Impunity and domination: A puzzle for republicanism

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Abstract

Republicans hold that freedom is non-domination rather than non-interference. This entails that any instance of interference that does not involve domination is not freedom-lessening. The case for thinking of freedom as non-domination proceeds mostly by way of a handful of highly compelling cases in which it seems intuitive to say of some person that he or she is unfree despite being in fact free from interference. In this essay, I call attention to a kind of case which directs attention to what seems to me to be a highly counterintuitive element of the republican conception of freedom.

Keywords

domination, impunity, negative liberty, Philip Pettit, republicanism

Contemporary versions of republicanism that are inspired by Philip Pettit’s work hold that freedom is non-domination rather than non-interference. This entails that any instance of interference that does not involve domination is not freedom-lessening. Put otherwise, on the republican view, in order to lessen your freedom, I must dominate you; merely interfering with you is not sufficient. One alleged virtue of the republican view is that it is able to recognize certain forms of government interference (e.g. laws against murder) as not involving the lessening of anyone’s freedom. Another is that it is able to recognize that certain arrangements which involve no actual interference are nonetheless freedom-lessening.

The case for thinking of freedom as non-domination proceeds mostly by way of a handful of highly compelling cases in which it seems intuitive to say of some person that he or she is unfree despite being in fact free from interference. Among the more vivid cases is the so-called lucky slave. The lucky slave belongs to a master, but has the good fortune of having a master who is disinclined to order or require any action of the slave. Republicans contend that, in such a case, although the slave is not interfered with, he is nonetheless dominated due to the fact that he is subject to the whim of his master; the lucky slave is thereby unfree.

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Another powerful case is that of the woman under traditional marital arrangements, whom we might call the traditional wife. The traditional wife may have had the good fortune to have married a properly tempered man. Yet given that traditional laws did not recognize spousal abuse as a crime, the traditional wife is nonetheless dominated by her husband. Were he to turn abusive, she would have no reliable recourse; thus she is unfree, even though she is in fact not abused.

These two cases, and others like it, go a long way in capturing an important element of freedom that seems to be invisible to standard negative theories of freedom. If, as the negative theories contend, freedom is lessened only when there is actual interference, then the cases of the lucky slave and the traditional wife involve no loss of freedom. It seems, then, that whatever is problematic in the cases must be explained by appeal to some category other than freedom. Yet the republicans seem correct to think that freedom is precisely what is at stake in these cases. The republican challenge to the negative theorists of freedom is that of explaining how their view could recognize that the lucky slave and the traditional wife are unfree. Some, notably Ian Carter and Matthew Kramer, have taken up this challenge. Roughly, their responses emphasize the ways in which the slave must condition his activities in order to maintain the good relations with his master that he currently enjoys. In this way, the lucky slave is not free from interference after all, and is accordingly unfree. The Carter and Kramer line strikes me as promising; however, it also seems to me that the republicans offer an account of the loss of freedom in such cases that is, at least initially, more intuitive. That is, it strikes me that even if the lucky slave were especially lucky in that his master were exceedingly disinclined to interfere in the slave’s life no matter what, it would still be right to think the slave unfree, even if his behavior is no different from that of a free man.

However, one may worry that the argument for republican freedom has relied too heavily upon the cases. I do not mean to deny the propriety of employing imaginary examples in moral and political philosophy. Surely they can, and often do, play a vital and enriching role. The concern rather has to do with the fact that it is easy to construct cases which highlight the advantages of a favoured view. What matters philosophically is how well a given view can address cases which are designed to punctuate the selling points of its competitors, and how one can draw from cases of any kind a compelling philosophical analysis of the intuitions driving our responses to them.

In this brief article, I develop a kind of case which directs attention to an undertheorized element of the republican view as articulated by Pettit; my suspicion is that this kind of case reveals a strikingly counterintuitive entailment of republicanism. I do not claim to have devised a refutation of republicanism; I aim only to raise a kind of case that looks like trouble for the republican view. In other words, I aim to press a consideration which has thus far gone unnoticed and to which republicans should feel compelled to respond. The challenge to the republican will be to formulate a response that does not render the view roughly equivalent to familiar noninterference views. Hence my subtitle: what is on offer is a puzzle.

