinates, even if those superiors are never inclined to impede opportunities to act. To find oneself relegated to a subaltern position – if only symbolically – can seem like an affront to one's liberty. Yet, this is an intuition which action-centric accounts of negative liberty are not as well placed to accommodate as civic republicanism, with its distinctive conception of the *liber homo*, whose freedom depends upon social recognition:

I am free when I am recognized by others as enjoying a status that resiliently protects me against arbitrary interference and guarantees my equal status as a citizen living in community with others.³⁴

Thus, republicanism makes sense of feelings of unfreedom which arise not only from inabilities to act, but from other aspects of the marginalisation and stigma faced by persons with disabilities – namely, denial of equal civic status, whether materially or symbolically.

³⁴ Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008), p. 11.

VI

Other objections to the ideal of non-domination claim that it is undesirable insofar as it valorises independence. We are all dependent on others to some extent for our physical and psychological needs, and in circumstances in which mental disorder or cognitive disability increases those needs, then relationships of dependence can also deepen in response. Thus, criticisms of republicanism which problematise its handling of interpersonal dependence are particularly important for republican approaches to psychological impairment.

Marilyn Friedman has highlighted the ubiquity of capacities for arbitrary interference. She notes:

The capacity to help someone climb the stairs is also the capacity to throw her down the stairs. An excess of power relative to another, which almost certainly constitutes domination on Pettit's view, seems nevertheless to be a necessary feature of relationships in which some people care for and meet the needs of others.³⁵

To the extent that capacities for arbitrary interference are also capacities to help and care for others, then Friedman urges us to be wary of minimising them. Indeed, Friedman worries that republicanism is motivated by an unwarranted repugnance for interdependence, which results from an "inadequate grasp of the essential role of dependency relationships in human life."³⁶ If republican opposition to domination requires a significant devaluation of otherwise benign relationships of dependency, then securing liberty risks being unreasonably burdensome in its repercussions for other aspects of welfare.

³⁵ Marilyn Friedman, 'Pettit's Civic Republicanism and Male Domination', *Republicanism and Political Theory*, Cécile Laborde and John Maynor (eds.) (Oxford: Blackwell, 2008), p. 254.

³⁶ Friedman, 'Pettit's Civic Republicanism and Male Domination', p. 255.

Friedman's objection would have most purchase against a republican account which construed the ideal of non-domination narrowly enough that it could conflict with other welfare considerations but which also granted it an absolute lexical priority. However, republicans can reject either or both of these commitments. While Pettit claims to offer no explicit support for "the traditional assumption that freedom as non-domination is the only goal with which our political institutions need to be concerned", he finds such monism "congenial".³⁷ Yet, Pettit understands non-domination widely, such that due regard for welfare is a necessary condition for its achievement.³⁸ Thus, he could claim that overzealously dismantling welfare-conferring relationships of care would threaten non-domination itself, rather than promoting non-domination at the expense of the competing value of welfare.

Some republicans have resisted attempts to subsume welfare considerations under a single ecumenical ideal of non-domination because they worry that this conflates conceptually and practically distinct values.³⁹ However, Friedman's objection can still be countered by republican accounts that retain the possibility of conflict between non-domination and welfare, since there is no necessary requirement to maximise non-domination at all costs. Protection against arbitrary power can figure as a primary good without being either the only end of political activity or a lexically prior one. This means that the elimination of arbitrary power which is essential to a relationship of care can be bought too dearly if the loss in welfare is great enough. Admittedly, this raises difficult problems about the appropriate weighting or trumping properties of non-domination with respect to other political goods; but whilst such questions are philosophically,

³⁷ Pettit, *Republicanism*, p. 81.

³⁸ *ibid.*

³⁹ Lovett, 'What Counts as Arbitrary Power?', p. 148-9.

politically, and legally challenging, there is reason to believe that they are tractable, as we see from efforts to implement other qualified rights, such as to privacy, security, property, or education.

Finally, republicans do not disdain care relationships or treat dependency as shameful. Republicanism is premised on the recognition that there is no-one who is not reliant on others, and that flourishing human lives are a collective rather than solitary endeavour. Its proponents simply aim to ensure that those relationships of interpersonal support in which we must stand are shaped in ways that resiliently protect us against arbitrary interference. Thus, republicans are far from harbouring contempt for neediness or relationships of care, and instead remain optimistic that the right tools can curtail the tendency of care to shade into control.

