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Law, Liberty and Reason

Philip Pettit

1 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. (Bentham 1962, 503)

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 (see Steiner 1993). 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 (see Carter 1999; Kramer 2003).

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The second 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 (see Pettit 1997b; Skinner 1998).

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."[1]

The paper is in 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.

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[1] See Paley (1825). Notoriously, this point is admitted in Isaiah Berlin's (1958) defence of negative liberty: in effect, liberty as non-interference, see Berlin (1958). For arguments to the effect that, under plausible empirical assumptions, negative liberty of this kind may make further constitutional demands, see Habermas (1995), Holmes (1995).

2 Liberty

2.1 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 (see Miller 1984, 66). 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 Paley[2]—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 deliberatively, 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.

The complaint that 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 (see Pettit 2008b, Chapter 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 (see Pettit 1997b, Chapter 1), that freedom requires "nothing more or less than the absence of coercion" (see Lind 1776) 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" (ibid., 18).

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[2] 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. See Paley (1825, 23–24).

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. 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 (see Pettit 2008c; Skinner 2008).

2.2 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 (see Pettit 2008c). 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 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 deliberates sincerely with B and leaves it up to B to act on or against any advice given. In this case, B retains the capacity to choose deliberatively, 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+: that is, the option of doing x and claiming the reward. A may control 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, then it will not undermine B's choice between x, y, and z; it will merely add the extra option, x+.[3]

[3] 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

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 go naturally 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.

2.3 The Inteference-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" (Price 1991, 77).

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.

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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 text.

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 provisioned 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 believes—we may assume, correctly[4]—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.

2.4 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

[4] 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.

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" (Blackstone 1978, 126). The tradition had recognized that natural liberty, sometimes described as license, might be reduced by laws. But the liberty that mattered, civil liberty, was established by the laws, and not put in jeopardy by them (see Reid 1988). 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" (Locke 1965, 325). Thus Locke himself can comment that "the end of Law is not to abolish or restrain, but to preserve and enlarge Freedom" (ibid., 348).

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" (Harrington 1977, 170). The empire

of laws, in this image, relates to the empire of men—the empire of individuals 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.

2.5 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 (see Skinner 2006, 156; Pettit 2007, 709). How does the republican idea of the un-dominated person relate, then, to the idea of the un-dominated choice?

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 available equally 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 provided equally 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 (see Pettit 2008a). 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 protected equally 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 basic 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) than to protect the liberty of every private man, which by that means comes to be the liberty of the commonwealth" (Harrington 1992, 8).

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 (see Braithwaite and Pettit 1990; Pettit 1997a, 59).

3 Law

3.1 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 providing for the freedom of the persons who live under them. 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