To begin, I will have to review a few details of republicanism. Domination is the core of the republican view of freedom. Pettit has expended great effort in making
the republican conception of domination precise. Over the years, Pettit has employed several different formulations of the republication conception of domination. We begin with an early articulation.

According to Pettit, Jack dominates Jill iff:

1. Jack has the power to interfere with Jill,
2. with impunity and at will, and
3. in certain choices that Jill is in a position to make.5

In a slightly later formulation, Pettit alters the second condition somewhat.6 Jack dominates Jill iff:

1. Jack has the power to interfere with Jill,
2. on an arbitrary basis, and
3. in certain choices that Jill is in a position to make.

In still more recent work, Pettit drops the tripartite analysis altogether, simply claiming that Jack dominates Jill insofar as Jill is exposed to Jack’s arbitrary interference.7 Pettit’s analysis of arbitrariness introduces the idea of interference that is not forced to track the ‘avowable interests’ of the person interfered with.8 Yet Pettit’s conception of arbitrary interference nonetheless retains much of the substance of the earlier ‘with impunity and at will’ formula. That is, Pettit holds that part of what it is for Jack to interfere on an arbitrary basis with Jill is for him to interfere in a way which is ‘subject to no particular difficulty or cost’ and which involves ‘no prospect . . . of suffering retaliation’.9 Indeed, in one of his most recent articulations, the reference to impunity reappears; Pettit claims that ‘individuals or groups dominate an agent’ when they have the power to interfere ‘with relative impunity’10 and ‘more or less without cost’.11 Consequently, one may say that domination requires some kind of impunity for the dominator. Or, to put the matter otherwise, on any version of republican freedom, a necessary condition for Jill to be dominated is that she be at the mercy of another, vulnerable to another’s whim or dependent ‘on the goodwill of others’.12 As a simplifying measure, then, I will here refer to the original tripartite analysis.

As the three conditions are jointly necessary for domination, any case in which at least one fails to obtain will be a case in which no domination occurs. Freedom is the absence of domination. Thus any case in which at least one condition fails to obtain is a case in which no one suffers any loss of freedom.

The existing critical literature tends to focus on difficulties concerning the precise nature of the first and third conditions. Critics wonder what should count as having the ‘power to interfere’ and what it means for someone to ‘be in a position’ to make a certain kind of choice. There has also been a good deal of attention paid to the idea of interference which ‘tracks’ the ‘avowable interests’ of another. These matters are worthy of careful examination. However, little critical attention has been given to the second condition, the ‘with impunity and at will’ condition. Yet it
seems that this condition makes the republican view especially vulnerable to a kind of objection that has not been explored as yet.

Consider the following case. Jack goes to a local beach on a sunny day and looks for sleeping sunbathers. He finds Jill soundly asleep, and very gently places her in handcuffs. Let us suppose that, in doing so, Jack interferes with Jill, and interferes with choices Jill is in a position to make; we may also say that Jack’s interference does not track Jill’s interests (and therefore is not forced to do so). Domination conditions (1) and (3) have been satisfied, and the second conjunct of condition (2) is satisfied as well – Jack has interfered at will. However, supposing that Jack and Jill are both citizens of a contemporary constitutional democracy, it is certainly the case that Jill has significant recourse against Jack’s interference. Upon waking, Jill calls a policeman, who releases Jill from the bonds and then promptly apprehends Jack. Jack is arrested, held criminally liable and in addition is subject to a civil lawsuit. In short, Jack’s interference fails to be ‘with impunity’. Thus it fails to satisfy the first conjunct in condition two. Consequently, Jack’s interference is not an instance of domination.

Therefore, the republican must say that, in handcuffing Jill, Jack did not reduce Jill’s freedom. Moreover, the republican must hold that, even when Jill awoke, when she became aware of the fact that she was in handcuffs, her freedom was not reduced by the fact that she was bound. Again, as Jack did not commit an act of domination, he did not reduce her freedom. The fact that Jill has available to her reliable and powerful channels of recourse and redress entails that her freedom was in no way reduced by the fact that she was wrongly placed in handcuffs. The republican must hold in this case that the change from a state of affairs in which Jill is not handcuffed to one in which she is bound does not involve a lessening of her freedom. This seems curious.