VII

Assuming non-domination is an ideal which is sufficiently pertinent, distinctive, and attractive in the context of mental disorder and cognitive disability, then how is it to be achieved? Republicans could seek to ensure that significant power over people with psychological impairments is exercised only when specifically mandated by a set of highly determinate laws, public policies, and institutional rules which sought to track their politically avowable interests. Yet, there are good reasons for scepticism about rigorist strategies.⁴⁰ In reducing the scope to use discretion, this also reduces the opportunity to exercise *phronesis*: the practical wisdom that consists in making sophisticated judgements that are sensitive to those contextual details of particular cases which cannot be captured

⁴⁰ See also Pettit, *Republicanism*, p. 176.

in general rules.⁴¹ Republicans are wary of extensive discretionary power because it can create uncertainty, servility, and privileging private over public interests. However, excessive zeal in eliminating discretionary authority can prevent power being guided by experience and uncodifiable knowledge, which threatens to make it harder to reliably track people's politically avowable interests.

The most popular republican strategy for combatting arbitrary power has been contestatory democracy.⁴² The contestatory democrat claims that electoral mechanisms for achieving liberty are insufficient because the collective consent of the people is compatible with the tyranny of majorities over minorities. They propose supplementing electoral with contestatory mechanisms which allow individuals to challenge power over themselves that is potentially dominating. These mechanisms include democratic fora in which politically avowable interests can be identified and articulated, alongside depoliticised tribunals and appeals boards in which citizens can find impartial redress. De Wispelaere and Casassas claim "contestatory democracy fits well with key concerns of the disability rights movement" – particularly in advocating a justiciable "power to challenge or even veto particular policy proposals" – which would provide material and

⁴¹ See Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986), ch. 10. For discussion of the problem of particularism in mental health law, see Kathleen Jones, 'The Limitations of the Legal Approach to Mental Health', *International Journal of Law and Psychiatry*, 3:1 (1980), pp. 1-15.

⁴² See Pettit, *Republicanism*, ch. 6; Philip Pettit, 'Republican Freedom and Contestatory Democratization', *Democracy's Value*, Ian Shapiro and Casiano Hacker-Cordon (eds.) (Cambridge: Cambridge University Press, 1999); Philip Pettit, *On the People's Terms: A Republican Theory and Model of Democracy* (Cambridge: Cambridge University Press, 2012); John Maynor, *Republicanism in the Modern World* (Cambridge: Polity Press, 2003), ch. 6.

symbolic support for involving people with disabilities in policy design and delivery.⁴³ Furthermore, Pettit has emphasised that contestatory democracy necessitates inclusion, whereby “voices will have to come from the sector represented, not just resonate in sympathy with that sector”, which echoes the disability rights rallying cry, ‘nothing about us without us!’⁴⁴

Contestatory democracy also provides grounds for a radicalisation of review mechanisms which enable individuals to trigger scrutiny of authority or decisions to which they are subject. For example, the recognition of the importance of inclusive procedures for contesting power provides impetus for reform of mental health tribunals – responsible for assessing appeals against mental health detention – so that they better reflect the voices of people diagnosed with mental disorders. This could take the form of recognising people with psychological impairments as experts-by-experience who should sit alongside professional and lay members within systems of review. Similarly, in order to oppose micro-domination at the sublegal level, then contestatory practices could include the creation of smaller fora in health and social care institutions, through which patients and residents could regularly articulate and discuss their views, and challenge local policies or decisions that they take to express arbitrary forms of power.⁴⁵

There are limits to the counter-majoritarian and inclusionary requirements of republican contestatory democracy. Strengthening mechanisms for individuals to challenge decisions and including affected groups in policy design and systems of review would not make

⁴³ De Wispelaere and Casassas, ‘A Life of One’s Own’, p. 10.

⁴⁴ Pettit, *Republicanism*, p. 191.

⁴⁵ This would be one step towards ‘user-led services’. See Colin Barnes and Geof Mercer, *Independent Futures: Creating User-Led Disability Services in a Disabling Society* (Bristol: Polity Press, 2006).

either those individuals or groups sovereign in these processes. Moreover, since most republicans reject subjective welfarism about interests, non-dominating power need not track what individuals *take* their own interests to be.⁴⁶ This means that republican contestatory democracy does not necessarily rule out paternalism – the exercise of power over people in their perceived interests but against their wishes – which may alarm those disability rights advocates who demand a “clear departure from a paternalistic regime for managing decision-making”.⁴⁷

While republican contestatory democracy does not itself prohibit paternalism, republicans can recognise paternalism as a harm additional to domination. Furthermore, if some paternalistic interventions are still permitted, republicanism would impose some important constraints upon them. Consider again the case of the demented woman who nursing staff believe is endangering herself near a busy road. The process of determining what is in her politically allowable interests should be both lawful and common knowledge, reflect the voices of other people with dementia, encourage her to communicate her own views about her interests, allow her to contest the decision by initiating a local review within the nursing home, and given the gravity of potential restrictions on movement, to invite a judicial ruling on her case. If the presumption against paternalism should ever be breached, then republican contestatory mechanisms would thereby temper some of the harms of unconstrained paternalism.