To be sure, the republican need not deny that, in handcuffing her while she slept, Jack harmed Jill. In fact, the republican could contend than in applying the handcuffs, Jack seriously wronged Jill. Thus the republican could say that Jack is deserving of severe punishment, and perhaps that Jill is entitled to considerable retribution. Not every serious wrong involves a loss of freedom, after all.

Yet, given that Jack did not lessen Jill’s freedom, there is a question about how republicans make sense of the harm Jack inflicted on Jill. In what way was she wronged? Notice that the negative liberty theorist has an easy and natural reply: interference is always a lessening of liberty, and thus a prima facie harm. The negative liberty theorist can say that, in this case, Jack’s interference is unjustified; therefore, Jill suffered an unjustified lessening of her freedom, and thus was harmed. The republican, by contrast, holds that interference is never sufficient for a loss of freedom. And so the republican can make sense of the harm Jill suffered only by invoking other concerns that seem morally more distant. For example, the republican might say that, in handcuffing Jill, Jack exercised a kind of power that caused a setback to her interests, and this setback constitutes the harm. According to this reply, the interference itself is not the harm; rather the harm consists in causing a setback to Jill’s interests. Jack’s interference is the cause of the harm, not the harm itself.
How plausible is this? Consider a slightly altered case in which a third party witnesses Jack handcuffing Jill and summons a police officer who promptly frees Jill from the handcuffs without waking her, and apprehends Jack. In this version, Jill was at no point aware of the fact that she had been handcuffed. It is unclear, then, that her interests were set back by being handcuffed, unless we take the mere fact of interference to constitute a harm. But what kind of harm would that be? Again, the negative liberty theorist holds that the interference is itself sufficient for a loss of freedom, and that loss is the harm. This is something that the republican does not accept.

Perhaps a more nuanced account of the kind of harm Jill suffers is available to the republican. I do not mean to deny that. The point rather is that the republican can make sense of the harm Jack inflicts on Jill only by some circuitous route. Yet the republican conception of freedom thrives on the highly intuitive analyses it offers of certain cases, such as that of the lucky slave already mentioned. The Jack and Jill example suggests that there are cases in which it seems that the fact of interference is itself sufficient for a lessening of freedom. The fact that Jill has a resilient power to impose a cost on Jack for his interference is indeed good news for Jill; but it hardly seems correct to say that in light of this power Jill’s freedom was not reduced by Jack. That is, it seems counterintuitive to say in this case that the difference between Jack lessening Jill’s freedom and his harming her in some other way comes down to the fact that Jill can impose a cost on Jack’s interference.

Perhaps the Jack and Jill case is complex enough to allow an opening for a republican rejoinder. One could imagine, for example, the republican claiming that, in handcuffing Jill, Jack does not lessen her freedom but only conditions it; or perhaps the republican might claim that there is a temporal element to domination such that Jack’s interference is for a short time with impunity, and thus that Jack does, indeed, lessen Jill’s freedom in some temporally indexed sense. I am not optimistic about responses of these kinds. For one thing, to introduce into the republican account a subtle distinction between lessening and conditioning freedom is to complicate what initially seemed to be a chief virtue of the view, namely, its directness and elegance. Recall the intuitive force of the staple republican cases of the lucky slave and the traditional wife. Once a distinction between lessening and conditioning freedom is introduced, it is not so clear that the lucky slave and the traditional wife cases involve freedom lessening after all.

Perhaps a more simple case could help us to see why a temporally indexed conception of domination is counterintuitive. Consider the case of a wrongly convicted prisoner in a properly ordered constitutional democracy. The wrongly convicted prisoner is interfered with, in a way that does not track his interests, and with respect to choices he is in a position to make. Yet, as with Jill, he is thankfully not without recourse; he may appeal his conviction, petition officials for a pardon, and so on. But are we really prepared to say that these facts entail that being in prison does not reduce his freedom? The loss of freedom seems to be a crucial element of the harm suffered in being wrongfully convicted. Moreover, I think it would be odd to say that he is dominated – and thus unfree – only
until the appeal process gets under way. Instead, it looks far more promising to say that in being imprisoned, his freedom was lessened; and because the conviction leading to the imprisonment was wrongful, he was seriously harmed.