⁴⁶ See Lovett, ‘What Counts as Arbitrary Power?’, p. 142.

⁴⁷ Michael Bach and Lana Kerzner, *A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Prepared for the Law Commission of Ontario* (Ontario, 2010), p. 44.

VIII

Despite its laudable support for inclusionary mechanisms of contestation, there are significant shortcomings to the republican appeal to contestatory democracy, and which are particularly visible in the context of psychological impairment. I shall argue that contestatory democracy actively compounds domination by pursuing anti-participatory and depoliticised forms of contestation that usurp the agency of potential contestants. To remedy these problems – especially with respect to disability – I suggest that republicans might look beyond contestatory democracy to a participatory politics of self-emancipation.

For arbitrary power to be contestable, it is not enough that there are fora for discussing challenges to it and procedures for adjudicating their validity; people must be psychologically willing and able to identify domination and to raise such challenges. Obstacles to this include disillusionment and resignation, social norms and ideologies that naturalise states of domination, an absence of self-worth and self-confidence, and other psychological and communicative problems – all of which can be particularly pronounced among those with psychological disabilities. Consider the testimony of two former psychiatric patients:

Being a patient was the most devastating experience of my life. At a time when I was already fragile and vulnerable, being labelled and treated only confirmed to me I was worthless. It was clear my thoughts, feelings, and opinions counted for little.⁴⁸

What we are experiencing is a hierarchy of disempowerments that stretches from the psychiatrist's consulting room to the queue for bread and jam at bed time. [...] In the end, it is sustained by our own suspicions that we are truly inferior.⁴⁹

⁴⁸ Judi Chamberlin, 'Confessions of a Non-Compliant Patient', *Journal of Psychiatric Nursing* 36 (2002), pp. 49-52 at p. 49.

This vulnerability and self-doubt is entrenched by the passivity-inducing environments that people with mental disorders often find themselves in. This is a diagnosis that has been echoed by a report by the US National Council on Disability:

After years of contact with a system that routinely does not recognize their preferences or desires, many people with psychiatric disabilities become resigned to their fate and cease to protest openly.⁵⁰

For republicans to properly address domination in the context of mental disorder and cognitive disability, they must recognise and be prepared to defuse such threats to agency that undermine the inclination and capability to contest.

How can this be done? Republicans have long commended politics as an arena in which important virtues of character can be exercised and strengthened. When the goal is to counter domination by ensuring that people are psychologically equipped to contest it, then the process of engaging in political activity is a promising means by which to develop the knowledge, skills, and confidence to challenge arbitrary power. This could involve a range of different political activities: efforts to educate oneself and others about one's legal rights; whistleblowing about abuse or other malpractice; organising collectively at a local level to improve some aspect of mental health or cognitive disability service provision; advocating for disability issues within a trade union or syndicalist union; or contributing to a regional, national, or international disability rights organisation in order to influence public policy or media representation of disability.

⁴⁹ Peter Campbell, 'Crisis Cards and Advance Directives', *Something Inside So Strong: Strategies for Surviving Mental Distress*, Jim Read (ed.) (London: The Mental Health Foundation, 2001), pp. 77-82 at p. 78.

⁵⁰ National Council on Disability, *From Privileges to Rights: People Labelled with Psychiatric Disabilities Speak for Themselves* (Washington: National Council on Disability, 2000), p. 11.

Contestatory democrats are not blind to the function of political activity in securing the psychological conditions for contestation. For instance, Pettit has recently remarked on the significance of “the resistive character of the citizenry” – “the disposition of the people to resist perceived abuses of power by the government”, both collectively and severally – which is a product of an “active, engaged style of politics”.⁵¹ Nevertheless, Pettit’s calls for a contestatory civic culture are heavily qualified by his rejection of a participatory politics in which people can be said to be ruling themselves, which is brusquely dismissed as a Rousseauian fantasy. For him, what matters primarily is securing a “high *aggregate* level of civic engagement”, rather than *who* is engaging, or whether conditions obtain in which individuals can be confident, optimistic, or defiant enough to act against their *own* domination.⁵² Furthermore, contestatory democrats actively stand in the way of civic engagement when they recommend depoliticising the problem of domination for certain contentious issues. For Pettit, often:

democracy requires recourse to the relative quiet of the parliamentary, cross-party committee, or the formal bureaucratic inquiry, or the standing appeals board, or the quasi-judicial tribunal, or the autonomous, professionalized body. It is only in that sort of quiet—it is only when political voices have been gagged [...]—that the contestations in question can receive a decent hearing.⁵³

However, this anti-participatory appeal to “autonomous, professionally informed bodies that are not exposed to the glare and the pressure of public debate”, whose “responses must be determined in a depoliticized way”, has significant drawbacks in the context of mental disorder and cognitive disability.⁵⁴

⁵¹ Pettit, *On the People’s Terms*, p. 239, p. 174, and p. 226.