To summarize the argument thus far. The cases typically invoked in defence of republican freedom – cases such as the traditional wife and the lucky slave – highlight circumstances under which it seems natural to say that interference is *not necessary* for a loss of freedom. But republicanism is committed to more than this. Republicans must deny that interference is ever *sufficient* to reduce freedom. And that commitment seems counterintuitive. The cases of Jack and Jill and the wrongfully convicted prisoner seem to involve a loss of freedom, and the loss seems to derive strictly from the interference.

Republicans may protest. They may charge that I have misinterpreted the ‘with impunity’ condition. After all, Pettit’s appeals to impunity are often accompanied with qualifications to the effect that it is sufficient for domination that an agent is able to interfere in the relevant respect with ‘relative impunity’\(^{18}\) or ‘more or less without cost’.\(^{19}\) It is worth noting that the qualified appeals to impunity often appear alongside unqualified appeals to the concept.\(^{20}\) More importantly, it is not clear precisely what the qualifiers accomplish. What is the difference between costless interference and ‘relatively costless’ interference?\(^{21}\) If it is the severity of the cost, then it seems that in our case Jack’s interference is certainly *not* ‘relatively costless’, as the cost Jill is able to impose is relatively quite severe. Similarly, we might ask what the difference is between the power to interfere ‘with impunity’ and the power to interfere ‘with relative impunity’. We are never told by Pettit to what relative impunity is relative. Furthermore, unlike the concept of a *cost*, it is not clear that impunity admits of degrees that would be relevant to the matter at hand. Indeed, one worries that by invoking ‘relative impunity’, Pettit commits to the claim that that *any successful attempt to interfere* will count as interference with relative impunity. If this is so, then the republican conception of freedom loses some of its distinctiveness, for every successful act of interference will be by definition an act of interference with (relative) impunity; and therefore there will be no case of wrongful and wilful interference that is not also a case in which freedom is lessened. The republican view now looks like a variation on negative liberty rather than an alternative conception of freedom.

Here republicans may contend that it was precisely for the purpose of eschewing such troubles that Pettit dropped the language of impunity and picked up the concept of arbitrary interference. I do not think that this kind of reply can succeed. To be sure, the precise analysis of what it is to interfere *arbitrarily* is complex. But, as I have briefly indicated, regardless of the finer details of arbitrariness, domination must in part involve a *vulnerability* to inappropriate interference.\(^{22}\) That is, domination must involve a *lack of status* which renders one susceptible to others’ mastery.\(^{23}\) Or, put differently, republican freedom consists not simply in the absence of domination, but in a kind of resilient *protection* against inappropriate interference. Recall that it is precisely for this reason that the lucky slave is nonetheless not free. Due to his good luck, the slave is not interfered with; yet he is nevertheless not *free* from interference because he lacks the status which would
protect him from his master’s inappropriate interference, should such interference occur.

It seems to me that the requisite protection from inappropriate interference must be understood to have two aspects. Obviously, one is protected against inappropriate interference if one is able to prevent such interference from occurring in the first place. The requisite status in this sense provides a kind of power to deflect potential dominators, perhaps in the way a crucifix wards off vampires in the old monster movies. But there is another sense in which one enjoys protection from inappropriate interference, namely, in having the status that enables one to redress inappropriate interference once it occurs. In other words, domination is defeated not only when one can ward off dominators, but also when one can summon the right kind of institutional power necessary to push back against inappropriate interference. Surely it cannot be the republican view that we are free only if we are never subjected to inappropriate interference; the success of an attempt to impose inappropriate interference cannot be sufficient to render us unfree. Even free agents will sometimes be the victims of interference that does not track their interests. Republicans must hold that, in such cases, freedom is retained if persons have the status to summon the relevant institutional powers to rectify the injury. Accordingly, the republican conception of domination must recognize that there is a status component of non-domination: in order to be free, one must be able to push back, with the right kind of institutional recognition and support, against potential dominators when they impose inappropriate interference.24

Again, this is precisely why the lucky slave is unfree according to the republican. The slave is vulnerable to arbitrary interference precisely because he lacks the status to redress inappropriate interference, should it occur. Importantly, that the slave is physically more powerful than the master, and thus able to defeat the master in a fight, does not suffice to render the slave free from arbitrary interference; even if the slave is physically more imposing than the master and thus can inflict a cost on his master, he is nonetheless at the master’s mercy because he lacks the standing to retaliate against the master’s arbitrary interference, should such interference occur. Again, without this element, the republican view is not different from familiar negative liberty theories.

Hence the republican analysis of domination must involve some condition referencing a lack of status on the part of the interfered-with. But once this is introduced, anyone with the requisite status is ipso facto non-dominable. A population of individuals who enjoy the familiar rights of petition and redress cannot be dominated. This is, I suspect, one way of articulating the tight connection republicanism countenances between freedom and democracy; and this tight connection is typically presented as a selling point for republicanism. Indeed, in his recent work on democracy, Pettit claims that it is the fact that democratic citizens have the ability to ‘contest the decisions made by various arms of government’ that renders democratic rule non-dominating.25

However, as the considerations noted suggest, this aspect of republicanism has a dark side. On the republican view, once the requisite individual entitlements and checks on power are in place and reliably operative, there is surprisingly
little – maybe nothing, in fact – that a state can do which will count as lessening the freedom of its citizens. Again, as long as the citizens have the standing requisite to defeat the ‘with impunity’ condition, they are invulnerable to domination, and thus are secure in their freedom. Wildly unjust laws – such as, for example, laws enabling police officers to detain and interrogate citizens suspected of being dissidents – will involve no lessening of anyone’s freedom, provided that they have the right procedural pedigree and for as long as citizens have the institutional status to contest and seek redress. But it seems natural to think that the story we should want to tell about the injustice of such a law will involve claims about how those who are detained suffer a loss of freedom. But republicans must contend that there could be cases of detention that are not freedom-lessening; indeed, they must contend that there could be instances in which detention is wrongful yet not freedom-lessening.

Before concluding, allow me to reiterate my central point. Imagine that a stranger named Jack places you in handcuffs as you sleep on a beach. The negative liberty theorist knows by that fact alone that your freedom has been lessened, and now can ask whether the lessening of freedom is justified. By contrast, the republican would need to know much more before he is able to determine whether Jack has lessened your freedom; again, on the republican view, interference is never sufficient for a loss of freedom. In order to determine whether Jack lessened your freedom, the republican must ascertain, among other things, whether you are able to retaliate in the right way. Yet it seems odd, at least to me, to think that there is a way for Jack to place you in handcuffs as you sleep on a beach that does not involve a lessening of your freedom. Indeed, it seems that the negative liberty theorist has the upper hand in thinking that handcuffing someone necessarily lessens that person’s freedom. Of course one may recognize that there are circumstances under which Jack is justified in handcuffing you, and there might even be cases in which Jack benefits you by handcuffing you. But it seems natural to think with the negative liberty theorist that these would have to be cases in which there is some reason to think that Jack is justified in lessening your freedom. On the republican view, the matter is far more complicated, and in the absence of a more detailed account of what the ‘with impunity’ condition amounts to, it seems as if republicans hold that it is possible for Jack to unjustifiably handcuff you, and thus seriously harm you, but nonetheless not lessen your freedom. I should think that republicans would want to resist this result. The puzzle is how to do so without affirming something like the core negative liberty claim that wrongful interference is sufficient for lessening freedom.