⁵² Pettit, *On the People’s Terms*, p. 226, emphasis added.

⁵³ Pettit, *Republicanism*, p. 196.

⁵⁴ *ibid.*

The main problem with anti-participatory and depoliticised strategies for securing domination is that they reinforce usurpation by insulating decision-making processes from those most affected by them.⁵⁵ When someone's agency is usurped, then others act for them, rather than them acting for themselves, with or without the mere assistance of others. While non-usurpation cannot always be achieved, it is valuable for a number of reasons – not only intrinsically, as a component of personal autonomy, but for its instrumental contribution to other goods.

In respect of disability, non-usurpation helps to combat 'learned helplessness', whereby impairments are exacerbated when others act for someone instead of supporting them in acting for themselves.⁵⁶ This deskilling holds as true for political abilities as it does for other physical, and intellectual, and social competencies – including the ability to identify and contest potential domination. Thus, it is important to exercise caution when considering proposals which would delegate the responsibility for protecting a swath of a person's avowable interests to independent committees or professional bodies, rather than to the person themselves, an organisation of which they are an equal member, or a group over which they might hope to exert some meaningful control.

The anti-participatory and depoliticised mechanisms favoured by contestatory democrats do not sufficiently encourage the political involvement of persons with psychological impairments. This not only threatens to usurp their agency but to lead to a political deskilling that undermines their ability and disposition to contest arbitrary power. What then should republicans do in light of these problems with existing models of

⁵⁵ On the relationship between usurpation and domination, see Patchen Markell, 'The Insufficiency of Non-Domination', *Political Theory* 36:1 (2008), pp. 9-36.

⁵⁶ On learned helplessness, see Bruce Winick, 'The Side Effects of Incompetency Labelling and the Implications for Mental Health Law', *Psychology, Public Policy, and Law* 1:1, pp. 6-42.

contestatory democracy? One promising but relatively underdeveloped alternative can be found in republican accounts which note the importance of instituting “more active measures to give space for the voices of those who are marginalized”, who “need to be encouraged to contribute under more participatory conditions.”⁵⁷

Republicans should recognise how the demands for self-emancipation and equal participation in civic life are especially resonant for persons with disabilities – who have for so long been treated as objects of charity rather than loci of political agency.⁵⁸ In practice, this would mean granting less political authority to putatively politically neutral groups of experts in designing and implementing policy or adjudicating challenges to potentially dominating power. Instead, self-organising groups of persons with disabilities would not only have to be consulted in processes of policy reform and contestatory review, but would themselves have to hold considerable decision-making power within them (albeit consistent with the requirement to live under a shared scheme of governance that does not ultimately privilege particular groups or individuals). Ensuring that people with psychological disabilities are collectively and severally integral to the exercise and scrutiny of power – not merely as its editors but as its authors – would help to combat the contestation-inhibiting deficits of agency that stem from the usurpation and deskilling that contestatory democracy unwittingly encourages. While this is the briefest of sketches of a participatory republican disability politics of self-emancipation, I

⁵⁷ Iseult Honohan, *Civic Republicanism* (London: Routledge, 2002), p. 237. It is worth noting the strong influence of the Athenian republican tradition upon Honohan, which takes civic participation to be good in itself, rather than the predominantly instrumental value which neo-Roman republicans like Pettit, Skinner, or Lovett treat it as being.

⁵⁸ For further discussion of self-emancipation in the context of disability, see Jane Campbell and Mike Oliver, *Disability Politics: Understanding Our Past, Changing Our Future* (Oxford: Routledge, 1996).

hope that it gives some indication of a possible direction of travel that is worth further exploration.

Summary Conclusion

Domination is often encountered by persons with mental disorders and cognitive disabilities. It is a deprivation of liberty that can result from the arbitrary power to be found in mental health and capacity law as well as the informal control that is exercised through health and social care institutions. Yet, in a disability context, there has been an undertheorisation both of domination as an analytical category and of non-domination as a normative ideal. I have shown that the republican account of non-domination is an appropriate and distinctive addition to our conceptual toolkits in thinking through the relation of disability to power, and that there is reason to think it is attractive as an ideal. Contestatory remedies to the problem of domination were canvassed, including the importance of ensuring systems of review and challenge are sufficiently inclusionary and that they extend to more routine matters of institutional administration and micro-domination. But I also highlighted limitations to contestatory democracy when applied to mental disorder and cognitive disability, and suggested that a republican participatory politics of self-emancipation might better address the deficits of agency that are an obstacle to the effectiveness of alternative contestatory mechanisms.