Although my aim in this article has been to expose what I regard as a highly counterintuitive element of Pettit-style republicanism, I should like to conclude with a brief suggestion concerning a point I raised at the beginning. I emphasize that this can only be a suggestion at present, something perhaps to be developed in another essay. Recall that I began by wondering whether the cases of the lucky slave and traditional wife might be doing too much of the philosophical work on behalf of republicanism. I would still concede that these cases are compelling, and the republican analysis of them is intuitive and forceful. Yet in light of the
arguments I have deployed, I now worry that the cases are misleading in a crucial respect. It is interesting that the lucky slave and traditional wife cases both involve forms of inequality that we now correctly regard as especially egregious. In fact, we tend to regard the inequality that is characteristic of racial and gender hierarchy as particularly problematic because it is so often accompanied by other forms of injustice; that is, where there is inequality of this kind, there is also likely to be a range of other serious social injustices, including exclusion, marginalization, powerlessness, disenfranchisement, humiliation and, importantly, loss of freedom. I worry that the intuitive overall badness of the condition of the lucky slave and traditional wife colours our judgements about their freedom. As the inequality involved in slavery and gender hierarchy is so frequently accompanied by unfreedom and other serious forms of injustice, we are likely to regard any situation of slavery or hierarchy as one that involves a loss of freedom. This is, of course, as it should be; it seems plausible to think that certain kinds of social injustice are intrinsically tied to others, or at the very least strongly correlated with them. In fact, it is tempting to say that part of what makes social inequality bad is that it provides occasion for injustices of other kinds.

However, here it is important to keep in mind an insight associated with Isaiah Berlin. Drawing a line from Bishop Butler, Berlin urges that ‘Everything is what it is: liberty is liberty, not equality or fairness or justice, or culture, or human happiness, or a quiet conscience.’26 That is, although kinds of injustice often come as a package in the social world, they are nonetheless conceptually distinct. My suggestion is that the lucky slave and traditional wife cases exploit this tight connection between social inequality and other kinds of injustice; we see slavery as a form of inequality that brings with it a severe loss of freedom, and so are understandably inclined to think that any instance of slavery will also be an instance in which freedom is severely lessened. Accordingly, we are jarred by a conception of freedom that could countenance an instance of slavery without a loss of freedom. And this is what gets the republican project off the ground; we must look for a conception of freedom which, unlike the negative conception, will resist the thought that there could be a slave that is somehow also free. But this is far less of an argument than it may initially appear; it rests on a kind of conceptual looseness in that what is taken for an insight about the nature of freedom is actually an empirical generalization concerning the ways in which different kinds of social injustice are interrelated. In short, my suggestion is that the staple republican cases are better analysed as cases of social inequality that are especially severe because they are so deeply correlated with injustices of other kinds, including loss of freedom.27

Notes
2. Ibid. p. 57.
8. Some of Pettit’s recent formulations employ the concept of ‘alien or alienating control’.
13. Ibid. p. 711.
14. As the ‘at will’ element of the second condition is not in question at present, I will hereafter refer simply to the ‘with impunity’ condition.
15. ‘The with-impunity condition means that there is no penalty, and indeed no loss, attendant on the person’s interference: the party interfered with has no way of asserting themselves in response, there is no central body to punish the interference, the interferer does not have to justify themselves to the victim or to the community at large or renounce any benefit to order to practice the interference. They have carte blanche.’ Pettit (n. 5), p. 580.
17. Consider Randall Adams, the subject of Errol Morris’s chilling 1988 documentary The Thin Blue Line. Adams spent 12 years on death row after having been wrongly convicted of killing a police officer in Texas. Morris’s documentary played a crucial role in reopening Adams’s case, and Adams was eventually exonerated, largely because of Morris’s film.
20. E.g. in his most recent articulation Pettit claims: ‘To the extent I have a power of interfering without cost in your choice, I count as dominating you’ (ibid.). On that same page, he later introduces the qualification cited above of ‘more or less without cost’ (ibid.).
25. Ibid. p. 152.
27. I would like to thank Scott Aikin, Joseph Biehl, Carrie-Ann Biondi, James Bohman, W. James Booth, Thom Brooks, Rick Burnor, Ann Cacoulos, Allen Coates, Elizabeth Edenberg, Andrew Forcehimes, Marilyn Friedman, Michael Harbour, Michael Hodges, Irfan Khawaja, Larry May, John Maynor, Emily McGill, John Peterman, Yvonne Raley, Jeffrey Tlumak, John Weymark and two reviewers for this journal for helpful comments and discussion.